Federal Judicial Center

International Litigation Guide

The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges

Second Edition

Hon. James D. Garbolino

Federal Judicial Center
2015

FIRST PRINTING

Contents

Preface vii
Executive Summary ix
Introduction 1
I. The 1980 Convention 5
A. Overview of the Convention 5
B. Purposes for Adoption of the Convention 6
C. Basic Elements of the Case for Return 7
D. Basic Elements of the Defenses to Return 7
E. Legal Framework 9
1. Text of the 1980 Convention 9
2. International Child Abduction Remedies Act 10
3. Concurrent Jurisdiction 11
4. Role of the Central Authority 11
F. Treaty Interpretation 12
1. *Abbott* Guidelines 13
a. Interpretation of the Convention Text 13
b. Deference to Convention Purposes 14
c. Executive Interpretation of Treaties 15
d. Sister State Decisions 15
2. Pérez-Vera Report 16
3. U.S. State Department Text & Legal Analysis 16
4. INCADAT 17
G. Whether Both Countries Are Bound by the Treaty 17
II. The Case in Chief for the Return of a Child 21
A. Summary 21
B. Burdens of Proof 23
C. Wrongful Removal and Retention 26
1. Distinguishing Between Wrongful Removal and Wrongful Retention 27
2. Anticipatory Violation and Wrongful Retention 28
3. Retention by *Ne Exeat* Order 29
4. Custody Rights 30
a. Holders of Custody Rights 30

b. Article 15 Request....32
c. "Chasing Orders"....33
d. Effect of Subsequent Custody Orders....35
e. Methods of Establishing Custody Rights....38
5. Rights of Custody Versus Rights of Access....47
6. *Ne Exeat* Orders—*Abbott v. Abbott*....48
D. Habitual Residence....50
1. Habitual Residence—Division in the Circuits....53
a. Synopsis....53
b. Majority View....54
c. Minority View....62
2. Settled Versus Acclimatized....64
3. Coercion and Physical Abuse....68
4. Immigration Status....71
5. Asylum....73
6. The Habitual Residence of Infants....74
7. Shuttle Custody....78
8. Military Families....80
E. Age of the Child....84
III. Defenses to the Petition for Return....87
A. Summary....87
1. Narrow Interpretation of Defenses....88
2. Court May Order Return Even If Defense Established....89
B. Delay of More Than One Year....94
1. Child Settled in New Environment....95
2. Equitable Tolling....98
C. Consent and Acquiescence....101
1. Generally—Separate Defenses....101
2. Consent by Participation in Custody Proceedings....103
3. Stranded Parents....105
D. Failure to Exercise Rights of Custody....107
E. Grave Risk of Harm—Intolerable Situation....109
1. Defining Grave Risk and Intolerable Situation....110
2. Child Abuse....113
3. Domestic Violence....114
F. Violations of Human Rights and Fundamental Freedoms....117

G. Child's Objection to Return....120
1. Age and Maturity....123
2. Manner of Hearing Child's Objection....125
3. Generalized Desires Versus Particularized Reasons....126
4. Children's Standing to Intervene on Their Own Behalf....127
H. The Effect of Asylum Proceedings....129
I. Nonstatutory Defenses: Equitable Defenses....130
1. Waiver....130
2. Unclean Hands....132
3. Fugitive Disentitlement....133
J. Undertakings....137
K. Exhausting All Possible Alternatives to Refusing Return—Circuit Split....143
IV. Issuing Orders of Return....149
A. Specificity: Time, Manner, and Date of Return....150
B. Mirror-Image Orders....150
C. Safe Harbor Orders....151
D. Returns to Countries Other Than Habitual Residence....152
E. Mootness and Stays....152
1. Mootness....152
2. Stays....155
V. Procedural Issues....157
A. Appellate Standard of Review....157
B. Expeditious Handling Required....161
1. Application of Federal Rules of Civil Procedure....163
2. Expedited Discovery....164
3. Relaxed Rules for Admissibility of Documents....164
C. Parallel Jurisdiction Issues....165
1. *Younger* Abstention....165
2. *Colorado River* Abstention....167
3. *Rooker-Feldman* Doctrine....169
4. Removal....169
D. Comity....170
1. Hague Convention Orders of Other Nations....170
2. Enforcement of Foreign Custody Decisions....172

E. Petitions for Access Only 173
1. Making Access Orders 175
2. Interim Visits Pending Trial 177
F. Contacting Judges in Foreign Jurisdictions 178
G. Attorney Fees and Costs 181
1. Authority for Awards 181
2. Amount of Awards 183
H. Findings of Fact Required 185
I. The Manner of Taking Evidence 186
1. Taking Testimony by Telephone 187
2. Decisions Based on Affidavits 187
3. Discovery 188
4. Whether an Evidentiary Hearing Is Necessary 188
VI. Case Management 193
A. Preventing Further Removal or Concealment of the Child 193
1. State Laws Regarding Removal of Child from Home Without Notice 194
2. Foster Care 195
3. Bonds 195
4. Deposit Passports 197
B. Establishing Timelines 197
C. Legal Representation 198
D. Narrowing the Issues for Trial 199
E. Mediation 199
Appendix A: Text of the 1980 Convention 201
Appendix B: International Child Abduction Remedies Act 217
Appendix C: Checklist for Hague Convention Cases 229
Appendix D: Countries Where Convention Is In Force with United States 233
Table of Authorities 235
Index 251

Preface

The 1980 Hague Convention entered into force in the United States in 1988. In the ensuing twenty-five plus years, child abduction litigation has produced over 150 appellate decisions and, within the last four years, three decisions from the U.S. Supreme Court.

This guide is designed to help federal and state judges deal with proceedings for the return of children under the 1980 Hague Convention. The first edition, published in 2012, was aimed at an audience primarily consisting of the federal judiciary. Bearing in mind that federal and state courts share concurrent jurisdiction over these unique cases, a greater emphasis has been placed on the inclusion of state court decisions in this edition. A review of the state appellate cases shows that an overwhelming number of state courts rely on the greater body of federal decisions. This reliance is likely the result, in part, of the scarcity of precedent within the individual states combined with the wealth of authoritative precedent in the federal system.

Cases arising under the 1980 Convention present challenges to trial and appellate courts owing to unique legal concepts and the time-sensitive nature of the proceedings. Recently, the Appellate and Civil Rules Committees of the Judicial Conference of the United States recommended that increased judicial education be focused toward expeditiously resolving Hague Convention cases as a first level of response.[1] This guide is part of the Federal Judicial Center's efforts toward fulfilling that goal.

Judge Jeremy D. Fogel
Director, Federal Judicial Center

1. *See* letter of Hon. Jeffrey S. Sutton in response to comments contained in the concurring opinion in *Chafin v. Chafin*, 133 S. Ct. 1027 (2013); Advisory Committee on Appellate Rules, Newark, N.J., Apr. 28–29, 2014, pp. 539–40.

Executive Summary

The 1980 Hague Convention on the Civil Aspects of International Child Abduction is a treaty that governs proceedings for the prompt return of children who have been wrongfully taken or kept away from their "habitual residence." The most typical situation that will trigger the operation of the Convention occurs when one parent relocates with a child across an international border without the consent of the left-behind parent or without a court order permitting that relocation. Proceedings under the Convention are civil, not criminal.[2] The Convention is the only internationally recognized remedy that compels the actual return of a wrongfully abducted child. The 1980 Convention serves two primary purposes: first, to deter future child abductions; and second, to provide a prompt and efficient process for the return of the child to the status quo that existed before the abduction.

A Hague Convention case is not a child custody case.[3] Rather, a Hague Convention case is more akin to a provisional remedy—to determine if the child was wrongfully removed or kept away from his or her habitual residence, and, if so, then to order the child returned to that nation. The merits of the child custody case—what a parent's custody and visitation rights should be—are questions that are reserved for the courts of the habitual residence. In the event that a parent has commenced a child custody proceeding in a U.S. state court,

---

2. In 1993, Congress enacted the International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204 (1993). This act provides felony criminal penalties for the removal or retention of a child from the United States with the intent to obstruct the lawful exercise of parental rights. Because the 1980 Hague Convention is only applicable when the treaty is in force between the two countries involved, IPKCA fills a void in the law regarding child abductions from the United States to a country where the 1980 Convention is not in force with the United States.

3. 22 U.S.C. § 9001(b)(4) reads, in part:

> In enacting this chapter the Congress recognizes –
> * * * * *
> The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

that proceeding must be stayed pending outcome of the Hague petition for return of the child. See *infra* page 5.

The substantive law and fundamental elements of a cause of action for return of a child are found in the text of the Convention. The Convention is set forth in Appendix A on page 201. The procedural aspects of handling these cases are governed by the International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001–9011. A copy of ICARA can be found in Appendix B, *infra* at page 217.

Courts may only entertain petitions for return of a child if the Hague Convention is in force between the two countries involved. This is a fundamental jurisdictional requirement. The 1980 Convention went into effect in the United States on July 1, 1988, and as of this writing it is currently in force between the United States and 80 other countries. A list of those countries can be found in Appendix D, *infra* at page 233. Additionally, the wrongful removal or retention of the child must have occurred after the date the treaty became effective in both countries. See discussion *infra* at page 2.

A quick checklist of key issues that arise in Hague cases is provided in Appendix C, *infra* at page 229, for use as a guide to issues that may arise.

Unique Concepts

Hague Convention cases have several unique aspects that distinguish them from other forms of litigation:

- *Expeditious handling.* The expected time frame for handling a Hague Convention case is six weeks. To meet the goal of promptly deciding the case, the Convention urges trial and appellate courts to use the most expeditious procedures that are available to hear and issue a ruling on the case. Courts have uniformly regarded the expeditious handling of these cases as essential. (See *infra* page 157.) In one reported case, the time from the

filing of the initial petition in district court to a published affirmance in the circuit court occurred within 95 days.[4]

- *Role of the executive branch.* Each country that is a signatory to the 1980 Convention must designate a "Central Authority" to assist in the administration of the Convention. In the United States, the Central Authority is the U.S. State Department. Within the State Department, the Office of Children's Issues is responsible for handling child abduction cases—both abductions to the United States (incoming cases) and abductions from the United States (outgoing cases). The role of the Central Authority includes locating children, securing the voluntary return of the child if possible, and cooperating with counterpart authorities in other countries. The Central Authority typically informs courts of the filing of a petition for a child's return, and it acts as a conduit for official inquiries by a U.S. or foreign court as to the status of foreign law. In this capacity, the State Department may request, pursuant to Article 11 of the Convention, reasons for the delay of a case beyond six weeks in order to provide status reports to the Central Authorities of foreign states. This action does not constitute disregard for the doctrine of separation of powers—rather, the State Department is fulfilling its role as the Central Authority for the United States. See discussion *infra* at page 11.
- *Administrative return.* The 1980 Convention provides for an administrative alternative to court proceedings. A parent seeking the return of a child may make a formal request through the Central Authority of either the country of the child's habitual residence or the Central Authority where the child is located. The Central Authority will make contact with the parent who has physical custody of the child and will attempt to negotiate a voluntary return of the child. The Central Authorities have no power to compel the return of the child. If efforts at voluntary return fail, the only remaining alternative under the Convention

4. Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010).

is to commence legal proceedings by filing a petition for the return of the child in the country where the child is physically present. See discussion *infra* at page 21.

- *Reliance on foreign precedent*. It is clear that courts may appropriately consider foreign precedent for the purpose of interpreting the Convention. In *Abbott v. Abbott*,[5] the Supreme Court recognized that the opinions of foreign courts interpreting the treaty were entitled to "considerable weight." See discussion of the *Abbott* case *infra* at pages 12 and 48. For the benefit of the countries that are signatory to the Convention, the Hague Permanent Bureau maintains a website with a searchable database of significant foreign decisions concerning the interpretation of the Hague Convention. See *infra* page 17.

Elements of the Case for Return

A case begins with the filing of a petition for the return of a child. State courts and federal district courts have original concurrent jurisdiction to hear Hague Convention cases. Because of this parallel jurisdiction, issues of abstention or removal may arise. See discussion *infra* at page 165.

A person or parent petitioning for the return of a child must show by a preponderance of the evidence that:

- a child under the age of 16
- has been wrongfully removed or retained
- from his or her habitual residence
- in violation of the custody rights of the left-behind parent.

If the parent petitioning for return of the child has proved the elements above, the court must order the return of the child, unless one of the defenses to return is established.

5. 560 U.S. 1, 130 S. Ct. 1983 (2010).

Some of the elements of the cause of action for return require definition:

- *Wrongfulness.* The removal to—or retention in—a foreign country is considered "wrongful" under the Convention if it amounts to a breach of the custody rights of the left-behind parent[6] according to the law of the country that is the child's habitual residence. "Wrongfulness" also requires some preliminary evidence that the parent seeking the child's return must have been actually exercising his or her rights of custody. See discussion *infra* at page 24.
- *Custody rights.* Custody rights are to be determined according to the law of the child's habitual residence. The Convention sets out three methods of determining custody rights: by a showing that they arise (1) by operation of law, or (2) by judicial or administrative decision, or (3) by an agreement of the parties. The term *custody rights* means more than mere visitation rights or access[7] rights. Custody rights include rights relating to the care of the child and, in particular, the right to determine the child's place of residence. In *Abbott*, the Supreme Court held that custody rights existed under the Convention where the left-behind parent had only visitation rights, but the taking parent violated a restraining order that prohibited the removal of a child across an international border. See discussion *infra* at page 30.
- *Habitual residence.* The term *habitual residence* is not defined by the Convention. In substance, the term refers to that place where a child has lived for a sufficient period of time for the child to have become settled. The term differs from the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) concept of "home state," which requires a six-month residence for a state to

6. An institution may have rights of custody if that institution has the responsibility for the care and support of the child.

7. The term "access rights" is used in the 1980 Convention, but it is not a term commonly used in the United States. The term is synonymous with "visitation rights." 22 U.S.C. § 9002(7) (1988).

acquire jurisdiction over child custody issues. The concept of habitual residence differs from domicile, in that domicile includes elements of future intent, citizenship, and nationality. See discussion *infra* at page 53.

There is a split among the circuit courts concerning the factors to look to in determining a child's habitual residence and, in particular, the role that the intent of the parents plays in the acquisition of a new habitual residence. An apparent majority of the circuits follow the rationale of the Ninth Circuit opinion in *Mozes v. Mozes*.[8] That decision focuses on the question whether a child's habitual residence has changed based on whether the parents have demonstrated a shared intention to abandon the former habitual residence and, if so, whether there has been a change in the child's geographic location for a period of time that is sufficient for the child to become settled or acclimatized. Other circuits, such as the Third, Seventh, and Eighth Circuits, place the primary focus of determining habitual residence on the degree that the child has become settled in his or her new environment. See discussion *infra* at page 53.

Defenses to Return

The Convention sets forth five defenses to petitions for return:

1. delay of over one year in bringing the petition for return (*infra* page 94);
2. consent or acquiescence to removal or retention of the child (*infra* page 101);
3. failure to exercise custody rights (*infra* page 107);
4. return would expose the child to a grave risk of harm (*infra* page 109); and
5. return would violate fundamental principles of human rights (*infra* page 117).

8. 239 F.3d 1067 (9th Cir. 2001).

Although not technically set forth as a defense, the Convention vests courts with discretion to refuse to return a child if that child objects to being returned. Courts must consider both the age of the child and the extent of the child's level of maturity in assessing the child's objections to return. See discussion *infra* at page 120.

Two of the defenses—grave risk to the child and violation of fundamental principles of human rights—must be established by clear and convincing evidence. The remaining defenses are subject to proof by a preponderance of the evidence.

Defenses to return are subject to a narrow interpretation. Underscoring this concept of narrow interpretation, the Convention gives courts the discretion to order a child returned to his or her habitual residence despite a defense having been proven. See *infra* page 89.

One of the most frequently raised defenses is the "grave risk" defense. The Convention provides that a court may refuse the return of a child if "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." 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. See discussion *infra* at page 113.

Managing the Case

Hague Convention cases require active case management. See discussion *infra* at page 193. Because these cases are to be handled in an expeditious manner, it is recommended that in federal courts, a Rule 16[9] conference should be promptly scheduled so that a trial date may

9. Federal Rule of Civil Procedure 16.

be set and orders made for the completion of discovery. State courts should use similar procedures. Topics that are likely to be covered at the case-management conference include the following:

- the child's current situation, including whether there is a risk of reabduction or concealment;
- a plan for discovery;
- the substantive issues likely to be raised at trial;
- the manner of taking evidence (e.g., by telephone, declaration or affidavits, or live testimony);
- whether the case is appropriate for summary judgment; and
- estimates of the length of trial.

Legal Representation

There are no provisions for paying for court-appointed counsel in Hague Convention cases. For applicants who are seeking the return of children, the U.S. State Department will assist with identifying counsel who may be able to provide representation on a pro bono or reduced-fee basis. See *infra* page 198.

Making Return Orders

A unique feature of the 1980 Hague Convention is the remedy—the actual physical return of the child to his or her habitual residence. If a court orders a child returned, that order may call for the enforcement of the order by the U.S. Marshals Service or any other relevant law enforcement organization. As such, return orders may be very specific as to the details of the child's return. See discussion *infra* at page 149.

Undertakings, Mirror-Image Orders, and Safe Harbor Orders

In the context of a Hague Convention case, an "undertaking" is an official promise or concession by a party to do something, or refrain from doing something. Undertakings may consist of offers for tempo-

rary support or housing for the child and parent upon return to the habitual residence; agreements not to seek a custody modification in the courts of the habitual residence for a certain period of time; or offers to pay the costs of transportation for the child's return. There is disagreement among U.S. courts as to whether undertakings should be accepted as a condition of ordering a child's return. See discussion *infra* at page 137.

Some courts may consider using "mirror-image" or "safe harbor" orders as a condition of a child's return. These orders may provide measures for the child's protection in transit and upon return to the habitual residence. These orders typically contain provisions for counterpart orders to be entered in the child's habitual residence so that conditions attached to the child's return may be enforced by the courts of that nation. See discussion *infra* at page 150.

Direct Judicial Communication

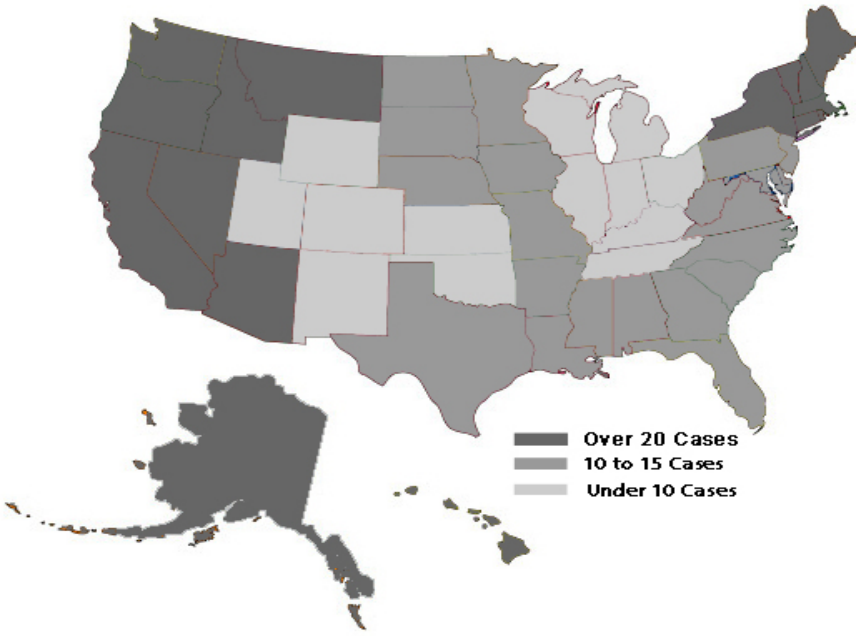
There is an emerging acceptance of judges directly communicating with their counterparts in foreign nations. Direct judicial communication may be helpful to resolve logistical issues concerning the return of a child. Sixty-two countries have designated one or more "International Hague Network Judges" to assist judges who wish to contact a foreign judge. These contacts usually deal with the details of foreign law, or the availability of resources to assist in the transition of a child back to the habitual residence. See *infra* page 178.

The number of return cases filed worldwide is increasing, as modern methods of communication and transportation contribute to the expanding ease of international travel and settlement.[10] The United States enjoys a bourgeoning body of federal and state case law that deals with the 1980 Convention, as well as a number of issues subject to disagreement among the circuits. As additional nations become

10. Nigel Lowe, Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law 2011.

treaty partners, the number of legal systems that impact this area of the law will expand accordingly.

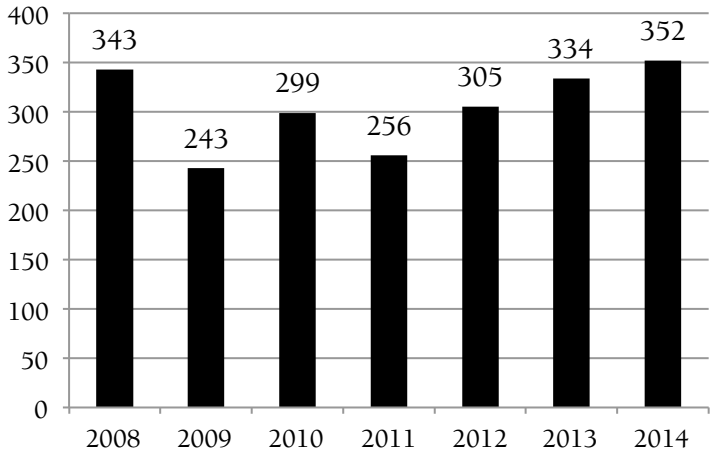
Figure 1. Distribution of Court Cases by Circuit, 1988–2014



Introduction

This guide provides an overview of the 1980 Hague Convention on the Civil Aspects of International Child Abduction,[11] focusing on the legal and procedural issues judges are likely to encounter during litigation under this treaty. As the statistics below indicate, the number of applications for return represents a significant number of cases over a period of time. The actual number of litigated Hague Convention cases, however, is smaller in comparison to other civil and criminal cases, so it is difficult to become proficient with handling Hague cases from experience alone. This publication will discuss the purposes served by the Convention, describe its provisions, review relevant statutory and case law, and offer practical suggestions for managing Hague cases.

Figure 2. Total Applications from Signatory Nations for Return Received Through U.S. State Department, 2008–2014



Source: U.S. State Department, Office of Children's Issues.

11. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501 [hereinafter "Convention"].

The Convention was signed by the United States in 1981 and ratified by Congress in 1986. Implementing legislation was passed in 1988. The treaty entered into force with other signatory nations on July 1, 1988.[12] As of August 2014, ninety-two nations have ratified or acceded to the treaty. It is in force between the United States and eighty of those countries.[13]

The Convention sets out an expeditious process for the return of a child when that child has been wrongfully removed or retained from his or her habitual residence in violation of the custody rights of the left-behind parent. The remedy provided by the Convention—the physical return of the child—seeks to restore the child's status quo that existed before the abduction.

Congress granted concurrent, original jurisdiction over Convention cases for both federal and state courts. Although this guide will focus primarily on federal case law, state court decisions will be discussed when helpful.[14] Because the Convention is an international instrument, decisions from courts of other contracting nations will be noted if relevant.[15]

---

12. Hague Convention on International Child Abduction Enters Into Force on July 1, 1988, 53 Fed. Reg. 23,843-01 (June 24, 1988).

13. The Convention automatically enters into force between countries that ratify the treaty and were members of the Hague Conference on Private International Law at the time of approval by the member states on October 25, 1980. The accession of all other nations must be specifically accepted by a nation in order for the treaty to enter into force between those two nations. For a more complete description of the process involved, see § I.G. Whether Both Countries Are Bound by the Treaty, *infra* at 17. Appendix D, *infra* at 233, lists the countries with which the treaty is currently in force with the United States.

14. Reference to unreported dispositions is occasionally made to highlight how courts have approached certain issues. Restrictions may apply to the citation of these cases for precedential value, based on local circuit rules in existence prior to 2007. Cases arising after January 1, 2007, may be cited pursuant to Federal Rule of Appellate Procedure 32.1.

15. *See generally* Abbott v. Abbott, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) (quoting Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338 (1985) ("In interpreting any treaty, '[t]he "opinions of our sister signatories" . . . are "entitled to considerable weight."'" El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999)).

This guide is structured sequentially, addressing topics in the order that judges are likely to encounter them. It commences with an overview of the Convention, summary of its provisions, and guide to interpretation. The next sections deal with the essential elements that make up a case for the return of a child, along with the defenses to return. Subsequent sections address orders of return, procedural issues that may arise, and a discussion of practical matters relating to case management. Appendices include the text of the Convention, the implementing legislation for the United States—the International Child Abduction Remedies Act[16] (ICARA)—a list of countries with which the treaty has entered into force with the United States, and a checklist that may be used as a quick reference guide.

As a final introductory note, courts should bear in mind that "a Hague Convention case is not a child custody case."[17] On the contrary, all relevant authorities caution courts not to become mired in the question of which parent is the "better" parent.[18] A foundational premise of the Convention is that the courts of the child's habitual residence are best at determining questions regarding the child's custody.[19] The Convention addresses a far more limited issue: whether the child should be returned to his or her habitual residence, enabling the courts of that nation to assess issues relating to custody and best

16. 22 U.S.C. §§ 9001–9011 (1988).

17. William M. Hilton, Esq. (1934–2009). Bill Hilton appeared as counsel in Hague Convention cases throughout the United States. As counsel for parents seeking the return of a child, Hilton would invariably begin his case by stating to the court "A Hague Convention case is not a child custody case." He compiled a vast amount of information relating to the Convention and made it available on the Internet for use by courts and counsel alike. *See, e.g.,* Baran v. Beaty, 526 F.3d 1340, 1350 (11th Cir. 2008); Simcox v. Simcox, 511 F.3d 594, 607 (6th Cir. 2007).

18. *See* 22 U.S.C. § 9001(b)(4) (1988); *see also* Jenkins v. Jenkins, 569 F.3d 549, 555 (6th Cir. 2009).

19. *See* Elisa Pérez-Vera, *Explanatory Report, in* 3 Actes et Documents de la Quatorzième session (1982) [hereinafter Pérez–Vera Report]. The *Pérez–Vera Report* is the official commentary of the Reporter to the proceedings leading to the adoption of the 1980 Hague Convention by the Hague Conference on Private International Law.

interests of the child. In this sense, proceedings under the Convention may be viewed as akin to a "provisional remedy."[20]

20. *See Jenkins*, 569 F.3d at 555 (citing Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005)); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005).

I. The 1980 Convention

A. Overview of the Convention

The Convention provides an expeditious remedy for the physical return of children who have been wrongfully removed or retained from their habitual residence, in violation of the custody rights of the left-behind parent. The treaty envisions that courts will promptly hear and decide the limited issues relating to whether the child was wrongfully removed to, or retained in, a foreign country. If the elements of the case for return have been met, the Convention requires that the child be expeditiously returned to his or her habitual residence (Appendix A sets forth the full text of the Convention). The framers of the Convention anticipated that most cases should be decided within six weeks (see *infra* page 12).

The structure for hearing return cases is set forth at 22 U.S.C. §§ 9001–9011, the International Child Abduction Remedies Act (ICARA). Pursuant to ICARA, both state and federal courts have original concurrent jurisdiction to hear cases arising under the Convention.[21] ICARA also sets forth burdens of proof applicable to the case for return and defenses,[22] relaxed rules for admissibility of documents,[23] and establishes guidelines for the award of fees and costs.[24] The text of ICARA can be found at Appendix B, *infra* at page 217.

Pendency of a Hague Convention petition for return in any U.S. court requires that state court custody proceedings be stayed.[25] One of the purposes of the Convention is to return a child to his or her habitual residence—the place where custody proceedings should be heard. Accordingly, the Hague case must be resolved before it can be determined if the custody case has been brought in the appropriate jurisdiction. If a court conducting a custody proceeding receives notice that

21. 22 U.S.C. § 9003(a) (1988).
22. *Id.* § 9003(e).
23. *Id.* § 9005.
24. *Id.* § 9007(b).
25. Convention, Article 16

there is a claim that the child has been wrongfully removed or retained in violation of the Convention (it need not be an actual petition for return), the court must stay that proceeding until either the Hague claim has been resolved or it has not been pursued within a reasonable time.[26] A federal court may vacate a state court custody determination that was entered in violation of the stay provisions of Article 16.[27]

B. Purposes for Adoption of the Convention

The Convention was adopted (1) to deter international abductions of children and (2) to provide a prompt remedy[28] for the return of abducted children.[29] It aims to restore the child to the "status quo ante" and discourage parents from crossing international frontiers in search of friendlier fora to validate their custody claims.[30]

The Convention is not a jurisdictional statute such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[31] The Convention's purview does not include the entry, modification, or enforcement of foreign or domestic child custody orders.[32]

---

26. *See* Convention, *supra* note 11, Article 16; *see also* Yang v. Tsui (Yang I), 416 F.3d 199, 203 (3d Cir. 2005)

27. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067, 1085 n.55 (9th Cir. 2001).

28. *See, e.g.*, Kijowska v. Haines, 463 F.3d 583 (7th Cir. 2006).

29. "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence as well as to secure protection for rights of access." Convention, *supra* note 10, Preamble.

30. *See, e.g.*, Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995).

31. Uniform Child Custody Jurisdiction and Enforcement Act, §§ 101–405 (1997). The UCCJEA is a model act that was approved for adoption in 1997 by the National Conference of Commissioners on Uniform State Laws. It has been enacted in 49 states, the District of Columbia, Guam, and the U.S. Virgin Islands. Legislation is pending in Massachusetts for adoption in that jurisdiction.

32. Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013).

C. Basic Elements of the Case for Return

The substantive law of the Convention is not complicated. The prima facie case for return must show that a child has been wrongfully removed to, or retained in, any contracting state in violation of the rights of custody of any person, institution, or other body.[33] The Convention defines a "wrongful removal or retention" as (1) a breach of the rights of custody according to the law of the country where the child was habitually resident, (2) where these "rights of custody" were actually being exercised, or would have been exercised but for the wrongful removal or retention.[34]

The determination of "custody rights" is to be made according to the law of the state where the child was habitually resident immediately before the wrongful removal or retention.[35] Children are defined as persons under sixteen years of age.[36]

D. Basic Elements of the Defenses to Return

There are five narrowly defined defenses to an action for return of a child:[37]

33. *See* Convention, *supra* note 11, Articles 1, 3.

34. *See id.*, Article 3(b).

35. *See id.*, Article 3(a).

36. *See id.*

37. The Convention limits the defenses to those stated. However, a handful of U.S. cases have established procedural defenses to actions for return of a child. *See, e.g.,* Prevot v. Prevot, 59 F.3d 556 (6th Cir. 1995) (fugitive disentitlement); March v. Levine, 249 F.3d 462 (6th Cir. 2001) (declining to apply fugitive disentitlement); Pesin v. Rodriguez, 244 F.3d 1250, 1253 (11th Cir. 2001) (holding that fugitive disentitlement doctrine precluded consideration of mother's appeal); Journe v. Journe, 911 F. Supp. 43, 47 (D.P.R. 1995) (holding that remedy under Convention was waived by voluntary dismissal of previous French action); Delgado-Ramirez v. Lopez, 2011 WL 692213 (W.D. Tex. 2011) (unreported disposition) (refusing fee award on the basis of "unclean hands"); *cf.* Karpenko v. Leendertz, 619 F.3d 259 (3d Cir. 2010) (refusing to apply the doctrine of "unclean hands").

1. the person making the request for return of the child has delayed for more than one year since the wrongful removal or retention, and the child has become settled in the new environment;[38]
2. the person, institution, or other body having the care of the child was not actually exercising custody rights at the time of removal or retention;[39]
3. the person, institution, or other body having the care of the child consented to or subsequently acquiesced in the removal or retention;[40]
4. the return of the child would expose the child to a grave risk of "physical or psychological harm or otherwise place the child in an intolerable situation";[41] or
5. the return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[42]

A court also may refuse a petition for return of a child if the child objects to return, and, based on the age and maturity of the child, the court determines it is appropriate to consider the child's views.[43]

However, even if the evidence establishes one of these defenses, the court retains some discretion to order the child returned.[44]

---

38. Convention, *supra* note 11, Article 12.
39. *Id.*, Article 13(a).
40. *Id.*
41. *Id.*, Article 13(b).
42. *Id.*, Article 20.
43. *Id.*, Article 13.
44. *See, e.g.*, Antunez-Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800, 814–15 (N.D. Iowa 2003); Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995); Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996) (citing to the U.S. State Department Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986)). *See infra* page 89.

E. Legal Framework

The Convention was proposed for adoption by the Hague Conference on Private International Law, an intergovernmental organization that develops international instruments on topics ranging from recognition and enforcement of judgments to banking and commercial transactions.[45]

Member states of the Hague Conference—including the United States—approved the Child Abduction Convention for adoption in 1980, and it entered into force on December 1, 1983, when it was ratified by three nations (France, Canada, and Portugal). Currently, ninety-two nations have signed that Convention, representing countries with legal systems based on common law, civil law, Islamic law,[46] and various combinations thereof.

1. Text of the 1980 Convention

A copy of the Convention is included as Appendix A. The text of the Convention is also available on the website of the Hague Conference on Private International Law.[47] The U.S. Department of State maintains a website with links to the official text of the Convention as well as other resources for attorneys and judges.[48]

---

45. The Hague Conference operates in a manner similar to the process used by the National Conference of Commissioners on Uniform State Laws when it proposes model acts, such as the Uniform Commercial Code or the Uniform Child Custody Jurisdiction and Enforcement Act. The Hague Conference also monitors, supports, and reviews the operation of conventions that provide for cross-border judicial and administrative cooperation, through quadrennial "special commissions" and regional conferences.

46. Morocco, which acceded to the Convention effective June 1, 2010, is the first country with an Islamic law system to become bound by the Convention.

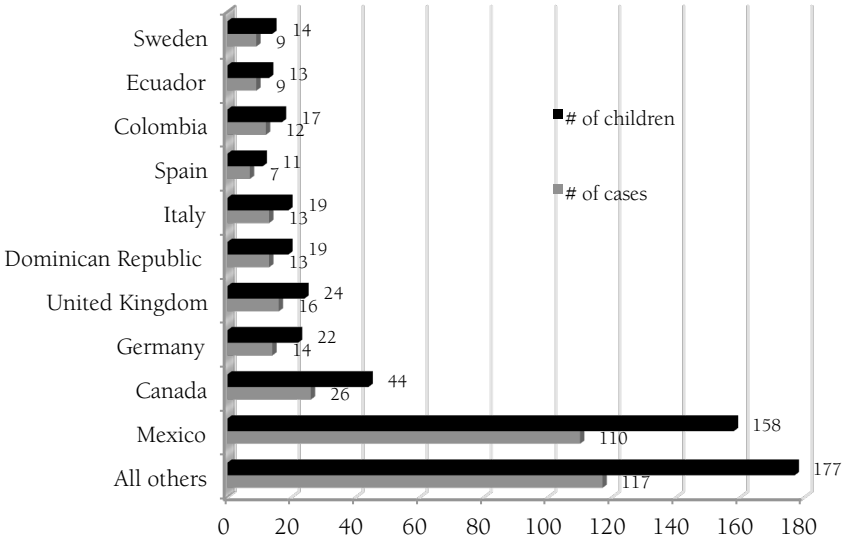
47. *See* http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

48. *See* http://travel.state.gov/abduction/attorneysjudges/attorneysjudges_4306.html.

2. International Child Abduction Remedies Act

The International Child Abduction Remedies Act[49] (ICARA) implemented the Convention in the United States. Congress passed ICARA in 1988, contemporaneous with the Convention entering into force between the United States and other nations.[50] The substantive law of the individual states of the United States does not impact the application of the Convention except in one area: courts (state or federal) may not peremptorily remove a child from a parent having physical control of that child unless provisions of state law are satisfied.[51]

Figure 3. Number of Cases and Children Reported to the Office of Children's Issues, U.S. State Department, for Calendar Year 2013



Source: Office of Children's Issues, Bureau of Consular Affairs, U.S. Department of State.

49. 22 U.S.C. §§ 9001–9011 (1988).
50. *See supra* page 2, note 12.
51. 22 U.S.C. § 9004(b) (1988). See discussion *infra* at page 194.

3. Concurrent Jurisdiction

Both U.S. district courts and state courts have original and concurrent jurisdiction to hear cases for return of a child under the Convention.[52] This gives rise to potential issues relating to removal,[53] parallel actions,[54] and abstention.[55]

4. Role of the Central Authority

The Convention creates not only the legal structure for litigation of return cases as described above, but it also provides for administrative tasks that are performed by a "Central Authority" designated by each member nation. In the United States, the Central Authority is the U.S. State Department.[56]

The Central Authority's role is to cooperate with counterpart authorities of sister states and to take an active role in facilitating the return of children wrongfully removed or retained in the United States. This mandate includes:

- locating children who have been wrongfully removed;
- securing the voluntary return of the child, if possible;
- exchanging information relating to the social background of the child;
- providing general information concerning the law of the contracting state;
- facilitating proceedings before the courts or administrative authorities to obtain the return of the child; and
- informing interested states as to the progress of individual cases.[57]

---

52. *See* 22 U.S.C. § 9003(a) (1988).

53. *See* 28 U.S.C. § 1441 (2002).

54. *See* Lops v. Lops, 140 F.3d 927 (11th Cir. 1998).

55. *See* Holder v. Holder (*Holder I*), 305 F.3d 854 (9th Cir. 2002).

56. *See* Exec. Order No. 12648: Relating to the Implementation of the Convention on the Civil Aspects of International Child Abduction, 53 Fed. Reg. 30,637 (Aug. 11, 1988).

57. *See* Convention, *supra* note 10, Articles 7, 11.

The U.S. State Department typically informs state and federal courts of the filing of a petition for return of a child and includes information concerning available resources that may be of assistance to the court.[58] At the request of a U.S. court, the U.S. State Department may act as a conduit for inquiries concerning whether the removal or retention of a child was wrongful under the law of the country from which the child was removed. The State Department will forward the request for information through diplomatic channels to the Central Authority of the foreign country. When an answer has been provided by the foreign court or by the Central Authority for that country, it will be transmitted through the State Department back to the initiating court. Such an inquiry may be made under Article 15 of the Convention.[59]

Most Hague Convention cases should be resolved in six weeks. Pursuant to Article 11 of the Convention, the U.S. State Department may request reasons for the delay of a case beyond six weeks so as to keep applicants or sister Central Authorities informed of the progress of a case.[60]

F. Treaty Interpretation

In *Abbott v. Abbott*,[61] the Supreme Court set forth four sources for interpreting parental custody rights: (1) the Convention text, (2) the Convention's purposes, (3) the view of the U.S. State Department, and (4) decisions of sister signatory states to the Convention.[62]

---

58. *See*, *e.g.*, R.S. v. D.O., 34 Misc.3d 1239(a), 950 N.Y.S.2d 725 (2012) (Court notes receipt of letter from the Office of Children's Issues in the U.S. State Department that states that "Father's Petition was initiated as a result of a request for the return of D and E made to the U.S. Central Authority by its counterpart in Italy. It further notes that the U.S. Central Authority believes that the Hague Convention on the Civil Aspects of International Child Abduction applies to this case, and provides a summary of the Convention." Slip Opinion, p. 2).

59. *See infra* page 32.

60. Convention, *supra* note 11, Article 11.

61. 560 U.S. 1, 130 S. Ct. 1983 (2010).

62. *See* Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013). Interpreting Article 12's delay defense, the court looked to "the text of the Convention, the Convention's pur-

1. *Abbott* Guidelines

Abbott addressed the issue of whether a *ne exeat*[63] clause, coupled with rights of visitation, constituted enforceable "custody rights" under the Convention.

a. Interpretation of the Convention Text. Citing to its decision in *Medellin v. Texas*,[64] the Supreme Court noted "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."[65] When defining some terms, such as "custody rights," the law of the habitual residence must be consulted to determine how domestic law treats the question,[66] but that right must inevitably be determined by following the text and structure of the Convention.

For example, a foreign nation may label as "custody rights" a set of rights that amount only to access or visitation rights in most other nations. While U.S. courts should consider that label, and the extent of the rights that it includes, courts should ultimately decide whether the particular label is consistent with the purposes and text of the Convention and with interpretations given to the Convention by sister states and other relevant authorities. The *Abbott* court specifically noted that Congress recognized the need for "uniform international interpretation of the Convention" in its findings and declarations preamble to ICARA.[67]

---

poses, the inherent equitable powers of federal courts, and the insights of the Executive Branch. *Id.* at 20–21.

63. A *ne exeat* clause is "An equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction. A *ne exeat* is often issued to prohibit a person from removing a child or property from the jurisdiction. . . ." Black's Law Dictionary (8th ed. 2004). In the United States these orders are routinely referred to as "restraining orders," which prohibit removal of a child from a state or local jurisdiction.

64. 552 U.S. 491 (2008).

65. *Abbott*, 560 U.S. at 10.

66. *See* Convention, *supra* note 11, Article 3(a).

67. 22 U.S.C. § 9001(b)(3)(B) (1988).

The Supreme Court expanded on the importance of international uniformity in *Lozano v. Montoya Alvarez*,[68] examining whether the concept of equitable tolling applied to Article 12's one year period for filing a petition for return of a child. The court focused upon the intent of the drafters of the Convention,[69] and recognized that the concept of equitable tolling was unique to American jurisprudence—not part of the "*shared* expectations of the contracting parties."[70] Accordingly, the court ruled that equitable tolling was not available to extend the one-year period set forth in Article 12.

b. Deference to Convention Purposes. The ultimate question in *Abbott* involved an issue integral to one of the Convention's fundamental purposes—deterring parental abductions motivated by seeking a friendlier forum.[71] When a court wrestles with interpreting a particular provision of the Convention, deference should be given to the purposes of the Convention. A court's interpretation should be consistent with the treaty's objectives.

---

68. 134 S. Ct. 1224 (2014).

69. "For treaties, which are primarily 'compact[s] between independent nations,' Medellín v. Texas, 552 U.S. 491, 505 (2008), our 'duty [i]s to ascertain the intent of the parties' by looking to the document's text and context, United States v. Choctaw Nation, 179 U.S. 494, 535 (1900); *see also* BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014)." *Lozano*, 134 S. Ct. at 1232.

70. *Lozano*, 134 S. Ct. at 1232–33 (emphasis in original).

"A treaty is in its nature a contract between . . . nations, not a legislative act." Foster v. Neilson, 27 U.S. 253, 254 (1829) (Marshall, C.J., for the Court); *see also* Jonathan Elliot, Debates on the Federal Constitution 506 (2d ed. 1863) (James Wilson) ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make . . ."). That distinction has been reflected in the way we interpret treaties. It is our "responsibility to read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.'" Olympic Airways v. Husain, 540 U.S. 644, 650 (2004) (quoting Air France v. Saks, 470 U.S. 392, 399 (1985) (emphasis added)). Even if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to "an agreement among sovereign powers," Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996).

Id.

71. See the discussion on custody rights *infra* beginning at page 48.

c. Executive Interpretation of Treaties. The opinions of the executive branch concerning interpretation of the Convention are entitled to great weight.[72] In *Abbott*, the Court gave deference to the opinions of the Office of Children's Issues of the U.S. State Department.[73]

d. Sister State Decisions. The decision in *Abbott* emphasizes the importance of consistency with the judgments of sister state signatories to the Convention.[74] This is especially true now that ninety-two countries are signatories to the Convention. Uniform interpretation can be undermined by undue reliance on local domestic practices, legal concepts,[75] and value-laden presumptions. Recognizing this challenge, the Supreme Court utilized the text of the Convention as a means to promote uniformity of interpretation among signatories. The Court observed that interpreting the Convention using a uniform text-based approach ensures international consistency in interpreting the Convention, foreclosing courts from relying on local usage to undermine recognition of custodial arrangements in other countries and under other legal traditions.[76]

The Court found that its view was supported by the weight of authority in other nations, with scholars noting "an emerging international consensus on the matter."[77]

---

72. *See Abbott*, 560 U.S. at 15 (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 n.10 (1982)).

73. The *Text & Legal Analysis*, drafted by the U.S. State Department at the time the Convention was newly adopted, also carries interpretative weight. U.S. State Department Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986) [hereinafter *Text & Legal Analysis*]. *See, e.g.*, Viteri v. Pflucker, 550 F. Supp. 2d 829, 834 (N.D. Ill. 2008); Castillo v. Castillo, 597 F. Supp. 2d 432, 438 (D. Del. 2009); Aldinger v. Segler, 263 F. Supp. 2d 284 (D.P.R. 2003).

74. *See* Linda Silberman, *Interpreting the Hague Convention Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005).

75. *See*, *e.g.*, *supra* note 70.

76. *Abbott*, 130 S. Ct. at 1991. *See also* Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1233 (2014) (noting the lack of acceptance of equitable tolling by courts of other signatory nations to the treaty).

77. *Lozano*, 134 S. Ct. 1233.

2. Pérez-Vera Report

The *Pérez-Vera Report* is the product of the official reporter of the 1980 sessions of the Hague Conference that led to the approval of the Convention.[78] The report is recognized as the official history and commentary to the Hague Convention and is a "source of the background on the meaning of the provisions of the Convention."[79] U.S. courts routinely cite to this report for guidance on interpreting the treaty.[80]

3. U.S. State Department Text & Legal Analysis

The *Text & Legal Analysis*[81] is a document that was prepared by the U.S. State Department for the U.S. Senate as part of the ratification process for the Convention. It is valuable as an interpretative tool and is frequently cited.[82]

---

78. *Pérez-Vera Report*, *supra* note 19. The *Pérez-Vera Report* may be accessed and downloaded at the website of the Hague Conference on Private International Law at http://hcch.evision.nl/index_en.php?act=publications.details&pid=2779&dtid=3.

79. *See, e.g.*, Simcox v. Simcox, 511 F.3d 594, 605 n.3 (6th Cir. 2007); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). But note *Abbott*'s reservation as to the weight to be given to the *Pérez-Vera Report*: "We need not decide whether this Report should be given greater weight than a scholarly commentary." *Abbott*, 130 S. Ct. at 1995. *Compare Text & Legal Analysis*, *supra* note 73, at 10,503–06 (identifying the *Pérez-Vera Report* as the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention") and *Pérez-Vera Report* ¶ 8 (1981) ("[the Report] has not been approved by the Conference, and it is possible that, despite the Rapporter's [sic] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective").

80. *See, e.g.*, Barzilay v. Barzilay (*Barzilay II*), 600 F.3d 912, 916–17 (8th Cir. 2010); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009).

81. *Text & Legal Analysis*, *supra* note 73.

82. *See, e.g.*, Nicolson v. Pappalardo, 605 F.3d 100, 105 (1st Cir. 2010); Baran v. Beaty, 526 F.3d 1340, 1345 (11th Cir. 2008); Karkkainen v. Kovalchuk, 445 F.3d 280, 288 (3d Cir. 2006).

4. INCADAT

The Permanent Bureau of the Hague Conference on Private International Law has compiled a searchable database of decisions of other signatory nations called INCADAT (International Child Abduction Database).[83] It is available in English, French, and Spanish. The database has links to the full text of many leading decisions of courts throughout the world, including U.S. courts.

G. Whether Both Countries Are Bound by the Treaty[84]

Two elements must be established in order to pursue an action for the return of a child: (1) the Convention must have "entered into force" between the two countries involved prior to the filing of the application for return;[85] and (2) the wrongful removal or retention of the child must have occurred after the date the treaty became effective in both countries.[86]

The issue of whether the Convention is "in force" between states can be complex, depending in some cases on whether the countries

---

83. This database can be found at the following website: http://www.incadat.com/index.cfm?act=text.text&lng=1.

84. The U.S. State Department maintains a list of countries with whom the Convention has entered into force with the United States. This can be accessed at the State Department's website, at http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html.

85. *See* Convention, *supra* note 11, Article 38. See *In re Kamstra*, 307 S.W.3d 581 (Tex. App. 2010), wherein the court held that a Hague Convention could not be maintained because the children were habitual residents of Burundi, a country that was not signatory to the 1980 Convention. *Accord* Mezo v. Elmergawi, 855 F. Supp. 59, 62 (E.D.N.Y. 1992).

86. *See* Convention, *supra* note 11, Article 35. In *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007), father brought suit against his former spouse to compel the return of the parties' two children to Dominican Republic. The United States had not accepted the Dominican Republic's accession to the Hague Convention, so the treaty was not in force between them. Father instead relied on the Alien Tort Statute (ATS) (28 U.S.C. § 1350). The circuit court affirmed the district court's denial of relief to father, finding that mother's fraudulent entry into the United States did not confer jurisdiction under the ATS.

involved are "member states" or "party states." "Member states" are those nations that were members of the Hague Conference at the time of the Fourteenth Session in 1980. A member state becomes bound to the Convention by ratifying it. "Party states" are countries that did not belong to the Hague Conference on Private International Law at the time the Convention was approved for adoption in 1980—party states become bound by the Convention by acceding to the Convention.

The legal significance of ratification versus accession is important. Between member states, the ratification by one member state causes the Convention to automatically enter into force between that member state and all other previously ratifying member states.[87] For example, the 2014 ratification by Japan, a member state, caused the Convention to come into force between Japan and all other member states that had previously ratified, including the United States. However, when Member State X ratifies the Convention, the Convention does not automatically enter into force between Member State X and a party state that has acceded to the Convention. Member State X must expressly accept the accession by the party state. For example, El Salvador (a party state) acceded to the Convention in 2001. However, this accession was not accepted by Belgium (a member state) until 2007. As such, the Convention had not "entered into force" between the two nations until Belgium accepted El Salvador's accession.

The same applies to the accession of one party state vis-à-vis another acceding state. That is, the accession must be specifically accepted by the previously acceding state. In the case of party state accession by Belarus, the act of Belarus agreeing to be bound by the Convention would not bind the United States, or any other member or party state, until these states affirmatively accept Belarus' accession. Until such formal acceptance is made, the Convention has not entered into force between these two nations.

---

87. Japan is the only remaining nation having original "member state" status that has not ratified the Convention. If and when Japan ratifies the Convention, it will immediately enter into force with the remaining member states.

If one country involved in a Hague Convention dispute only recently has acceded to the Convention, it may be complicated to determine whether both countries are reciprocally bound by the treaty. Addressing this issue, the court in *Viteri v. Pflucker*[88] concluded that the Convention will apply if it is *in force* in each country—that is, each country has either ratified or acceded to the Convention on the date of the wrongful removal.

In *Viteri v. Pflucker*, mother took the parties' child to the United States in September 2005. She failed to return to Peru when her visa expired in October 2005. Peru acceded to the Convention in 2001, and the United States ratified the Convention in 1988. In October 2005 (the date of wrongful retention), the Convention was *in force* in each country, but had not entered into force between them. The United States accepted Peru's accession in 2007, and the treaty entered into force between the two countries on June 1, 2007. Father petitioned for the return of the child in February 2008, and mother moved for dismissal for lack of jurisdiction.

The court ruled that a wrongful removal occurs as a fixed date: in the instant case, before the United States accepted Peru's accession to the Convention. Therefore, the court ruled the Convention did not apply because the Convention was not in force *between* the United States and Peru on the date of the wrongful removal. The United States' acceptance of Peru's accession in 2007 does not grant jurisdiction for a wrongful removal that occurred in 2005. The Convention must be in force between two countries; the Convention cannot simply be in force in each respective country.[89]

---

88. 550 F. Supp. 2d 829 (N.D. Ill. 2008).

89. Practical reasons support this requirement. Petitions typically are transferred between countries through their Central Authorities. To the extent that a country acceding to the Convention fails to designate a Central Authority—or, having done so, the Central Authority lacks the capacity to perform its required tasks, such as locating children or communicating effectively with counterparts in other nations—the operation of the Convention is rendered a nullity.

II. The Case in Chief for the Return of a Child

A. Summary

The Convention provides two methods for requesting the return of a child: (1) administrative requests and (2) court proceedings. The administrative request procedure begins with the filing of an application for return directly with the Central Authority of either the country where the child is located or the country of the left-behind parent. If the proceeding is started in the latter, the Central Authority will forward the request to the counterpart Central Authority where the child is located. The Central Authority will usually attempt to negotiate a return of the child directly with the parents involved. Central Authorities have no independent powers to compel the child's return; if a Central Authority's negotiations fail, the left-behind parent must make an application to a court where the child is located and secure a court order for the child's return.

The U.S. State Department attempts to track each case filed in U.S. courts where return of a child is sought. Occasionally, however, a petitioner may file a case without any prior involvement or notice to the U.S. Central Authority, and the case will not come to its attention. Although notice to the U.S. State Department is not a prerequisite to filing an action, should the need later arise to utilize the resources of the Central Authority, delays may occur that could have been prevented by petitioner's earlier notice.[90]

---

90. For example, there may be a delay in Article 15 requests for information from the habitual residence whether the removal or retention of a child was unlawful under that nation's laws. The State Department also provides other services that may prove valuable to the court, such as assistance in locating counsel for petitioners; providing translation services for documents; assisting in securing passports and visas; facilitating contacts with the Central Authority of the child's habitual residence; and providing assistance with the return of children to their habitual residences.

In the United States, a petition for the return of a child may be filed in either state or federal court. The elements to the prima facie cause of action for return are:

- the child was wrongfully removed or retained;
- the child was removed from his or her habitual residence;
- there was a breach of the rights of custody under the law of the child's habitual residence;
- the left-behind parent was exercising those custody rights; and
- the child is under the age of sixteen.

When such an action is filed, a state court entertaining the merits of a custody case must stay any pending custody matters pursuant to Article 16 of the Convention.

No particular form of action is required to begin a case for return.[91] Because custody matters are not within the jurisdiction of federal courts, it is commonplace to commence a federal action by filing a petition for the return of the child, pursuant to 22 U.S.C. § 9003(b).[92] A petition for return is sometimes accompanied by a request for a warrant in lieu of habeas corpus.[93] In state courts, however, the matter has been raised in a number of legal avenues.[94]

---

91. *See Text & Legal Analysis*, *supra* note 73, at 10,507.

92. 22 U.S.C. § 9003(b) (1988) states: "Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."

93. A warrant in lieu of a writ of habeas corpus is an order directed to law enforcement officers commanding them to physically secure the child and bring the child before the court. *See, e.g.*, *In re* Kim, 404 F. Supp. 2d 495 (S.D.N.Y. 2005); Aldinger v. Segler, 338 F. Supp. 2d 296 (D.P.R. 2004); *In re* Leslie, 377 F. Supp. 2d 1232 (S.D. Fla. 2005); *see also* Grieve v. Tamerin, 269 F.3d 149 (2d Cir. 2001) (raising return of child issue in writ of habeas corpus); Wanninger v. Wanninger, 850 F. Supp. 78 (D. Mass. 1994) (raising return of child issue in petition for warrant in lieu of writ of habeas corpus).

94. *See, e.g.*, Harsacky v. Harsacky, 930 S.W.2d 410 (Ky. Ct. App. 1996) (raising return of child issue during domestic violence action); Brennan v. Cibault, 643

Petitions for return may be filed in existing custody cases, or they may be filed as independent actions.[95] In *In re J.J.L.-P.*,[96] the father filed a petition for return in a previously filed custody case. Mother opposed the case on jurisdictional grounds, claiming that ICARA required the filing of an independent action. The Texas court noted that the language of ICARA as set forth in § 9003(b) was permissive as to how petitions for relief might be filed, and thus held that father had the discretion to file his petition for return in an existing custody case or as a separate and distinct lawsuit.[97]

B. Burdens of Proof

ICARA sets forth the burdens of proof for the case in chief for return and for the defenses to return.[98] For the case in chief (i.e., proof of the

---

N.Y.S.2d 780, 227 A.D.2d 965 (App. Div. 1996) (addressing return of child issue during action to modify custody and access); Geiser v. Valentine, No. 80286/07, slip op. 52046(U), 17 Misc. 3d 1117(A), 851 N.Y.S.2d 65 (N.Y. Sup. Ct. 2007) (unpublished table decision) (raising return of child issue in action for writ of habeas corpus).

95. In one North Carolina case, a petition for return of a child filed by a German child protective service agency was denied on the basis that the petition was not verified. The court treated the petition as one for enforcement of a German court order removing the child from the parents and assuming guardianship over the child. As such, the court deemed the action to be one for registration and enforcement of a Hague Convention return order, and did not deal with the petition on its merits. Obo v. Steven B., 687 S.E.2d 496, 500 (N.C. App. 2009).

96. 256 S.W.2d 363 (Tex. App. 2008).

97. *Id.* at 370.

98. 22 U.S.C. § 9003(e) (1988), Burdens of Proof:

> (1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence -
>
> (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
>
> (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.
>
> (2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing -
>
> (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

child being under sixteen, that there was a wrongful removal from the child's habitual residence, and the removal was in violation of the custody rights of the left-behind parent), the burden upon the petitioner is a preponderance of the evidence.[99]

In the case in chief, the petitioner must prove that the person with custody rights was actually exercising those rights at the time of the wrongful removal or retention.[100] There are two provisions in the Convention that deal with the exercise of rights of custody: (1) Article 3(b)[101] requires a showing in the petitioner's case in chief, and (2) Article 13 refers to non-exercise of custody rights as an affirmative defense. In petitioner's case in chief, the Convention presumes that only preliminary evidence will be needed to establish that custody rights were being exercised.[102]

In *Walker v. Walker*,[103] the Seventh Circuit reversed a district court's finding that a father was not exercising his custody rights because he abandoned his children. The district court relied upon father's failure to return to the United States from Australia, his failure to provide financial support to the mother and children, and a letter

---

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

99. *See* 22 U.S.C. § 9003(e)(1)(A) (1988).

100. *See*, *e.g.*, Baxter v. Baxter, 423 F.3d 363, 369 (3d Cir. 2005); Mozes v. Mozes, 239 F.3d 1067, 1084–85 (9th Cir. 2001).

101. Convention, Article 3:

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 . . . 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.

102. *See, e.g.*, Asvesta v. Petroutsas, 580 F.3d 1000, 1018 (9th Cir. 2009) ("We and other courts have held that a petitioner's burden under Article 3(b) is minimal."). The *Pérez-Vera Report* provides, in paragraph 73, that "This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child." *See also Text & Legal Analysis*, *supra* note 73, at 10,507 (noting "Very little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child.").

103. 701 F.3d 1110 (7th Cir. 2013).

proposing settlement that focused on financial matters. The appellate court found the facts supporting an Article 3 abandonment unconvincing, and noted that the standard for finding that a parent was exercising custody rights at the time of removal is a liberal test. Courts will generally find a parent exercised his or her rights to custody whenever "a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child."[104]

In the case of the Article 13(a)[105] defense, however, the person opposing the return of the child has the burden of proving by a preponderance of the evidence that custody rights were not being exercised.[106]

The Convention sets forth five narrowly defined defenses to an action for return of a child. Under ICARA, the defenses are subject to different burdens of proof. Three defenses may be proved by a preponderance of the evidence:

- The person making the request for return of the child has delayed for more than one year since the wrongful removal or retention, and the child has become settled in the new environment.
- The person, institution, or other body having the care of the child was not actually exercising custody rights at the time of removal or retention.

---

104. *Id.* (citing Bader v. Kramer, 484 F.3d 666, 671 (4th Cir. 2007)).

105. Convention, Article 13:

> [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention . . . .

106. *See Pérez-Vera Report*, *supra* note 19, ¶ 73:

> Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (i.e., discharged by the 'abductor' if he wishes to prevent the return of the child).

- The person, institution, or other body having the care of the child consented to, or subsequently acquiesced in, the removal or retention.

Two defenses must be established by clear and convincing evidence:

- The return of the child would expose the child to a grave risk of "physical or psychological harm or otherwise place the child in an intolerable situation."
- The return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

C. Wrongful Removal and Retention

Article 3 of the Convention defines wrongful removal or retention 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.

The legal definition of the term "wrongful" usually implies some sort of *mens rea* or evil intent. In the context of the Convention, however, "wrongful" simply indicates that a person has engaged in the conduct described in the elements set forth in subsections (a) and (b) of Article 3 above.[107]

---

107. *See* Thomson v. Thomson, [1994] 3 S.C.R. 551, 119 D.L.R. 4th 253, ¶ 53 (Can. S.C.C.) (holding that mother's knowledge of an order preventing child's removal from Scotland was not essential) ("Nothing in the nature of *mens rea* is required; the Convention is not aimed at attaching blame to the parties. It is simply intended to

1. Distinguishing Between Wrongful Removal and Wrongful Retention

The Convention provides a one-year time period for a parent to commence proceedings for the return of the child after a wrongful removal or wrongful retention.[108] If an action is commenced after the one-year period, then the abducting parent may assert the Article 12 defense that the child has become settled and should not be returned to the petitioning parent.

A distinction should be drawn between the concepts of wrongful removal and wrongful retention. The difference between the two is significant because the one-year time period to file an action begins to run from the date of the wrongful conduct. In most cases, the wrongful conduct in question is unequivocal, giving rise to a fair degree of certainty as to the date the one-year period commenced.[109] Typically, wrongful removal cases are characterized by parents unilaterally taking children from the habitual residence without the knowledge or permission of the left-behind parent.

Determining the commencement date of wrongful retention can be more complicated. Most cases dealing with wrongful retention involve a party leaving the child's habitual residence with the child by agreement with the other party. This frequently occurs when a parent leaves with a child for a visit or vacation in another country. When the traveling party refuses to return the child according to the previous agreement, this conduct may become a wrongful retention. In the case of a wrongful retention, the time begins to run either (1) from the date when the child remains with the abducting parent despite the clearly communicated desire of the left-behind parent to have the child re-

---

prevent the abduction of children from one country to another in the interests of children. If the removal of the child was wrongful in that sense, it does not matter what the appellant's view of the situation was.").

108. *See* Convention, *supra* note 11, Article 12. Despite this provision, even though more than one year has passed, Article 12 also provides that the child must still be returned unless it is shown that the child is settled in the new environment. *See* Child Settled in New Environment, *infra* page 95.

109. *See, e.g.*, Belay v. Getachew, 272 F. Supp. 2d 553 (D. Md. 2003).

turned,[110] or (2) when the acts of the abducting parent are so unequivocal that the left-behind parent knows, or should know, that the child will not be returned.[111]

2. Anticipatory Violation and Wrongful Retention

One issue arising in this context is whether an anticipatory breach of an agreement to return a child constitutes a wrongful retention. In *Toren v. Toren*,[112] the parties entered into a custody agreement in Israel in 1996. The agreement provided that the children would live with their mother in Massachusetts for a period of years, but not beyond July 21, 2000. In 1997, mother filed an action in Massachusetts seeking to modify the Israeli decree and requested sole custody of the children. In 1998, father filed a petition for return of the children under the Hague Convention on the basis that mother's actions were in breach of their custody agreement and constituted an unlawful retention of the children. The First Circuit rejected father's claim and dismissed the petition:

> Even if the father had alleged facts sufficient to support his claim that the mother intended to retain the children in the United States after July 21, 2000, we do not believe that the Hague Convention or ICARA would enable us to exercise jurisdiction over such a claim. To the extent that the father's argument is based on the mother's future intent, the father is seeking a judicial remedy for an anticipatory violation of the Hague Convention. But the Hague Convention only provides a cause of action to petitioners who can establish actual reten-

---

110. *See, e.g.*, Karkkainen v. Kovalchuk, 445 F.3d 280, 290 (3d Cir. 2006) (citing Slagenweit v. Slagenweit, 841 F. Supp. 264, 270 (N.D. Iowa 1993)). *See also* Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627, 76 Ohio Misc. 2d 25 (1995) (determining that action taken in custody proceedings unequivocally asserted left-behind parent's rights to custody).

111. *See, e.g.*, Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010); Zuker v. Andrews, 2 F. Supp. 2d 134, 140 (D. Mass. 1998); *see also In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004) (ruling that after several missed dates for returning child, date of wrongful retention was the date when father learned that mother was never going to return the child to Argentina).

112. 191 F.3d 23 (1st Cir. 1999).

> tion. . . . Therefore, we do not see how a petitioner like the father, alleging only an anticipatory retention, can invoke the protections of the Hague Convention.[113]

Following *Toren*'s holding, the district court in *Falk v. Sinclair*[114] found that an unlawful retention did not commence until the actual date an American father was to return the child to mother in Germany. The question in *Falk* was whether mother had filed her petition for return of the child within one year of the commencement of the unlawful retention. Father maintained that mother filed her application more than one year after the retention, arguing that retention occurred when he unequivocally indicated to the child's mother that he was not going to return the child to Germany. Mother alleged that the unlawful retention began on the date that the child was to be returned, approximately forty days after father gave "clear notice" that he was not returning the child. Citing to *Toren*, the *Falk* court held that an anticipatory breach of the parties' agreement was not sufficient to amount to a wrongful retention. Accordingly, the one-year period under Article 12 did not begin to run until father failed to return the child on the parties' agreed-on date.[115]

3. Retention by *Ne Exeat* Order

In one case, a party contended that the action of a state court forbidding the removal of a child from that state amounted to a wrongful retention of the child. In *Pielage v. McConnell*,[116] mother, a native of the Netherlands, was involved in a child custody case with the child's father, a U.S. citizen, in the state courts of Alabama. In the course of litigation, mother was given temporary physical custody of the child, but the state court also entered a *ne exeat* order that forbade mother from removing the child from Alabama's jurisdiction pending a full custody decision on the merits. Wishing to return to the Netherlands

---

113. *Id.* at 28.

114. 692 F. Supp. 2d 147 (D. Me. 2010); *accord* Philippopoulos v. Philippopoulou, 461 F. Supp. 2d 1321, 1325 (N.D. Ga. 2006).

115. *Falk*, 692 F. Supp. 2d at 162.

116. 516 F.3d 1282 (11th Cir. 2008).

with the child, but unable to do so because she was restrained from removing the child from Alabama, mother filed in federal court a Hague Convention petition for return, claiming that the effect of the Alabama *ne exeat* order was to wrongfully retain the child in Alabama. Affirming the district court's dismissal of mother's action, the Eleventh Circuit ruled that the Convention was "meant to cover the situation where a child has been kept by *another* person away from the petitioner claiming rights under the Convention, not where the petitioner still retains the child but is prevented from removing him from the jurisdiction" (emphasis added).[117]

4. Custody Rights

To be wrongful, the removal or retention of the child must be in violation of the left-behind parent's custody rights.[118] Custody rights are more than mere visitation or "access" rights.[119] A person may not maintain an action for return of a child when that person is entitled to exercise only access or visitation rights.[120]

a. Holders of Custody Rights. Article 3(a) of the Convention provides that custody rights may be 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. . . ." The vast majority of cases involve parents or relatives claiming custody rights, but administrative agencies or other

117. *Id.* at 1289.

118. *See* Convention, *supra* note 11, Article 3.

119. The Convention speaks in terms of "access rights"—a common term in other countries for what is usually described in the United States as "visitation rights." *See* 22 U.S.C. § 9002(7) (1988) (providing "the term 'rights of access' means visitation rights").

120. *See, e.g.*, Bromley v. Bromley, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998) (quoting Viragh v. Foldes, 612 N.E.2d 241, 415 Mass. 96 (1993)); Radu v. Toader, 463 F. App'x 29 (2d Cir. 2012) (Romanian divorce decree granted mother sole custody of child).

bodies also may claim custody rights.[121] Article 3 establishes that the law of the country in which the child was habitually resident determines custody rights.[122]

A party's nationality or cultural affiliation does not alter this principle. For example, Native Americans and members of tribes are not exempt from the operation of the Convention.[123]

A wrongful removal may occur even if a child's removal from his or her habitual residence does not violate interim orders. The key question is whether the removal of the child violates the rights of the left-behind parent. In *Ozaltin v. Ozaltin*,[124] mother took her two children from Turkey to the United States. Shortly thereafter, she commenced a divorce proceeding in Turkey. In its interim orders the Turkish Court did not order mother to return from the United States, and in fact provided father with visitation rights both in the United States and in Turkey. Father petitioned for the return of the children to Turkey. Mother countered that the removal of the children from Turkey could not have been wrongful because subsequent orders from the Turkish court allowed her to remain in the United States. The Second Circuit held that father maintained custody rights to the children under Turkish law and the removal of the children constituted a

---

121. *See, e.g.*, *In re* S.J.O.B.G., 292 S.W.3d 764 (Tex. App. 2009) (custody rights claimed by the Child Welfare Services of Norwegian Municipality); L.H. v. Youth Welfare Office of Wiesbaden, 150 Misc. 2d 490, 568 N.Y.S.2d 852 (Fam. Ct. 1991) (holding that where a child is placed by the German Child Welfare Office, the child's biological mother's custody rights can be taken by the court declaring the child a ward of the German court); Brown v. Orange Cnty. Dep't of Soc. Servs., 91 F.3d 150, 1996 WL 366366 (9th Cir. 1996) (unpublished table decision) (alleging wrongful removal of child by child welfare agency); *In re* Marriage of Witherspoon, 155 Cal. App. 4th 964, 973 (2007) (despite German youth welfare office taking custody of children, mother still retained sufficient custody rights to maintain her action for return of the children).

122. Nevertheless, as the Supreme Court noted in *Abbott*, custody rights must be determined "by following the text and structure of the Convention." Abbott v. Abbott, 130 S. Ct. 1983, 1990 (2010).

123. *See*, *e.g.*, Diabo v. Delisle, 500 F. Supp. 2d 159, 163 (N.D.N.Y. 2007).

124. 708 F.3d 355 (2d Cir. 2013).

breach of the father's rights to custody. Citing to the *Pérez-Vera Report*,[125] the court also noted that "a removal under the Hague Convention can still be 'wrongful' even if it is lawful."[126]

b. Article 15 Request. A removal or retention of a child is not deemed to be wrongful if the custody rights of the left-behind parent have not been violated. In order to determine whether a parent has custody rights, a court may require information about the law of the child's habitual residence. To assist in resolving the issue, a court may request a determination on the custody rights issue from the authorities of that contacting state. Article 15 of the Convention authorizes an inquiry to be made of the child's habitual residence to determine whether, under the law of that nation, the child's removal was wrongful.[127] Although this provision has not been widely noted in the case law, it

---

125. *Pérez-Vera Report*, *supra* note 19, ¶ 71: "[F]rom the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is . . . wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention . . . seeks . . . to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

126. *Ozaltin*, 708 F.3d at 369. See also *In re Marriage of Witherspoon*, 66 Cal. Rptr. 3d 586 (Cal. Ct. App. 2007), quoting from the *Pérez-Vera Report*: "Under the Convention, one parent's removal or retention of a child may breach the second parent's custodial rights under the law of the children's habitual residence, even if such acts do not breach the law itself. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

127. *See* Convention, *supra* note 11, Article 15. As a cautionary note, courts should anticipate that an Article 15 request typically proceeds back and forth through the diplomatic channels of the Central Authorities. As a result, this may add delay to the proceedings. For this reason, Article 15 requests should be addressed early in the proceedings.

appears that it has been used in some cases.[128] For example, in *Lakhera-Bonnefoy v. Lakhera-Bonnefoy*,[129] mother was involved in a Hague proceeding pending in another country. In order to obtain a judicial determination that the United States was the child's habitual residence, mother filed a request with the New York State Courts to issue an Article 15 finding that the child's habitual residence was New York. Based on the evidence presented by the mother, the court entered an order finding that under U.S. law, that the child's habitual residence was the state of New York.

The procedure for obtaining information pursuant to Article 15 is cumbersome and may cause unnecessary delay.[130] Another option for the court is to make direct contact with a Hague network judge (see *infra* page 180) and request information concerning the law of custody rights in the foreign jurisdiction.

c. "Chasing Orders." In some cases, a left-behind parent may seek a custody order from the courts of the child's habitual residence *after* the child has been removed. This does not constitute an Article 15 request. Rather, these orders are commonly referred to as "chasing orders," and they ordinarily have very little efficacy.[131]

---

128. *See, e.g.*, Armiliato v. Zaric-Armiliato, 169 F. Supp. 2d 230 (S.D.N.Y. 2001) (Article 15 declaration provided by petitioning father to court); Silverman v. Silverman (*Silverman II*), 338 F.3d 886 (8th Cir. 2003) (Israeli court provided Article 15 declaration for use in U.S. courts); Sorenson v. Sorenson, No. 07-4720 (MJD/AJB), 2008 WL 750531 (D. Minn. 2008) (unreported disposition) (father asserting that Australian Central Authority requested an Article 15 declaration).

129. 836 N.Y.S. 2d 486 (N.Y. Sup. Ct. 2006) (unreported disposition).

130. The Conclusions and Recommendations of the Sixth Special Commission on the practical operation of the 1980 and 1996 Conventions, June 2011, page 8, acknowledges the reporting of problems and delays in connection with the use of Article 15.

131. *See, e.g.*, Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) (where father obtained chasing order ostensibly determining in his favor all issues that would be appropriate for the U.S. court to determine). In *Feder*, the U.S. court avoided any discussion of the Australian family court order in its analysis of the issue of custody rights and made its determination de novo. *See also* Hanley v. Roy, 485 F.3d 641 (11th

In *White v. White*,[132] the Fourth Circuit reviewed the significance of a court order changing custody to a left-behind parent two years after the child was removed by the parent having full custody. In *White*, mother and father were granted a legal separation by Swiss courts. Mother was granted full custody of the child and father was given the right to visits only. Mother left Switzerland with the child and relocated to the United States. Because she was the sole custodian of the child by court decree, she was entitled under Swiss law to move, and her relocation with the child was not in violation of father's custody rights. Two years after mother's departure from Switzerland with the child, a Swiss trial court awarded custody of the child to father. The Fourth Circuit, however, pointed out that a determination whether a removal of a child is wrongful within the meaning of the Convention must be made on the facts as they existed at the time of removal.[133] Citing to a number of sister-state decisions, the court determined that the lawful removal of a child from a country cannot be converted into wrongful retention by the subsequent issuance of a "chasing order" in favor of the left-behind parent.[134]

Similarly, in *Walker v. Walker*,[135] the parents disagreed whether the children's habitual residence was in Australia or the United States. Mother filed an action for divorce in Chicago and obtained a decree for sole custody of the children. On father's appeal to the Seventh Circuit from a denial of his petition for return, mother contended that the case was moot because of the Illinois custody order. The court of appeals held the case was not moot. Article 17 of the Convention[136] per-

---

Cir. 2007) (finding that removal of children from grandparents who were testamentary guardians was a wrongful removal).

132. 718 F.3d 300 (4th Cir. 2013).

133. *Id.* at 306.

134. *Id.* at 306–07. *Accord* Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013).

135. 701 F.3d 1110 (7th Cir. 2013).

136. The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the re-

mits, but does not compel, recognition of a custody decree. The issue of habitual residence was still before the district court, and until that issue was decided, it could not be determined whether the U.S. or Australia was entitled to determine custody issues.[137]

Litigation may be complicated by the issuance of chasing orders giving the left-behind parent full custody. If the primary caretaker parent abducts the child, courts hearing the return case may be reluctant to order the child's return to the habitual residence, placing the child in the immediate custody of a parent who played a lesser role in the care of that child. The Convention presumes that a child will be returned to his or her habitual residence, effectively restoring the *status quo ante*. Depending on the circumstances of the case, the existence of a chasing order altering that status quo may result in the child being returned to a situation that the court feels is inappropriate.[138] Under such circumstances, the court may be motivated to craft its return order in such a manner that the return of the child does not pose a risk of physical or emotional harm. See the section on "Undertakings," *infra* at page 137.

d. Effect of Subsequent Custody Orders. The 1980 Convention is designed only for determining the merits of an abduction. It is not intended to address or resolve competing custody or jurisdictional claims that may engage the parties for years.

A number of recent cases have examined the question whether the removal of a child that—a removal not wrongful at the time—may later be transformed into a wrongful retention based upon subsequent court proceedings altering the custody rights of the left-behind parent. In *Barzilay v. Barzilay*,[139] the parties and their children were residents

---

quested State may take account of the reasons for that decision in applying this Convention.

137. *Id.* at 1116.

138. These issues may arise in cases where there is a showing of previous domestic violence, child abuse or neglect, or circumstances that otherwise impact on the welfare of the child.

139. *Barzilay II*, 600 F.3d 912 (8th Cir. 2010).

of Missouri. Their 2005 divorce decree provided that both parents had joint legal and physical custody and mother had primary parental responsibility. The decree also provided that upon one party moving to Israel, the other party "shall forthwith take such steps to move back to Israel so that Husband and Wife and the children shall reside within the same country." Less than a year after the decree was entered, father relocated to Israel and pressured mother to relocate as well. Mother agreed to take the children to Israel for a summer visit in 2006. Father obtained an ex parte order preventing the removal of the children from Israel. In order to leave with the children, mother negotiated an agreement to the entry of an Israeli court order compelling her and the children to move to Israel by 2009, and designated the Israeli court as the only court with jurisdiction over the children and issues of immigration and custody. Father petitioned for return of the children to Israel, basing his case for habitual residence upon the Israeli decree and the relocation provisions of the Missouri decree. The trial court found the children's habitual residence to be in the United States and denied father's petition. The Eighth Circuit affirmed. The court determined that parties may not, by mere contract, establish the habitual residence of their children without regard to a factual basis supporting that agreement.[140] Ultimately, the court characterized the Israeli and Missouri decrees as custody decrees, and, as such, not subject to enforcement through the use of the 1980 Hague Convention.

---

140. "As the discussion above makes clear, determination of habitual residence under the Hague Convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child . . . To allow parents simply to stipulate to any habitual residence they choose would render these factual considerations irrelevant . . . Any idea that parents could contractually determine their children's habitual residence is also at odds with the basic purposes of the Hague Convention. The Convention seeks to prevent the establishment of 'artificial jurisdictional links' as a means to remove the child from the 'family and social environment in which its life has developed.'" *Pérez-Vera Report*, *supra* note 19, at 428. It is difficult to imagine a jurisdictional link more artificial than an agreement between parents stating that their child habitually resides in a country where it has never lived. *Barzilay II*, 600 F.3d at 920–21.

> Immediately before the alleged wrongful retention in this case began, the children's habitual residence under the Hague Convention was in Missouri, where they had lived without interruption for five years. Under the Convention, it was consequently for the courts of Missouri to determine whether [mother's] refusal to bring the children back to Israel was indeed wrongful and if so, to fashion an appropriate remedy. Instead of seeking to enforce his custody rights in the Missouri courts, however, [father] went to the court in Kfar Saba because, as he candidly testified in the district court, "it proposed better chances for me winning." Having obtained a favorable judgment there, he then turned to the federal court seeking enforcement of his newly minted custody rights through an ICARA petition. This course of litigation not only betrays a fundamental misunderstanding of the Hague Convention, but also precisely the sort of international forum shopping the Convention seeks to prevent.[141]

Similarly, in *Redmond v. Redmond*,[142] mother moved from Ireland with her child and relocated to Illinois in 2007. The child's mother and father were not married. Under Irish law, father had no custody rights. As such, father could not object to the removal of the child. Shortly after mother and the child relocated to the United States, father commenced proceedings in Ireland to establish his paternal and custody rights. After three-and-one-half years of custody litigation in Ireland, father ultimately obtained a custody decree in 2011 granting him paternity rights and joint custody of the child. The decree also ordered that both the mother and her child were to return to Ireland to live, despite the fact that the child had lived in the United States with mother for the past three and a half years. In defiance of the Irish decree, mother refused to relocate with the child back to Ireland. Father thereupon petitioned for return of the child to Ireland, contending that mother had wrongfully retained the child in the United States because she failed to return the child to Ireland as required by the Irish decree. The trial court granted the petition, finding that mother wrongfully retained the child when she violated the Irish court order

141. *Id.* at 922.

142. 724 F.3d 729 (7th Cir. 2013).

for her and the child to return to Ireland. The Seventh Circuit reversed, finding that the child had clearly established a habitual residence in the United States.

The *Redmond* court characterized the question as "Is a change in one parent's custody rights enough to make the other parent's continued physical custody of the child a putative wrongful 'retention' under the Convention?" Stated differently, does the parent with physical custody of a child commit a wrongful retention—colloquially, an "abduction"—by reneging on a promise, made under oath, to obey a newly entered custody order in favor of the other parent?"[143] In answering those questions in the negative the court stated that:

> [T]he concepts of removal and retention can be understood only by reference to the child's habitual residence; a legal adjustment of a parent's custody rights does not by itself give rise to an abduction claim.
>
> • • •
>
> [A] parent may *not* use the Convention to *alter* the child's residential status based on a legal development in the parent's favor. The availability of the return remedy depends on the child's habitual residence because the "retention of a child in the state of its habitual residence is not wrongful under the Convention."[144]

e. Methods of Establishing Custody Rights. Custody rights under the Convention may be established by (1) operation of law, (2) judicial or administrative decision, or (3) agreement of the parties.[145] Courts are frequently requested to interpret foreign law questions, especially

---

143. *Id.* at 740. Both the mother and child were present in Ireland for the final custody hearing in February 2010. When the court ordered mother and child to return to Ireland to live, mother requested permission to return to the United States with the child to prepare for their court-ordered move back to Ireland. The Irish court conditioned mother and child's return to the United States upon mother's promise to the court, under oath, that she would return to Ireland with the child by the end of the next month.

144. *Id.* at 742 (citing *Barzilay II*, 600 F.3d at 916).

145. *See* Convention, *supra* note 11, Article 3.

when analyzing the question whether a parent has "custody rights" under the Convention. Proof of foreign law may be established pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.[146] The Convention also envisions that proof of foreign law may be established by the use of "certificates or affidavits," Central Authority opinions, letters, and expert testimony.[147]

i. Custody Rights Established by Operation of Law. Courts frequently look to the establishment of custody rights by operation of law, particularly in cases involving unmarried parents or where married parties have not previously sought orders relating to the status of their marriage or the custody of their children. For example in *Yang v. Tsui (Yang II)*,[148] the court determined the custody rights of unmarried parents pursuant to the law of British Columbia, the child's habitual residence. Under British Columbia law, the parent with whom the child "usually resided" is entitled to custody of the child.[149] Similarly, in *Bader v. Kramer (Bader I)*,[150] the court applied the law of the child's habitual residence, in that case Germany. The parents' divorce agreement granted only visitation rights to father, with no underlying award of custody. Under German law, absent an order granting one

146. Fed. R. Civ. P. 44.1: "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

147. *See Pérez-Vera Report*, *supra* note 19, ¶ 101. *See also* Whallon v. Lynn, 230 F.3d 450, 458 (1st Cir. 2000) (establishing proof of foreign law by an affidavit of Mexican attorney); *accord* Shalit v. Coppe, 182 F.3d 1124, 1130 (9th Cir. 1999) (finding that father's filing of declaration of his Israeli attorney is not sufficient); Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1064 (6th Cir. 1996) (interpreting German civil code and noting that "[w]e review the district court's findings of fact for clear error and review its conclusions about American, foreign, and international law *de novo*"); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004) (establishing foreign law via letters from Argentine Central Authority).

148. 499 F.3d 259 (3d Cir. 2007).

149. *Id.* at 277.

150. 445 F.3d 346 (4th Cir. 2006).

parent sole custody of the child, both parents retain "parental responsibility" for the child. Hence, father had enforceable custody rights.[151] And in *Patrick v. Rivera-Lopez*[152] a child was born in Puerto Rico to an unmarried couple. Subsequently, the parties married in Puerto Rico and then moved to the United Kingdom. The First Circuit held that father had established his custody rights pursuant to U.K. law (the child's habitual residence) by virtue of the United Kingdom's recognition of Puerto Rico's legitimation statute providing that a child is legitimated by the subsequent marriage of the parents.[153]

(a) Choice of law: territorial law. *Yang* raised another point regarding choice of law. Many countries, including the United States, contain individual territories that have their own unique systems of law. Countries with territories include Canada,[154] Mexico,[155] and Australia.[156] Article 31 of the Convention provides that where there are two or more systems of law applicable to different territorial units within a country, the law of the habitual residence "shall be construed as referring to the law of the territorial unit in that State where the child habitually resides." Since the United States has no national system of family law, state laws are used to define parents' custody rights.[157]

(b) *Patria potestas*. Principally in civil-law jurisdictions, including Central and South America, the right of *patria potestas* may establish enforceable rights of custody under the Convention. *Patria potestas* is a legal concept derived from Roman Law that connotes "all the duties and rights of the parents in relationship to their children who have not reached majority, regarding the care, development and

---

151. *Id.* at 351.

152. 708 F.3d 15 (1st Cir. 2013).

153. *Id.* at 20.

154. *See, e.g.*, Application of McCullough on Behalf of McCullough, 4 F. Supp. 2d 411 (W.D. Pa. 1998).

155. *See, e.g.*, Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (utilizing the law of the State of Baja California Sur); Perez v. Garcia, 148 Wash. App. 131, 198 P.3d 539 (Wash. App. 2009).

156. Feder v. Evans-Feder, 63 F.3d 217, 221–22 (3d Cir. 1995).

157. *Id.*; *see also Text & Legal Analysis*, *supra* note 73, at 10,506.

education of their children."[158] Some U.S. courts have held that the right of *patria potestas* does not overrule contrary provisions spelled out in a valid custody agreement.[159] Other cases, however, have incorporated the concept of *patria potestas* into agreements and orders.[160]

---

158. Altamiranda Vale v. Avila, 538 F.3d 581, 584 (7th Cir. 2008) (explaining the right of *patria potestas* as interpreted in Venezuela); *see also In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M.D. Fla. 2002). In *Whallon v. Lynn*, 230 F.3d 450, 456 n.7 (1st Cir. 2000), the First Circuit explained the origin and transition of the doctrine:

> *Patria potestas* is a concept derived from Roman law and originally meant paternal power. It referred to a father's "near absolute right to his children, whom he viewed as chattel," a right with which courts were powerless to interfere. (citation omitted); *see also* Black's Law Dictionary 1188 (7th ed. 1999) (defining *patria potestas* as "[t]he authority held by the male head of a family over his children and further descendants in the male line, unless emancipated," initially including "the power of life and death"). In contrast, the Roman legal tradition did not provide wives with rights of parental authority. (citation omitted).
>
> • • •
>
> . . . Latin American countries with civil code traditions appear to recognize some form of *patria potestas* rights. Pesin v. Rodriguez, 77 F. Supp. 2d 1277, 1286 (S.D. Fla.1999) (noting, in Hague Convention case, that under Venezuela's code father and mother "'are vested with the parental authority until a judicial decision establishes otherwise'" and that "father and mother who exercise parental authority have custody of their children . . . shall elect by mutual consent their place of domicile, residence or domicile [sic]"; finding that mother's removal of child breached father's rights of custody under the Convention). This case highlights the difficulties in imposing Anglo-American definitions of custody on legal systems, like Mexico's, that have different origins and traditions. Baja California Sur's code suggests the continuing resilience of *patria potestas* rights (albeit in a diluted form) under Mexican law, despite the presumption that physical custody of children under age seven be awarded to the mother, at least in cases of divorce.

159. *See*, *e.g.*, Gonzales v. Gutierrez, 311 F.3d 942, 954 (9th Cir. 2002) (holding Mexico's doctrine of *patria potestas* "does not confer rights of custody upon the non-custodial parent where a competent Mexican court has already decided the rights and obligations of both parents"), *overruled on other grounds,* Abbott v. Abbott, 130 S. Ct. 1983, 1986 (2010); *see also* Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007) (holding "to the extent that Mexican law of *patria potestas* afforded plaintiff any right of custody of the child, plaintiff relinquished such rights in the agreed divorce decree").

160. *See*, *e.g.*, Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1123–24 (D. Colo. 2008) (finding the Mexican interpretation of *patria potestas* to be consistent with Convention's definition of custody); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D.

ii. Custody Rights Established by Judicial or Administrative Decision.[161] Decisions or custody determinations made before the child has been removed from the habitual residence will typically define the nature of the custodial relationship, whether those judgments have been issued by a U.S. court or the court of a foreign nation.[162] A custody decree may be effective even if it is obtained ex parte.[163] Additionally, a temporary custody order granting custody rights will support a petition for return even though the court has not made a final ruling on the merits of the custody case. In *Kufner v. Kufner*,[164] a temporary court order awarding mother primary care of the children and granting father visitation rights did not terminate father's custody rights. Under German law, joint custody remained in effect until the death of a parent or a court order terminating joint custody. Mother's removal of the children in the face of a nonremoval order from the

---

Ga. 2004)) (commenting on the incorporation of *patria potestas* in Argentine agreement); *see also* Lalo v. Malca, 318 F. Supp. 2d 1152 (S.D. Fla. 2004) (showing Panamanian divorce decree that provided physical custody to the mother, visitation rights to father, and shared *patria potestas* rights).

161. Although in most countries custody and visitation decisions are typically made only by courts, in some countries these decisions may be made by administrative bodies. *See* Viragh v. Foldes, 612 N.E.2d 241, 243, 415 Mass. 96, 98 (1993) ("In Hungary, custody issues are decided by the courts while specifics of visitation matters are determined by an administrative system, referred to as the Guardianship Authority."); *see also Text & Legal Analysis*, *supra* note 73, at 10,506–07 ("Custody rights [arise] by reason of judicial or administrative decision. Custody rights embodied in judicial or administrative decisions fall within the Convention's scope. While custody determinations in the United States are made by state courts, in some Contracting States, notably the Scandinavian countries, administrative bodies are empowered to decide matters relating to child custody including the allocation of custody and visitation rights.").

162. Note, however, that judgments of a foreign nation are not entitled to the protection of full faith and credit. *See* Diorinou v. Mezitis, 237 F.3d 133, 142 (2d Cir. 2001). Full faith and credit applies only to United States courts' orders and judgments regarding the Hague Convention. *See* Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828, 843 (S.D. Tex. 2006) ("As a general matter, judgments rendered in a foreign nation are not entitled to the protection of full faith and credit.").

163. *See*, *e.g.*, Van De Sande v. Van De Sande, 431 F.3d 567, 569 (7th Cir. 2005).

164. 519 F.3d 33 (1st Cir. 2008).

German court was sufficient to confer upon father "rights of custody" that supported his successful application for return of the children.[165]

It is not required that orders conferring custody rights be issued by the courts of the child's habitual residence. In *Brooke v. Willis*,[166] where father was a resident of England and mother was detaining the child in the state of Virginia, the existence of a court order from California was held to govern the custodial rights of the parties. The California order granted each parent equal joint legal and physical custody of the child. The district court found that father had custody rights pursuant to the California order:

> Although the 1989 Stipulation and Order regarding custody . . . was made by a California court rather than a British court, the explanatory report accompanying the Convention provides that a judicial decision regarding custody may originate in a country other than the place of habitual residence (citations omitted). Furthermore, when custody rights are exercised in the place of habitual residence based on a foreign custody decree, it is not necessary for the state of habitual residence to formally recognize that decree (citation omitted).[167]

If a parent is able to obtain a favorable custody decree from a nation that is not the child's habitual residence, the court may disregard that decree. Article 17 of the Convention provides the following:

> The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

In *Altamiranda Vale v. Avila*,[168] mother and father divorced in Venezuela. Mother obtained father's consent to travel with their children to Florida for five days on the pretense that she was going to a wedding. Mother left Venezuela, but instead flew to Illinois where she

---

165. *Id.* at 39.
166. 907 F. Supp. 57 (S.D.N.Y. 1995).
167. *Id.* at 62.
168. 538 F.3d 581 (7th Cir. 2008).

settled and married a man she had met on the Internet. Father petitioned for a return of the children. The parties agreed to a dismissal of father's petition based on their written agreement that the children would be in mother's custody but would spend every summer and lengthy holidays with father in Venezuela. The agreement provided that if mother failed to comply with its terms, father could refile his Hague Convention petition. The agreement further provided that the children's habitual residence was Illinois, and mother obtained an uncontested state judgment incorporating the terms of the agreement. When mother defaulted on her promise to allow the children to travel to visit with their father, father moved to set aside the judgment dismissing his Hague application and reinstate his request for the return of the children. Mother raised the Illinois judgment as a defense to his petition, contending that the children's habitual residence was no longer Venezuela pursuant to the Illinois decree, and argued that the Illinois decree was entitled to full faith and credit. She also contended that the reopening of father's Hague case was barred by the *Rooker-Feldman*[169] doctrine. The Seventh Circuit rejected each of mother's contentions and ordered the children returned to Venezuela, finding that Article 17 explicitly allowed courts to override a custody decree obtained by fraud.[170]

iii. Custody Rights Established by Agreement. Article 3 provides that custody rights may be established by "an agreement having legal effect" under the law of the child's habitual residence. Such agreements do not have to be reduced to a judgment or incorporated into

---

169. Noel v. Hall, 341 F.3d 1148, 1156, 1158, 1163–64 (9th Cir. 2003). The *Rooker-Feldman* doctrine bars federal courts from "exercising subject-matter jurisdiction over a proceeding in which a party losing in state court seeks what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *See* Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983). See discussion of the *Rooker-Feldman* doctrine *infra* at page 169.

170. *Altamiranda Vale*, 538 F.3d at 585.

custody orders in order to be binding.[171] For example, in *Carrascosa v. McGuire*,[172] the court found that the parties signed a valid, binding "Parenting Agreement" to resolve their custody issues without seeking "any court's imprimatur." Similarly, in *Vela v. Ragnarsson*,[173] an agreement between mother and father transferring custody of the child to father was found to be effective under Icelandic law once the agreement was approved by a district commissioner.[174]

However, a custody agreement must be sufficiently definite to be accorded legal significance. *In re Application of Adan*[175] involved an informal agreement made by the parents that addressed the parenting of the child. During Hague litigation, the parties failed to provide the court with an English version of the document and were vague on precisely what the parenting agreement provided. The court noted:

> Indeed, [father] conceded in his testimony before the District Court that he did not consider the agreement binding because it "was not ratified in front of a judge," and that the agreement "didn't last long really." The parties have not cited, and the District Court did not mention, any provisions of Argentine law related to the creation, terms, or enforceability of such agreements, and we therefore have

---

171. The Legal Analysis of the Convention recites a brief but relevant history on this part of Article 3:

> Comments of the United States with respect to language contained in an earlier draft of the Convention (i.e., that the agreement "have the force of law") shed some light on the meaning of the expression "an agreement having legal effect." In the U.S. view, the provision should be interpreted expansively to cover any legally enforceable agreement even though the agreements may not have been incorporated or referred to in a formal custody judgment. Actes et documents de la Quatorzieme Session, (1980) Volume III. Child Abduction, Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision: As regards the definition of an agreement which has "legal effect" in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Pérez-Vera Report, paragraph 70 at 447.

Text & Legal Analysis, *supra* note 73, at 10,507.

172. 520 F.3d 249, 256 (3d Cir. 2008).

173. 386 S.W.3d 72 (Ark. App. 2011).

174. *Id.* at 76.

175. 437 F.3d 381 (3d Cir. 2006).

> insufficient information to conclude whether the agreement had "legal effect under the law of [Argentina]," as required by Article 3 of the Convention.[176]

iv. Agreements Establishing Habitual Residence. Parents may not arbitrarily fix a child's habitual residence by an agreement between them. In *Barzilay v. Barzilay (Barzilay II)*,[177] mother took the parties' three children to Israel to visit with their father. While in Israel, father commenced a custody action, ultimately resulting in the parties reaching an agreement that was approved by an Israeli court. The agreement, reduced to a formal judgment, provided that mother and the children would repatriate to Israel by August 2009 and mother's failure to do so would amount to an abduction under the Hague Convention. The judgment also designated the Israeli courts as the only proper jurisdiction for handling custody issues between the parents. Soon after mother and children returned to the United States, father filed a Hague Convention action in federal district court.[178] The district court found that the children's habitual residence was in Missouri. Father argued that the Israeli judgment was res judicata and entitled to recognition in U.S. courts. He also argued that the parties' agreement in the judgment was a binding contract establishing the children's habitual residence in Israel.

The court found both of father's arguments to be unpersuasive. As a factual matter, the Israeli judgment conceded that the children's habitual residence was in Missouri. The district court found, however, that a recitation in a custody order fixing the children's habitual residence by consent was ineffectual:

> We have held that "[h]abitual residence may only be altered by a change in geography and passage of time." *Silverman,* 338 F.3d at 898.

---

176. *Id.* at 393.

177. 600 F.3d 912 (8th Cir. 2010).

178. The district court abstained on the basis that the Missouri state court had adjudicated that Hague petition, but on appeal the matter was remanded with instructions to hear the merits of the petition. Barzilay v. Barzilay (*Barzilay I*), 536 F.3d 844 (8th Cir. 2008).

> It follows that it may not be altered by simple parental fiat. In other words, "[w]hile the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone." *Mozes,* 239 F.3d at 1078. The notion that parents can contractually determine their children's habitual residence without regard to the actual circumstances of the children is thus entirely incompatible with our precedent. Indeed, [father] has not cited a decision by any court anywhere in the world embracing such a proposition.[179]

5. Rights of Custody Versus Rights of Access

Rights of custody support a Hague petition for the return of a child; rights of access alone do not.[180] For this reason, it is important to determine if a petitioning party possesses rights of custody or rights of access. Article 5 of the Convention defines these distinct rights as follows:

> For the purposes of this Convention—
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

In *Jenkins v. Jenkins*,[181] the parties, both Israeli citizens, moved to the United States for the purpose of seeking better employment. They lived in Ohio for almost three years and became established there. When their marriage deteriorated, mother wanted to go back to Israel with their child, but father refused to allow the child to leave the United States. Mother, who still resided in the United States, commenced

179. *Barzilay II*, 600 F.3d at 920.

180. While a return remedy may not be used to "organize" or enforce rights of access, there is some authority that a parent may petition for a court to enforce access rights in the United States. *See* discussion *infra* at page 173.

181. 569 F.3d 549 (6th Cir. 2009).

an action for return of the child to Israel. The Sixth Circuit denied mother's application, finding that there was no breach of her rights of custody. The court noted,

> In refusing to let [mother] take [the child] to Israel, [father] may arguably have committed a breach of [mother's] "rights of access" to [the child], (footnote omitted) but he did not commit a "breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the [alleged] removal or retention."[182]

6. *Ne Exeat* Orders—*Abbott v. Abbott*

Abbott[183] addressed an issue that generated conflicting rulings in the courts of appeals: Can a parent with only access rights acquire custody rights if a *ne exeat* clause accompanies the access rights? In a six-to-three opinion, the Supreme Court held that a *ne exeat*[184] order confers a right of custody to a left-behind parent, entitling that parent to maintain an action under the Convention.

This decision reversed the Fifth Circuit opinion[185] that followed the Second Circuit judgment in *Croll v. Croll*.[186] *Croll* held that a parent with visitation rights and a *ne exeat* clause possessed only part of the "bundle of rights" that encompass "rights of custody." *Croll* reasoned that such limited rights are insufficient to compel a return remedy under the Convention. The Fourth and Ninth Circuits had also

---

182. *Id.* at 555.

183. 560 U.S. 1 (2010).

184. As in *Abbott*, a *ne exeat* order typically restrains a parent, or both parents, from removing a child from the jurisdiction of the court, or from moving a child across an international frontier without the permission of the other parent or a court. Usually this right is not absolute, and if permission to remove the child is unreasonably withheld, or a court determines that good cause for continued restraint no longer exists, a court of competent jurisdiction may vacate the *ne exeat* order.

185. Abbott v. Abbott, 542 F.3d 1081 (5th Cir. 2008).

186. 229 F.3d 133 (2d Cir. 2000), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010).

adopted *Croll*'s reasoning.[187] However, in *Furnes v. Reeves*,[188] the Eleventh Circuit refused to follow the holdings of the Fourth and Ninth Circuits, holding that a *ne exeat* provision conferred a right that would satisfy the Convention's definition of "custody rights," thus creating a split among the circuits.

In *Abbott*, mother, father, and child lived in Chile since the child was an infant. The Chilean court granted mother the daily care and control of the child, and father was granted "direct and regular" visitation. According to Chilean statute, once a parent is granted visitation rights, a *ne exeat* right is conferred, requiring the custodial parent's permission before the child may be removed from the country.[189] An additional *ne exeat* was ordered at mother's request when she became concerned that the child's father might remove the child. In 2005, while custody proceedings were still pending before the Chilean courts, mother took the child to Texas in violation of the order of the Chilean court and Chilean statute. Father commenced a Hague application in Texas.

The U.S. Supreme Court held that father's statutory *ne exeat* clause gave him both the right to determine the child's place of residence and a joint right relating to the care of the child. The court acknowledged that a *ne exeat* clause did not fit within "traditional notions of physical custody," but reasoned that the Convention established its own concept of custody rights consistent with increasingly broad definitions in use within the United States.[190]

---

187. *See* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003); Gonzales v. Gutierrez, 311 F.3d 942 (9th Cir. 2002). State courts that have considered the issue appear to have accepted *Croll*'s reasoning regarding the lack of efficacy of a *ne exeat* order. *See* Ish-Shalom v. Wittman, 797 N.Y.S.2d 111, 19 A.D.3d 493 (App. Div. 2005); Welsh v. Lewis, 292 A.D.2d 536, 740 N.Y.S.2d 355 (App. Div. 2002).

188. 362 F.3d 702 (11th Cir. 2004) (abrogated on other grounds by Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014)).

189. *See, e.g.*, Law No. 16,618, Julio 22, 1966, Diario Oficial [D.O.] (Chile).

190. Abbott v. Abbott, 560 U.S. 1, 12, 130 S. Ct. 1983, 1991 (2010). See also *Sanchez v. Suasti*, 140 So.3d 658, 661 (Fla. App. 2014), following *Abbott*, finding that father had rights of custody by virtue of a Brazilian appellate court ruling that mother could not remove the child from the country without father's consent.

Mother argued that the *ne exeat* order imposed by the Chilean court did not have a provision that granted father a right to consent to the child's removal. She argued that the provision could not confer custody rights upon father, but rather was merely a provision that protected the Chilean court's continuing jurisdiction. The court declined to rule on the legal significance of a *ne exeat* clause, which did not include a provision granting a parent the right to consent to the removal of a child. In dictum, however, the court noted, "Even a *ne exeat* order issued to protect a court's jurisdiction pending issuance of further decrees is consistent with allowing a parent to object to the child's removal from the country."[191]

D. Habitual Residence

Resolving the question of a child's habitual residence is indispensible to a Hague Convention return case because wrongful removal of a child can occur only if the child has been removed or retained from his or her habitual residence.[192] The habitual residence determination is also necessary when an issue arises regarding whether the parent requesting return has custody rights since those rights are determined according to the law of the child's habitual residence.[193]

"Habitual residence" is not defined by the Convention. According to the *Pérez-Vera Report*, "We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference that regards it as a question of pure fact, differing in that respect from domicile."[194]

---

191. *Abbott,* 560 U.S. at 14.

192. In order for the Convention to apply, the child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights." Convention, *supra* note 11, Article 4. "In practical terms, the Convention may be invoked only where the child was habitually resident in a Contracting State and taken to or retained in another Contracting State." *Text & Legal Analysis*, *supra* note 73, at 10,504.

193. *See* discussion *supra* at page 30.

194. *Pérez-Vera Report, supra* note 19, ¶ 66.

Before a substantial body of U.S. case law developed, courts adopted the definition of habitual residence set forth in a case from the United Kingdom, *In re Bates*:[195]

> [T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.[196]

The "settled purpose" language of *Bates* has continued to be one of the hallmarks of the habitual residence inquiry. However, as discussed *infra*, some later U.S. cases began to focus on the issue of "parental intent."

The question of whether a particular place is a child's habitual residence is a fact-driven issue.[197] Courts have considered a number of factors when analyzing habitual residence issues, including language issues,[198] how well the child has acclimated to his or her environment, the intentions of the child's parents, the time that the child was physically located in a particular place,[199] and personal issues, such as medical care, schooling,[200] social life,[201] extended family, friends, and age.[202]

---

195. [1989] EWHC (Fam) CA 122/89 (Eng.).

196. *Id.* at 10.

197. *See, e.g.*, Holder v. Holder (*Holder II*), 392 F.3d 1009, 1016 (9th Cir. 2004) (opining that cases involving military families do not "generate a typical fact pattern and, in all Convention cases, emphasis is on the details of the case at hand").

198. *See, e.g.*, McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. 2007) (unreported disposition).

199. *See, e.g.*, Miller v. Miller, 240 F.3d 392, 400 (4th Cir. 2001); Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995).

200. *See, e.g.*, Ruiz v. Tenorio, 392 F.3d 1247, 1255 (11th Cir. 2004); Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 898–99 (8th Cir. 2003).

201. *See*, *e.g.*, *Holder II*, 392 F.3d at 1020.

Since the purpose of the habitual residence inquiry is to fix the place for the exercise of child custody jurisdiction, the question of which place qualifies as the habitual residence is limited to the particular country in question, not to discrete locations within that country.[203]

The concept of habitual residence must be distinguished from "domicile."[204] The differences between the two are noted in the *Pérez-Vera Report* and by most courts.[205] Domicile embodies elements of future intent, citizenship, and nationality—concepts that the Convention does not consider determinative of a child's habitual residence.[206] Nationality and citizenship have no bearing on a determination of a child's habitual residence. It is not unusual for a court to be presented with a situation where both parents and children share the same na-

---

202. *See, e.g.*, *id.* at 1019.

203. *See* Hollis v. O'Driscoll, 739 F.3d 108, 112 (2d Cir. 2014), citing Mota v. Castillo, 629 F.3d 108 (2d Cir. 2012).

204. A handful of early state-court decisions wrongly equated the concept of habitual residence to that of domicile. *See*, *e.g.*, Cohen v. Cohen, 602 N.Y.S.2d 994, 998 (N.Y. App. Div. 1993) (noting that domicile was "very analogous" to habitual residence); *see also* Roszkowski v. Roszkowska, 274 N.J. Super. 620 (1993).

205. *See Pérez-Vera Report, supra* note 19, ¶ 66. *See*, *e.g.*, Kijowska v. Haines, 463 F.3d 583, 587 (7th Cir. 2006) ("[E]quating habitual residence to domicile would re-raise the spectre of forum shopping by encouraging a parent to remove the child to a jurisdiction having a view of domicile more favorable to that parent's case. So, consistent with Congress's recognition of 'the need for uniform international interpretation of the Convention,' 22 U.S.C. § 9001(b)(3)(B), 'habitual residence' should bear a uniform meaning, independent of any jurisdiction's notion of domicile. Koch v. Koch, . . . 450 F.3d at 712."). *See also* Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401–02 (6th Cir. 1993) ("[H]abitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.").

206. *E.g.*, Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (dismissing consideration of the children's status as registered residents of Sweden on the basis that their official resident status had nothing to do with their habitual residence).

tionality and citizenship, yet the child's habitual residence is deemed to be another country.[207]

1. Habitual Residence—Division in the Circuits

a. Synopsis. There is a division among the circuits regarding the focus of the habitual residence inquiry. Circuits following the Ninth Circuit's *Mozes*[208] rationale place initial focus on parental intent vis-à-vis the acquisition of a new habitual residence or the abandonment of the old habitual residence. Under this approach the first inquiry when deciding whether a new habitual residence has been acquired is: Did the parents demonstrate a shared intention to abandon the former habitual residence?[209] The second question in the *Mozes* analysis is whether there has been a change in geography for an "appreciable period of time"[210] that is "sufficient for acclimatization."[211]

Other circuits reject *Mozes*'s emphasis on parental intent.[212] These circuits favor the test first enunciated in the Sixth Circuit's seminal case of *Friedrich I*,[213] which calls for courts to direct their focus on the "past experiences of the child, not the intentions of the parents."[214] These courts emphasize the facts surrounding the child's perceptions

---

207. *E.g.*, Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) (ordering child returned to Australia where both parents and child were American citizens living in Australia).

208. Mozes v Mozes, 239 F.3d 1067 (9th Cir. 2001).

209. *Id.* at 1075.

210. *Id.* at 1078 (citing C v. S (Minor: Abduction: Illegitimate Child)), [1990] 2 All E.R. 961, 965 (Eng.)).

211. *Id.* at 1067 (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995)).

212. Robert v. Tesson, 507 F.3d 981, 992 (6th Cir. 2007); Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2011); Karkkainen v. Kovalchuk, 445 F.3d 280, 292 (3d Cir. 2006).

213. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396 (6th Cir. 1993).

214. *Id.* at 1401. The *Friedrich* analysis was adopted in *People ex rel. Ron v. Levi*, 719 N.Y.S.2d 365, 367 (N.Y. App. Div. 2001).

and degree of acclimatization, and, contrary to *Mozes*, relegate the question of parental intent to a subordinate role.[215]

Despite the apparent differences in approach between the circuits, the Seventh Circuit has suggested that the disparity of focus is less dramatic than the case language might indicate:

> Conventional wisdom thus recognizes a split between the circuits that follow *Mozes* and those that use a more child-centric approach, but we think the differences are not as great as they might seem. . . . In substance, all circuits—ours included—consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts.[216]

b. Majority View. In *Nicolson v. Pappalardo*,[217] the court observed that a majority of the circuits approach the question of habitual residence beginning "with the parents' shared intent or settled purpose regarding their child's residence."[218] The First, Second, Fourth, and Fifth Circuits[219] place the primary focus upon parental intent, following the

---

215. For an excellent review of the nuances of different tests for determining a child's habitual residence among the various circuits—*i.e.*, the *Mozes* line of cases versus the *Feder*, *Friedrich*, and *Barzilay* line—see *Redmond v. Redmond*, 724 F.3d 729, 744–47 (7th Cir. 2013).

216. *Redmond*, 724 F.3d at 745–46.

217. 605 F.3d 100 (1st Cir. 2010). *Accord* Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012), *cert. denied*, Larbie v. Larbie, 133 S. Ct. 1455 (2013).

218. *Nicolson,* 605 F.3d at 104.

219. *See* Zuker v. Andrews, 1999 WL 525936 (1st Cir. 1999) (unreported opinion); Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005); *Larbie*, 690 F.3d 295; Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). Note, however, that some courts apply some of the *Mozes* criteria, but deviate from it in other ways. *See* Whiting v. Krassner, 391 F.3d 540, 550 (3d Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding an intent to abandon the United States as a prior habitual residence for an infant, who was to spend a two-year period in Canada, and then return to the United States). *See also Norinder v. Fuentes*, 657 F.3d 526 (7th Cir. 2011), where the court acknowledged that in *Koch*, 450 F.3d at 715, the Seventh Circuit adopted a "version" of the *Mozes* analysis by considering "the shared actions and intent of the parents coupled with the passage of time."

Ninth Circuit decision in *Mozes v. Mozes*.[220] In *Gitter v. Gitter*[221] the Second Circuit succinctly held

> [W]e conclude that in determining a child's habitual residence, a court should apply the following standard: First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.[222]

Mozes cautions that parental intent cannot effect a change in the habitual residence "by wishful thinking alone," but that it must be accompanied by an actual "change in geography"[223] plus an "appreciable period of time."[224]

The *Mozes* line of cases has been further explained by the Second Circuit, in *Guzzo v. Cristofano*, as providing a test that is flexible enough to account for the "varied circumstances of individual cas-

---

220. 239 F.3d 1067 (9th Cir. 2001).

221. 396 F.3d 124 (2d Cir. 2005).

222. *Id.* at 134. *Accord In re* J.G., 301 S.W.2d 376, 381 (Tex. App. 2009).

223. *Friedrich I*, 983 F.2d at 1402.

224. *Mozes*, 239 F.3d at 1079. But it has been suggested that the time necessary to establish a habitual residence may be as short as one day. *See* Brooke v. Willis, 907 F. Supp. 57, 61 (S.D.N.Y. 1995) (finding a time period was one summer and stating, "Place of habitual residence is determined more by a state of mind than by any specific period of time; technically, habitual residence can be established after only one day as long as there is some evidence that the child has become settled into the location in question."). In *Bates*, a period of three months was found sufficient to have constituted the child's habitual residence. *In re* Bates, [1989] EWHC (Fam.) CA 122/89 (Eng.). Other cases have found habitual residence on periods of time as short as eight weeks.

es."[225] Those circumstances include the age of the child, and the time spent in respective countries. The court observed

> [A]lthough it makes sense to "'regard the intentions of the parents as affecting the length of time necessary for a child to become habitually resident, because the child's knowledge of these intentions is likely to color its attitude toward the contacts it is making,'" (citations omitted) courts must not forget that the core concern of "habitual residence" is where a child normally or usually lives. Once a court "'can say with confidence'" that the child has become settled into a new environment, habitual residence in that country is established.[226]

Mozes[227] categorizes parental intent into three general fact patterns: (1) cases where there is an agreed-on intent to change a habitual residence; (2) cases where the parties agree to a temporary relocation; and (3) cases involving a relocation for an ambiguous or unspecified period of time.

i. Mutual Intent. The first *Mozes* category deals with cases where there was a mutual settled intent to change habitual residence, even though one party may have given a "grumbling acceptance." Where parties have exhibited a mutual intention to relocate to another place, courts have found that the relocation amounts to a change in the child's habitual residence.[228] In *Feder v. Evans-Feder*,[229] mother and father moved to Australia so that father could accept employment there. Father moved in advance, and the mother and child followed. Mother expressed an initial reluctance to relocate to Australia, but acquiesced in the move, joining in the plans to establish a life in that

---

225. 719 F.3d 100, 108 (2d Cir. 2013).

226. *Id.* at 108–09.

227. Mozes v. Mozes, 239 F.3d 1067, 1076–77 (9th Cir. 2001).

228. *See* Harsacky v. Harsacky, 930 S.W.2d 410, 415 (Ky. App. 1996) (finding that it was the intention of the parties to relocate to the United States for an indefinite period of time). *See also* Courdin v. Courdin, 375 S.W.3d 657 (Ark. App. 2010) (parties manifested mutual intent to permanently leave Brazil and settle in the United States).

229. 63 F.3d 217 (3d Cir. 1995).

country. After several months in Australia, mother surreptitiously removed the child back to the United States. Granting father's petition for return of the child to Australia, the court relied on the analysis in *Friedrich I*, adding to the definition of habitual residence:

> . . . [W]e believe that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place *and the parents' present, shared intentions regarding their child's presence there*.[230]

ii. Relocations for a Finite Period of Time. The second *Mozes* category[231] includes relocations that are intended for a specific and limited period of time. Where that time is relatively short, courts have refused to find a change in habitual residence. For example, in *In re Morris*[232] father was offered a teaching position in Switzerland for ten months, resulting in the relocation of the mother and child to that country. Though the parents jointly intended to move back to Colorado after the teaching assignment ended, mother changed her mind during the ten months, wishing to stay in Europe. Father clandestinely returned to Colorado with the child, and mother filed a Hague Convention petition in district court. The court found that the child's habitual residence was in Colorado, noting:

> In determining the habitual residence of a child, the duration of the residence in the contracting state is a factor for consideration. *See* Mozes v. Mozes, 19 F. Supp. 2d 1108, 1115 (C.D. Cal. 1998). Where the duration of a stay in a foreign country is intended to be indefinite, the habitual residence of a child is usually in that foreign country. *See* Falls v. Downie, 871 F. Supp. 100, 102 (D. Mass. 1994); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993). How-

230. *Id.* at 224 (emphasis added).
231. *Mozes,* 239 F.3d at 1076–77.
232. 55 F. Supp. 2d 1156 (D. Colo. 1999).

> ever, where the stay is intended for a limited, distinct period of time, especially for less than one year, courts have been reluctant to find that a new habitual residence has been established. *See In re* S (Minors), F.L.R. 70 (UK 1994).[233]

Even though parents may agree that a relocation is for a finite period of time after which return to the original home is contemplated, where the period of time is sufficiently long for the child to become acclimatized to the new environment, courts may find that a change of habitual residence has occurred. For example, in *Whiting v. Krassner*[234] the parents agreed to allow their infant child to be relocated to Canada for two years, then to be relocated back to the United States upon the occurrence of certain conditions. In finding that the child's habitual residence shifted to Canada, the court stated:

> [T]he fact that the agreed-upon stay was of a limited duration in no way hinders the finding of a change in habitual residence. Rather, as we stated in *Feder,* the parties' settled purpose in moving may be for a limited period of time. *See Feder,* 63 F.3d at 223. Logic does not prevent us from finding that the shared intent of parents' to move their eighteen-month old daughter to Canada for two years could result in the abandonment of the daughter's prior place of habitual residence. Put more succinctly, in our view, the intent to abandon need not be forever; rather, intent to abandon a former place of residency of a one-year-old child for at least two years certainly can effectuate an abandonment of that former habitual residence.[235]

In *Shalit v. Coppe*,[236] a twelve-year-old boy relocated with his father to Israel so that his mother could attend law school in the United States. The duration of the relocation was agreed to be three years. At the end of the second year, the child traveled to Alaska to visit with his mother. She unilaterally decided not to return the boy, and father sought relief under the Hague Convention. Finding that the child had

---

233. *Id.* at 1161.
234. 391 F.3d 540, 548–50 (3d Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005).
235. *Id.* at 550.
236. 182 F.3d 1124 (9th Cir. 1999).

become settled in Israel, the court ruled that the child's habitual residence had changed to Israel.[237]

Under some circumstances, a child's habitual residence may shift with his or her parents' change in residence, even though the stays in each place were relatively brief. In *Zuker v. Andrews*,[238] mother and father, an unmarried couple, alternated residences between the United States, mother's country of origin, and Argentina, father's country. Father was involved in the recording industry in Argentina and consented to mother's periodic return to the United States with the child. The child alternated between the United States and Argentina seven times between 1993 and 1996, never spending more than ten months in one location. The court found that the child's habitual residence shifted with the moves stating, "[For the periods noted] [the child] was a habitual resident of the country in which he was actually situated. This is certainly true from the point of view of [the child]. It is also true from the point of view of the shared intentions of the parents."[239]

---

237. Despite the finding that the child's habitual residence had changed from Alaska to Israel, the court did not order the child returned, principally upon the basis that father failed to prove that mother's retention of the child was in violation of his custody rights. *Id.* at 1131. In *Toren v. Toren*, 191 F.3d 23 (1st Cir. 1999), the First Circuit declined to return two children to Israel, finding that the question whether the habitual residence had changed was premature. The parties' amended divorce agreement provided that the children would reside with the mother in the United States for a period of approximately four years, after which time they would return to Israel to go to school. At the end of the first year mother commenced an action to modify the custody arrangement requiring her to return the children to Israel. In denying father's petition for return, the court reasoned that by the very terms of the Israeli judgment of divorce, mother was not wrongfully retaining the children since the children did not have to be returned to Israel for three more years. Until that time it was contemplated that mother would retain the children in the United States. The court further held that mother's maintaining a custody modification action in Massachusetts courts did not amount to a violation of the Israeli judgment since the Massachusetts courts had yet to attempt to modify the judgment.

238. 2 F. Supp. 2d 134 (D. Mass. 1998).

239. *Id.* at 138.

iii. Lack of Mutual Intent. The third category cited by *Mozes* involves situations where parents agree to allow a relocation, but for an ambiguous or uncertain period of time. In these cases, the result seems to center around whether the stay was intended to be indefinite or whether there was a conflict in the parental intent. Where the intent points to an indefinite stay, courts have tended to find an abandonment of the prior habitual residence.[240] Where, however, there is a lack of consensus between the parents whether the stay was indefinite or simply left for future negotiation, *Mozes* then finds that there is no mutual intent to abandon the prior habitual residence.[241] This category of cases tends to be fact-specific, and, as noted in *Mozes*, the findings of the trial court are entitled to great deference.[242]

In *Murphy v. Sloan*,[243] the Ninth Circuit ruled that the relocation of mother and child to Ireland for a "trial period" did not result in the child acquiring a new habitual residence, despite the "trial period" lasting three years. The purpose for the move was to enable mother to obtain a master's degree, and the parents never shared the intent that the move to Ireland be permanent. On appeal, the Ninth Circuit affirmed the district court's finding that the parents did not have a shared, settled intent to abandon the United States as the child's habitual residence. The appellate court also rejected the invitation to revise it's holding in *Mozes*, noting that "nearly every circuit has adopted our view of the proper standard for habitual residence, which takes into account the shared, settled intent of the parents and then asks whether there has been sufficient acclimatization of the child to trump this intent."[244] Finally, the court rejected mother's contention that the child had become acclimatized to Ireland during the three years that she primarily lived there.[245]

---

240. *Mozes,* 239 F.3d at 1077.
241. *Id.* at 1077–78.
242. *Id.* at 1078.
243. 764 F.3d 1144 (9th Cir. 2014).
244. *Id.* at 1150.
245. *Id.* at 1152 (see discussion regarding acclimatization).

In *Levesque v. Levesque*,[246] an indefinite but substantially shorter period of relocation was found to constitute a change in the child's habitual residence. Upon mother and father's separation, mother returned with the child to Germany for an undetermined period of time with father's consent. Approximately three months later, father went to Germany and abducted the child back to the United States. The court found that parents mutually agreed that both mother and child would return to Germany for "some" period of time, and this was sufficient to demonstrate an intention to alter the child's habitual residence.[247]

iv. Acclimatization. Finally, *Mozes* recognizes that despite a lack of uniform parental intent, a relocation to a different country for a longer period of time may result in such a degree of acclimatization that the child acquires a new habitual residence. In this latter situation, however, the court advises that "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."[248] For example, in *Langa*

---

246. 816 F. Supp. 662 (D. Kan. 1993).

247. *Id. Cf.* Cohen v. Cohen, 602 N.Y.S.2d 994, 158 Misc. 2d 1018 (Sup. Ct. 1993). In *Cohen*, two children, both raised in Ohio and New York, were taken by their father to Israel. At the time he took the children, father had separated from the children's mother, who had been their primary caretaker. The court found, based on conflicting evidence, that it was never the intention of the family to move to Israel, certainly not mother's intention, and that the children were allowed to accompany the father for the purpose of meeting their paternal grandparents. "Since this court determines that it was not the mutual intent of the parties to move the children to Israel and, in fact, the intent of one of the parties was merely to permit a visit to that country, the habitual residence of the children was not changed from the United States of America." *Cohen,* 602 N.Y.S.2d at 999, 158 Misc. 2d at 1026.

248. In *Mozes*, the court found

> The Convention is designed to prevent child abduction by reducing the incentive of the would-be abductor to seek unilateral custody over a child in another country. The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try. The question whether a child is in some sense "settled" in its new environment is so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there. [footnote omitted]. Further, attempting to make the standard more rigorous might actually make matters worse, as it could open children to harmful manipulation

v. Langa,[249] the parents moved from the United States to South Africa, but maintained residences in separate cities. Mother and the two children lived with mother's parents. The children did not reunite with their father, remaining in South Africa for only three weeks. The Third Circuit held that a three-week stay with grandparents cannot be regarded, whether viewed objectively or subjectively, as sufficient to establish their habitual residence in South Africa, no matter how that term is defined."[250]

In *Wipranik v. Superior Court*,[251] a California court of appeals affirmed the trial court's finding that a stay of three years in Israel was sufficient to conclude that the child had acquired a new habitual residence. In addition to the length of time the child had spent in Israel, the finding was further supported by evidence that the child attended school in Israel for two years and had family and friends in that country. Mother's contention that she only intended to stay in Israel for a temporary period of time was rejected by the court.[252]

c. Minority View. In the seminal case of *Friedrich I*,[253] the Sixth Circuit set forth five factors considered important in determining habitual residence questions, placing the focus on the child's past experiences, and not on the issue of parental intent:

1. courts should look to the facts and circumstances of each case as opposed to concepts of legal residence or domicile;
2. courts should consider only the child's experiences;

---

when one parent seeks to foster residential attachments during what was intended to be a temporary visit-such as having the child profess allegiance to the new sovereign. . . . The function of a court applying the Convention is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life.
Mozes, 239 F.3d at 1079.

249. 549 F. App'x 114 (3d Cir. 2014).

250. *Id.* at 116.

251. 63 Cal. App. 4th 315 (1998).

252. *Id.* at 323.

253. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396 (6th Cir. 1993).

3. courts should focus exclusively on the child's past experience, and not future plans of the parents;
4. a child may only have one habitual residence;[254] and
5. habitual residence is not determined by the nationality of the child's primary caregiver.[255]

In *Robert v. Tesson*,[256] the Sixth Circuit adhered to its previous test set out in *Friedrich I*, but also incorporated a major part of the Third Circuit's holding in *Feder v. Evans-Feder*. The court held that "a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization," and where this presence has a "degree of settled purpose from the child's perspective."[257] The *Robert* court declared that the *Feder* language was consistent with its holding in *Friedrich I*, that the proper inquiry must "focus on the child, not the parents, and examine past experience, not future intentions."[258]

---

254. There remains a question whether a child may acquire more than one habitual residence. *See* Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) (implying the possibility of dual habitual residences). In *Johnson v. Johnson*, 493 S.E.2d 668 (Va. Ct. App. 1997), father and mother entered into a custody agreement that provided that their daughter would spend alternating school years in Sweden and the United States. Despite this agreement, substantial litigation ensued, including multiple Hague Convention cases. While it could be argued that had the agreement been followed, the child indeed had more than one habitual residence, it is not clear that the drafters of the Convention contemplated that this type of arrangement would fall within the purview of the Convention. *See also* Quinn v. Settel, 682 So. 2d 617 (Fla. Dist. Ct. App. 1996) (implying the concept of concurrent habitual residences where a child was the subject of a shared custody agreement between the parents, spending equal amounts of time in the United States and France). *But cf.* Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010) (holding that a child may only have one habitual residence); *accord In re Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999).

255. Robert v. Tesson, 507 F.3d 981, 989 (6th Cir. 2007).

256. 507 F.3d 981 (6th Cir. 2007).

257. *Id.* at 989.

258. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993). But see *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012), where the Fifth Circuit refused to follow the Sixth Circuit's child-centered approach, citing both *Whiting v. Krassner,* 391 F.3d 540 (3d Cir. 2004), and *Mozes v. Mozes,* 239 F.3d 1067, 1079 (9th Cir.

The Third, Seventh, and Eighth Circuits[259] have adopted an approach that looks to both parental intent and the degree of the child's settlement in determining the issue of habitual residence. In *Stern v. Stern*,[260] the Eighth Circuit cited to its previous decision in *Barzilay v. Barzilay (Barzilay II)*[261] and noted that the issue of the child's settlement must be viewed from the child's perspective and that parental intent is not dispositive (under the Eighth Circuit's decisions). Citing to decisions in the Third[262] and Sixth[263] Circuits, and rejecting the *Mozes* approach, the court noted that "[t]he child's perspective should be paramount in construing this convention whose very purpose is to 'protect children' (citation omitted) by preventing their removal from 'the family and social environment in which [their lives have] developed'."[264]

2. Settled Versus Acclimatized

The terms "settled" or "acclimatized" are terms of art that are employed in two different contexts in cases arising under the 1980 Convention. First, Article 12 of the Convention specifically uses the term "settled"[265] as part of the delay defense.[266] Second, case law has used

---

2001), noting that "'The question whether a child is in some sense "settled" in its new environment is so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there. We therefore opt against following the Sixth Circuit's exclusively child-centered approach. To focus on a young child's experience encourages future "would-be abductor[s] to seek unilateral custody over a child in another country" or to delay returning to the child's original habitual residence as long as possible.'" *Larbie*, 690 F.3d at 311.

259. Feder v. Evans-Feder, 63 F.3d 217, 222 (3d Cir. 1995); Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006); Redmond v. Redmond 724 F.3d 729, 744–47 (7th Cir. 2013); Silverman v. Silverman (*Silverman II*), 338 F.3d 886 (8th Cir. 2003).

260. 639 F.3d 449 (8th Cir. 2011).

261. 600 F.3d 912 (8th Cir. 2010).

262. Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006).

263. Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

264. *Stern*, 639 F.3d at 452 (citing to the *Pérez-Vera Report* (1981)).

265. For a discussion of the term "settled" within the meaning of an Article 12 defense, see the discussion *infra* § III.B.1, page 95.

the terms "settled" and "acclimatized" in connection with analyzing a child's habitual residence. At first blush the concepts appear to be nearly the same, e.g., a child has become settled in his or her new environment versus a child has become acclimatized to the new environment. However, the concepts are distinct and are not interchangeable in terms of the lexicon of the 1980 Convention.

Under Article 12's delay defense two factors must be established: first, more than one year has elapsed from the time of the wrongful removal or retention; and second, the child has become settled in his or her new environment. The settlement of the child is irrelevant unless the first prong of the defense, the passage of one year, has been established. Absent the predicate time element, the defense fails, and the court "shall" order the return of a wrongfully removed child. A finding that a child is "settled" does not preclude the court from ordering the child's return. However, where acclimatization results in the acquisition of a new habitual residence a court cannot order the return of a child. At least one court[267] has clearly noted the essential differences between the two concepts, holding that

> Here, although the Court concludes that [the child] is "settled" for purposes of the Article 12 defense, she is not so "acclimatized" to the United States that her habitual residence has changed.[268]

Invoking the issue of settlement in connection with habitual residence analysis appears to derive from early U.S. cases[269] that relied on the language from *In re Bates,*[270] which defined habitual residence as a move to a specific location with a "settled purpose." The "settled pur-

---

266. "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Convention, *supra* note 11, Article 12, ¶ 2.

267. Taveras v. Morales, 22 F. Supp. 3d 219 (S.D.N.Y. 2014).

268. *Id.* at 231.

269. *Friedrich I,* 983 F.2d at 1403; Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995); *Feder*, 63 F.3d at 223–24.

270. [1989] EWHC (Fam) CA 122/89 (Eng.).

pose" language has found its way into every circuit's[271] consideration of habitual residence, and is relied on particularly in the Third, Sixth, and Eighth Circuits[272] where the courts analyze the issue of settlement from the child's perspective. Although the various circuits have refined their own definition of habitual residence, *Bates* is still cited for its "settled purpose" language[273] and for the advisability of maintaining a flexible definition for habitual residence.[274]

The concept of acclimatization is significant to a habitual residence analysis particularly in those circuits where the primary focus is on parental intent. Thus, a child may acquire a new habitual residence, despite contrary mutual parental intent, by becoming so accustomed to the new environment that the new roots have established

---

271. Sanchez-Londono v. Gonzalez, 752 F.3d 533 (1st Cir. 2014); Ermini v. Vittori, 758 F.3d 153 (2d Cir. 2014); Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009); Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001); Kanth v. Kanth, 232 F.3d 901 (10th Cir. 2000); Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004).

272. "[A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose from the child's perspective.'" *Feder*, 63 F.3d at 224; "[A] child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has a 'degree of settled purpose from the child's perspective.'" Robert v. Tesson, 507 F.3d 981, 992 (6th Cir. 2007); "[F]actors relevant to the determination of habitual residence [include] 'the settled purpose of the move from the new country from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country.'" Barzilay v. Barzilay (*Barzilay II*), 600 F.3d 912, 918 (8th Cir. 2010).

273. Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2011); Sorenson v. Sorenson, 559 F.3d 871, 874 (8th Cir. 2009); Robert v. Tesson, 507 F.3d 981, 989 (6th Cir. 2007); *In re* Application of Adan, 437 F.3d 381, 392 (3d Cir. 2006); Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004); Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 898 (8th Cir. 2003); Delvoye v. Lee, 329 F.3d 330, 334 (3d Cir. 2003); Zuker v. Andrews, 181 F.3d 81 (1st Cir. 1999).

274. Redmond v. Redmond, 724 F.3d 729, 742–43 (7th Cir. 2013); Guzzo v. Cristofano, 719 F.3d 100, 106–07 (2d Cir. 2013); Whiting v. Krassner, 391 F.3d 540, 546–47 (3d Cir. 2004); Miller v. Miler, 240 F.3d 392, 400 (4th Cir. 2001); Mozes v. Mozes, 239 F.3d 1067, 1082 (9th Cir. 2001).

that residence as "home." Courts have agreed that "if the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place," then acclimatization is established.[275]

Courts have been cautious, however, not to suggest that acclimatization is dependent on a particular period of time or a typical pattern of adjustment. Rather, they analyze the "degree" of acclimatization as a factor that might, or might not, override the issue of parental intent. For example, in *Mota v. Castillo*,[276] the court held that acclimatization should only prevail over shared parental intent in the rare circumstances where

> a child's degree of acclimatization is "so complete that serious harm . . . can be expected to result from compelling his [or her] return to the family's intended residence."[277]

Stated in different terms, the court in *Mozes v. Mozes*,[278] observed that

> The question . . . is not simply whether the child's life in the new country shows some minimal degree of settled purpose, but whether we can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child out of the family and social environment in which its life has developed.[279]

Factors that may influence courts in analyzing whether a child has become acclimatized include:

- a change in geography combined with the passage of an appreciable period of time[280]

---

275. Sanchez-Londono v. Gonzalez, 752 F.3d 533 (1st Cir. 2014) (quoting Mozes v. Mozes, 239 F.3d 1067, 1081 (9th Cir.2001)); *Accord* Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004); Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005).

276. 692 F.3d 108, 116 (2d Cir. 2012).

277. *Id.* (quoting Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005)).

278. 239 F.3d 1067 (9th Cir. 2001).

279. *Id.* at 1081 (internal quotation marks and citation omitted).

280. Sanchez-Londono v. Gonzalez, 752 F.3d 533, 543 (1st Cir. 2014) ("In addition to shared parental intent, factors evidencing a child's acclimatization to a given

- age of the child[281]
- immigration status of child and parent[282]
- academic activities[283]
- social engagements[284]
- participation in sports programs and excursions[285]
- meaningful connections with the people and places in the child's new country[286]
- language proficiency[287]
- location of personal belongings[288]

When the child is an infant or quite young, many of the above factors are inapplicable and/or less weighty than parental intent because of the child's age-related inability to fully acclimatize.[289] As observed by the First Circuit in *Neergaard-Colón v. Neergaard*,[290] "acclimatization is rarely, if ever, a significant factor when children are very young."[291]

3. Coercion and Physical Abuse

The habitual residence of a child may not be changed if that child is forced or compelled to remain in the new location owing to the coer-

---

place—like a change in geography combined with the passage of an appreciable period of time—may influence our habitual-residence analysis.").

281. Neergaard-Colón v. Neergaard, 752 F.3d 526, 533 (1st Cir. 2014).

282. Mota v. Castillo, 692 F.3d 108, 116 (2d Cir. 2012).

283. Robert v. Tesson, 507 F.3d 981, 996 (6th Cir. 2007); Ruiz v. Tenorio, 392 F.3d 1247, 1255 (11th Cir.2004).

284. Karkkainen v. Kovalchuk, 445 F.3d 280, 293 (3d Cir. 2006).

285. Robert v. Tesson, 507 F.3d 981, 996 (6th Cir. 2007); Holder v. Holder (*Holder II*), 392 F.3d 1009, 1020 (9th Cir. 2004).

286. *Robert*, 507 F.3d at 996.

287. *Karkkainen*, 445 F.3d at 293.

288. *Id.* at 294.

289. *In re* Mikovic v. Mikovic, 541 F. Supp. 2d 1264, 1275 (M.D. Fla. 2007); Whiting v. Krassner, 391 F.3d 540, 550 (3d Cir. 2004).

290. 752 F.3d 526 (1st Cir. 2014).

291. *Id.* at 533 (citing to *Holder II*, 392 F.3d at 1021, noting that it was "practically impossible" for a ten-month old child, "entirely dependent on its parents, to acclimatize independent of the immediate home environment of the parents").

cion of, or threats to, a caretaker parent. Coercion cannot be deemed "voluntary conduct" necessary to the establishment of a new habitual residence.[292]

In the case *In re Application of Ponath*,[293] the district court found that a child's continued presence in Germany was the product of husband's abuse of the mother. The child was born in the United States. When the child was sixteen weeks old, the family went to Germany for what was to be a three-month visit with father's parents. Despite mother's desire to return to the United States, she and child were prevented from doing so by father's physical, emotional, and verbal abuse. "The concept of habitual residence must, in the court's opinion, entail some element of voluntariness and purposeful design. Indeed, this notion has been characterized in other cases in terms of 'settled purpose'. . . . In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention."[294]

In *Koch v. Koch*,[295] father did not deny a history of spousal abuse, but argued that the issue was irrelevant to a determination of the habitual residence of the child. The Seventh Circuit disagreed in dicta,

---

292. *See* Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 900 (8th Cir. 2003) (finding an absence of evidence that the change of residence was the result of abuse or coercion).

293. 829 F. Supp. 363 (D. Utah 1993).

294. *Id.* at 367. But see *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), where mother claimed that her husband and father-in-law held her a virtual prisoner after the birth of her child in Mexico. She removed the child to the United States when the child was six weeks old. The court declined to follow the reasoning of *Ponath* on the basis that in *Ponath*, the child was born in the United States, presumably the child's habitual residence, and was forced to remain in Germany only because of the father's abuse. In *Nunez-Escudero*, the child was born in Mexico and knew no other residence until mother unilaterally relocated to the United States. The court rejected the contention that habitual residence of an infant moves with the mother. Nevertheless, the court remanded the matter to the district court to determine whether Mexico was the child's habitual residence and whether an Article 13(b) defense existed. *Nunez-Escudero*, 58 F.3d at 379.

295. 450 F.3d 703 (7th Cir. 2006).

stating that physical attacks "have some relevance in some situations to determine habitual residence issues."[296]

In *Maxwell v. Maxwell*,[297] mother and father had quadruplets. The family lived in Massachusetts until father moved back to Australia. Mother moved to North Carolina and secured a permanent order awarding her custody of the children; father was granted visitation. The parties reconciled, and mother made arrangements to move to Australia. Suspecting that father had ulterior motives for the reconciliation, mother purchased round-trip tickets for herself and the children and obtained three-month visas. Shortly after her arrival in Australia, the marriage broke down, and father blocked mother's efforts to leave the continent. With the assistance of the U.S. Embassy, mother secured new passports for herself and the children and returned with them to the United States. Father filed a Hague petition in North Carolina for return of the children to Australia. In reviewing the issue of the children's habitual residence, the court followed the approach adopted in *Mozes*, finding that mother never intended to abandon residence in the United States and the children had not become acclimatized to Australia. Father's petition was denied.

A court order preventing removal of a child may not constitute nonconsensual presence and support a claim of a coerced habitual residence. In *Janakakis-Kostun v. Janakakis*,[298] during the course of a bitter separation and divorce action in Greece, a court order prohibited mother, a U.S. citizen, from removing child from Greece. In violation of the order, mother abducted the child to the United States, where the child and her mother had visited frequently during previous years. Mother claimed, inter alia, that the child could not have acquired a habitual residence in Greece because she, the mother, was

---

296. *Id.* at 719. See also *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001), where the court considered the emotional and physical abuse of the spouse and children to be a factor in determining whether there was a sufficient degree of acclimatization and shared intent (citing to *Ponath*) to establish a new habitual residence.

297. 588 F.3d 245 (4th Cir. 2009).

298. 6 S.W.3d 843 (Ky. Ct. App. 1999).

prohibited from leaving the country. The court held that the Greek nonremoval order did not invalidate the habitual residence that the child had established in Greece.

4. Immigration Status

The question of a child's status as an illegal alien can arise in two contexts. First, it can arise as a factor in considering whether the child has become sufficiently acclimatized to a place so as to qualify as the child's habitual residence. It can also be part of a two-part defense under Article 12: (1) an application for return has been filed more than one year after the date of wrongful removal or retention, *and* (2) the child has become settled in his or her environment. As the considerations are essentially the same, cases relating to both situations are discussed below.

In *Mozes*, the court noted: "While an unlawful or precarious immigration status does not preclude one from becoming a habitual resident under the Convention, it prevents one from doing so rapidly."[299] This was the issue in the case *In re Koc*,[300] where both mother and child were subject to deportation because they remained in the United States after their visas expired. Although it appeared that U.S. immigration officials were not looking to deport them, the court could not rule out future deportations. This reality, in addition to other reasons cited by the court, compelled the conclusion that the child had not become "well settled" in the United States.[301]

In *Kijowska v. Haines*,[302] mother, a citizen of Poland, gave birth to a child in the United States. She and the child's father, a U.S. citizen,

---

299. Mozes v. Mozes, 239 F.3d 1067, 1082 n.45 (9th Cir. 2001) (citing E.M. Clive, *The Concept of Habitual Residence*, 3 Jurid. Rev. 137, 147 (1997)).

300. 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

301. *Id.* at 154; *see also* Mota v. Castillo, 629 F.3d 108, 116 (2d Cir. 2012) ("We are compelled to note, also, that [the child's] uncertain immigration status, as well as the admittedly undocumented status of her father, places an additional obstacle on the path to determining that a supervening acclimatization has occurred."); *accord In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004).

302. 463 F.3d 583 (7th Cir. 2006).

were not married. The child's father told mother that he was not going to seek custody of the child. Two months later, mother and the child left for Poland, where they remained for six months. When the child was eight months old, mother and the child flew to the United States based on mother's hope of reconciling with the father. Father, armed with an Illinois state court order granting him custody of the child, met her at the airport, obtained custody of the child, and convinced immigration authorities that mother was entering the United States with the intention of overstaying her visa. Mother was required to return to Poland without the child. Mother's citizenship status, though not determinative, was deemed a factor in the court's finding that Poland was the child's habitual residence. Mother could not remain in the United States, and father earlier disavowed any interest in child custody. When mother and child initially moved to Poland, it was clear that both parents intended Poland to become the child's new habitual residence.[303]

In the Ninth Circuit, immigration status is not dispositive as to whether the child has become settled. The court in *In re B. Del C.S.B.*[304] examined whether a child's status as an illegal alien affects his or her ability to become "settled" pursuant to Article 12 of the Convention. The eleven-year-old spent the first four years of her life in Mexico, came to California for approximately five months, and then returned to Mexico. She returned to California a year later, where she remained for the next five years. The district court found that the child had not become settled within the meaning of Article 12 because of her unlawful immigration status and ordered her returned to Mexico. The court of appeals reversed, noting immigration status will be

303. *Id.* at 587–88. *See also* Alonzo v. Claudino, 2007 WL 475340 (M.D.N.C. 2007) (unreported disposition) (considering the parties illegal immigration status, "there cannot be the 'degree of settled purpose' required to establish habitual residencey in the United States. It is impossible to be settled when you are subject to arrest and deportation at any time." *Id.* at 5.).

304. 559 F.3d 999 (9th Cir. 2009).

considered by courts if there is "an immediate, concrete threat of deportation."[305]

> We can see nothing in the Convention itself, in our case law, or in the practical reality of living in this country without documented status, to persuade us that immigration status should ordinarily play a significant, let alone dispositive, role in the "settled" inquiry. . . . [P]rior district court cases that have concluded that an undocumented child is not "settled" have considered status as only one element among many pointing to a lack of significant ties to the United States.[306]
>
> Immigration status cannot be determinative for purposes of the "settled" inquiry if, as here, there is no imminent threat of removal. We agree with the district court that but for the immigration question, Brito has demonstrated that "Brianna has developed significant connections to the United States," including a stable home and school life in which she has consistently "achieved academic and interpersonal success" in her five years here. (citation omitted) We conclude that, given these circumstances, Brianna is "now settled" in the United States within the meaning of Article 12.[307]

5. Asylum[308]

The determination of a child's habitual residence does not appear to be impacted by a grant of asylum.

In *Miltiadous v. Tetervak*,[309] mother removed herself and her two children from Cyprus, their habitual residence, to the United States. As father had rights of custody and did not consent, the removal was wrongful. Both mother and children were granted asylum on the basis that if she returned to Cyprus, she would be subject to additional do-

---

305. *Id.* at 1009.

306. *Id.* at 1011 (citing Lopez v. Alcala, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008)); *see also In re* Ahumada Cabrera, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); Giampaolo v. Erneta, 390 F. Supp. 2d 1269, 1281–83 (N.D. Ga. 2004); *In re* Koc, 181 F. Supp. 2d 136, 152–55 (E.D.N.Y. 2001).

307. *B. Del C.S.B.*, 559 F.3d at 1014.

308. See the discussion concerning asylum as it pertains to potential defenses under Article 13(b) and 20, *infra* page 129.

309. 686 F. Supp. 2d 544 (E.D. Pa. 2010).

mestic abuse by her husband.[310] Father petitioned for the return of the children and mother objected, arguing that returning the children to Cyprus under the Hague Convention would result in a violation of section 1158(c)(1) of the Immigration and Nationality Act,[311] thus contravening her right to asylum. The court found that the mother and the children were illegally in the United States until their grant of asylum and noted the indefinite nature of their asylum status. For these reasons, the court concluded that mother failed in her argument that the United States had become the children's habitual residence:

> Thus, although the Respondent has temporarily been granted asylum, her asylum status is still tenuous. Indeed, her own asylum approval letter indicates that her asylum status may be terminated at any time for a variety of reasons. (reference omitted) [T]he children's immigration status is derived from Respondent's and is uncertain. (citation omitted) The Court finds that Respondent's somewhat uncertain asylum status weighs against finding the United States as the children's habitual residence.[312]

6. The Habitual Residence of Infants

Courts are generally in agreement that infants cannot acquire a habitual residence separate and apart from their parents. If the parents have a shared intent that an infant will reside with them, the child will acquire that habitual residence.[313] Where there is an absence of mutual intent,

---

310. "Respondent filed for political asylum in the United States on May 9, 2008, seeking permanent asylum for herself and her children due to the fear of imminent physical and mental abuse by her husband in Cyprus. (Doc. no. 9, Ex. 2). On July 22, 2009, Respondent was granted asylum and her children's immigration status is derived from hers. Trial Tr. at 7:19–21, Oct. 29, 2009. Respondent and the children currently reside with her parents in Philadelphia, Pennsylvania." *Miltiadous*, 686 F. Supp. 2d at 547.

311. 8 U.S.C. § 1158 (2009).

312. *Miltiadous*, 686 F. Supp. 2d at 552 n.9.

313. *See, e.g.*, Darín v. Olivero-Huffman, 746 F.3d 1 (1st Cir. 2014) (parents shared a mutual intent to return to Argentina before the wrongful retention occurred). The fact that the three-year-old child had spent most of his time in the United States was considered by the court, but this fact was found not to be controlling. "The fact that a child frequently visits relatives in another country for extended periods of time,

however, courts tend to look at the factual circumstances relating to the child.[314]

Courts have rejected the notion that an infant's habitual residence will follow the mother, even where the child is of a very young age.[315] An infant may not actually acquire habitual residence if the infant's location at the time of litigation has nothing to do with establishing a new home and residence and the parties have no shared intent as to where, or if, they will live as a family. One commentator has suggested:

> [A] newborn child born in the country where his . . . parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.[316]

The First Circuit followed this reasoning in *Nicolson v. Pappalardo*.[317] In that case, an American mother became pregnant by an Australian father. Mother moved back to the United States before the birth

---

by itself, does not mean the second country is or becomes the child's habitual residence." *Id.* at 13. *Cf.* Redmond v. Redmond, 724 F.3d 729, 743 (7th Cir. 2013) (Court gave weight to fact that child had spent 80% of his four-year life in the United States, finding that consideration of the time in the United States was appropriate since the child had not been wrongfully removed to the United States. The court also recognized that the length of time a child spends in a country is a factor that must be considered with care lest abductions be invited by the conduct of parents that sequester children.).

314. *See, e.g.*, Flores v. Contreras, 981 S.W.2d 246 (Tex. App. 1998).

315. *See* Meredith v. Meredith, 759 F. Supp. 1432 (D. Ariz. 1991); Kijowska v. Haines, 463 F.3d 583, 587–88 (7th Cir. 2006); Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 379 (8th Cir. 1995).

316. Delvoye v. Lee, 329 F.3d 330, 334 (3d Cir. 2003) (quoting E.M. Clive, *The Concept of Habitual Residence*, 3 Jurid. Rev. 137, 146 (1997)).

317. 605 F.3d 100 (1st Cir. 2010); *see also* Larbie v. Larbie, 690 F.3d 295, 310 (5th Cir. 2012) (finding parents intentions should be dispositive where the child is so young that the child could not possibly decide the issue of his or her own habitual residence).

of the baby; after father proposed marriage, mother returned to Australia. In Australia, the couple married, and the child was born in December 2008. Even before the birth of the child, the parties experienced marital difficulties, and mother indicated that as soon as she could travel after the birth, she would return to the United States. After the child's birth, the couple remained together in Australia for three months. With father's consent, mother moved back to the United States with the child and refused return to Australia thereafter. The court found that the child's habitual residence was in Australia based on mother's intent to initially relocate to Australia and not return to the United States. Additionally, although the child was but an infant, she had lived in Australia for all of her life until she was removed to the United States.

A recent case, *In re A.L.C.*,[318] squarely held that a child had no present habitual residence. Mother, father, and one child were residents of Sweden. When mother became pregnant with their second child, she came to the United States to give birth. Father consented to mother's departure from Sweden with their first child so that she could give birth and have a period of recovery in Los Angeles. After the child's birth, mother refused to return to Sweden. Father petitioned for the return of both children to Sweden.

The district court ordered both children returned to Sweden. The Ninth Circuit affirmed the return of the first child but reversed the finding of the district court that Sweden was the newborn's habitual residence. The court held that the newborn could not have become a habitual resident of Sweden because the child had never lived there. Citing to *Mozes*,[319] the court observed that "habitual residence cannot be acquired without physical presence."[320]

The court further held that the United States was not the child's habitual residence. The court noted that a child's habitual residence is not automatically established by the mother's physical location or her

318. *In re* A.L.C., ___ F. App'x ___, 2015 WL 1742347 (9th Cir. 2015).
319. Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).
320. *Id.* at 1080–81.

caregiving.[321] Based on the fact that there was a conflict of parental intent as to where the child's habitual residence existed, and the lack of acclimatization that was independent of the home environment, the court found that no habitual residence came into existence.

> When a child is born under a cloud of disagreement between parents over the child's habitual residence, and a child remains of a tender age in which contacts outside the immediate home cannot practically develop into deep-rooted ties, a child remains without a habitual residence because "if an attachment to a State does not exist, it should hardly be invented."[322]

In *Delvoye v. Lee*,[323] mother, a U.S. citizen, and father, a Belgian citizen, developed a romantic relationship in the United States. When mother discovered that she was pregnant, she acquired a limited visa to travel to Belgium in order to take advantage of the free medical services there. Mother left her New York apartment intact. When the baby arrived in May 2001, the parties' relationship had already disintegrated, and father reluctantly consented to mother's return to New York with the child. Given that the parties shared no intention that they would settle in Belgium, the father's application was denied on the basis that he failed to prove Belgium, not the United States, was the child's habitual residence.[324] The court reasoned that when the parties' intentions are in agreement regarding their location, then the infant's habitual residence is fixed. Where, however, the child is born into an already conflicted and disintegrating parental relationship, the child may not acquire a habitual residence.

In *Nunez-Escudero v. Tice-Menley*,[325] an American mother and Mexican father lived in Mexico during their marriage until their child

---

321. Citing to *Nunez–Escudero v. Tice–Menley*, 58 F.3d 374, 379 (8th Cir. 1995) and *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1401–02 (6th Cir. 1993).

322. *In re A.L.C.*, slip opinion p.3, citing *Mozes*, at 1020 (quoting Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 89, 112 (1999)).

323. 329 F.3d 330 (3d Cir. 2003).

324. *Id.* at 333–34.

325. 58 F.3d 374 (8th Cir. 1995).

was six weeks old. Mother then separated from her husband and took the child to Minnesota. In response to father's petition for return, mother argued that a six-week-old child cannot make its own determination of habitual residence and that an infant's place of habitual residence should be with the mother. Her reasoning for rejecting Mexico as the child's habitual residence was (1) she had no intention of remaining permanently in Mexico herself; and (2) an infant is dependent on the mother to make the choice of habitual residence. The court rejected the argument that habitual residence necessarily follows a mother's determination when the child is too young to establish its own habitual residence. Because the parties lived together in Mexico for nearly a year, a factual basis existed for finding that Mexico was the child's place of habitual residence.

7. Shuttle Custody

"Shuttle custody" cases, i.e., cases where children regularly move between parents who live in different countries, are unusual,[326] and they present difficult conceptual problems for resolution of habitual residence questions.[327]

There is an abundance of cases concluding that a child can have only one habitual residence.[328] Nevertheless, courts have encountered a handful of cases where a child spends nearly equal time in homes

---

326. *Mozes v. Mozes*, 239 F.3d 1067, n.7 (9th Cir. 2001), notes that "The exception would be the rare situation where someone consistently splits time more or less evenly between two locations, so as to retain alternating habitual residences in each."

327. For example, see *Johnson v. Johnson*, 493 S.E.2d 668 (Va. Ct. App. 1997), where father and mother entered into a custody agreement that provided that their daughter would spend alternating school years in Sweden and the United States. This situation led to substantial litigation both in Sweden and the United States, including multiple Hague Convention cases.

328. Sorenson v. Sorenson, 559 F.3d 871, 873 (8th Cir. 2009) (citing Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 898 (8th Cir. 2003)); Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993); Freier v. Freier, 969 F. Supp. 436, 440 (E.D. Mich. 1996); Panteleris v. Panteleris, 2014 WL 3053211 (N.D. Ohio 2014); Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010) (holding that a child may only have one habitual residence); *In re* Morris, 55 F. Supp. 2d 1156 (D. Colo. 1999).

across international frontiers.[329] In *Brooke v. Willis*,[330] the parties stipulated to an order of equal custody, one half in California, and one half in the United Kingdom. After one initial exchange, mother refused to return the child to father in England. The court found the U.K. to be the child's habitual residence, and provided in a footnote to that conclusion that owing to "the peculiar circumstances of this case, it is arguable that Demelza is also a habitual resident of the United States under the Convention."[331]

Most of the cases involving shuttle custody have resolved the issue of habitual residence by focusing on parental intent. For example, in *Reyes v. Jeffcoat*, [332] the parties maintained residences in both Venezuela and South Carolina. The child lived alternately with each parent over a number of years. For the three years before the Convention proceedings were filed, the child spent 45% of his time in the United States and 55% of his time in Venezuela. The trial court found that as of 2006, the parents expressed a mutual intent to make the United States the child's habitual residence. The Fourth Circuit affirmed the trial court's decision finding that the United States was the child's habitual residence and noted that given his constant travel between, the child led a full and active life in both the United States and Venezuela and was comfortable in both countries.

Similarly, in *Valenzuela v. Michel*,[333] mother and father agreed that their twin girls should move from Nogales, Mexico, to Arizona and thus be able to take advantage of U.S. education, medical care, and government support. Except for approximately two months in 2010, the children split their time from May 2009 to February 2011 between mother in Mexico and father in the United States. In March 2011,

---

329. *See* Quinn v. Settel, 682 So. 2d 617 (Fla. Dist. Ct. App. 1996) (implying the concept of concurrent habitual residences where a child was the subject of a shared custody agreement between the parents, spending equal amounts of time in the United States and France).

330. 907 F. Supp. 57 (S.D.N.Y. 1995).

331. *Id.* at 61, n.2.

332. 548 F. App'x 887 (4th Cir. 2013).

333. 736 F.3d 1173 (9th Cir. 2013).

father took the children but did not return them. The Ninth Circuit, after reviewing both domestic and foreign authority, concluded that the United States was the children's habitual residence. In reaching that conclusion, the court relied on factors that showed (1) the parents intended to abandon Mexico as the children's sole habitual residence, (2) there was a change in geography, and (3) there was a passage of an appreciable period of time.[334]

8. Military Families

Abduction cases involving families connected with the military share at least one common question—how military commitments may affect the outcome of a question involving the child's habitual residence. Beyond that common element, there are no hard and fast rules.[335] Some cases involve the posting of U.S. service members abroad for periods of time up to three or more years. In such cases, courts will likely be faced with balancing the specific duration of the military commitment versus the period of time that might support a finding of acclimatization. Given that all courts agree that the determination of habitual residence is fact-driven, results in individual cases may be difficult to categorize. Past decisions tend to highlight the tension between circuit courts that adhere to the *Mozes* approach (whether parents intended to abandon previous habitual residence), the *Friedrich* approach (child-centered focus), and those courts that consider both the child-centered approach and parental intent.[336]

For example, in *Holder v. Holder (Holder II)*,[337] father received a four-year assignment to Germany. After eight months in Germany,

---

334. *Id.* at 1179.

335. "We emphasize that courts must consider the unique circumstances of each case when inquiring into a child's habitual residence. Thus, for example, no per se rule dictates that children of U.S. military personnel remain habitually resident in the United States when joining their parents at overseas posts. To the contrary, fact patterns vary considerably within the limited universe of Convention cases involving military personnel." Holder v. Holder (*Holder II*), 392 F.3d 1009, 1016 (9th Cir. 2004).

336. *See* discussion *supra* at page 64.

337. 392 F.3d 1009, 1011 (9th Cir. 2004).

mother removed the children back to the United States. Father commenced custody proceedings in California and later filed a Hague Convention petition in district court in the state of Washington. The court found that the move to Germany, despite the anticipated four-year duration, to be "conditional" and for a "specific, delimited" period of time, thus contraindicating an intent to alter the previous habitual residence.[338] Acknowledging that the four-year commitment made this a close case, the Ninth Circuit found that the parties lacked a shared intent to abandon their prior habitual residence and shift it to Germany. The court additionally found that during the eight-month period in Germany, the children had not acclimatized to their new surroundings.[339]

In *Chafin v. Chafin*,[340] mother, a citizen of the United Kingdom, married father, a member of the U.S. armed forces. When father was deployed to Afghanistan, mother took the parties' child to Scotland. Mother and child remained in Scotland for several years. Father was later transferred to Alabama. In 2010, mother took the child to Alabama for an unsuccessful trial reconciliation with the child's father. Father subsequently retained the child when mother was deported. The district court found that the child's habitual residence was in Scotland.[341] The court noted that mother had entered the United States on a ninety-day visitor visa that required proof of a return ticket. Mother's belief that father would be transferred to Germany within five months was additional evidence of the lack of her intent to make the U.S. the child's habitual residence. Noting its previous reliance on the *Mozes* line of cases, the Eleventh Circuit affirmed the habitual residence determination of the district court.[342]

---

338. *Id.* at 1018.

339. *Id.* at 1019.

340. 742 F.3d 934 (11th Cir. 2013) (on remand from *Chafin v. Chafin*, 133 S. Ct. 1017 (2013)).

341. Implicit in the district court's determination was that while father was deployed, the child acquired a habitual residence in Scotland.

342. *Chafin*, 742 F.3d at 938 (citing Ruiz v. Tenorio, 392 F.3d 1247, 1252 (11th Cir. 2004)).

In *Larbie v. Larbie*,[343] the Fifth Circuit held that a mother's residing in the United Kingdom for a year with the child while father was deployed to Afghanistan did not alter the child's habitual residence in the United States. The court found that such a residential arrangement did not demonstrate that both parties harbored the intent to abandon the prior habitual residence. [344]

Following the *Mozes* line of cases, a district court in Florida held in *Yocom v. Yocom*[345] that a settled intent to abandon a prior residence was shown by the evidence where father and mother relocated to Germany pursuant to father's three-year assignment. The child was approximately five months old. The parties' marriage broke down within months of their arrival in Germany. When the child was barely one year old, mother moved with the child back to the United States. The court's finding that the habitual residence was Germany was supported by evidence that mother was apparently unable to find a stable location to live upon her return to the United States, and that the parties had sold their personal belongings before their move to Germany.[346]

In *Daunis v. Daunis*,[347] father requested return of his two children to Italy where he was stationed by the U.S. Navy. The children lived principally in Italy for three years, but approximately one-half of that time was spent in the United States. Additionally, father filed an action for divorce in Louisiana before the parties relocated to Italy. The Se-

---

343. 690 F.3d 295 (5th Cir. 2012).

344. *Id.* at 311. In an early U.K. case, *Re A.* (Minors) (Abduction: Habitual Residence) [1996] 1 WLR 25 HC/E/UKe 38, High Court (July 1995), a British High Court found that Iceland was the children's habitual residence, and dismissed mother's petition for return to the United Kingdom. The children's father was a U.S. serviceman stationed at Keflavik, and the family lived there for twenty-two months before mother wrongfully removed them. The court found that the actual presence of the children in Iceland prevailed over the fact that the term of father's military posting was only for the period of three years.

345. 2005 WL 1863422 (M.D. Fla. 2005) (unreported disposition).

346. *Id.* at 5.

347. 222 F. App'x 32, 2007 WL 786331 (2d Cir. 2007) (unreported disposition).

cond Circuit upheld the district court's decision that Italy was not the children's habitual residence, relying on the *Mozes* approach.[348]

In *Friedrich v. Friedrich*,[349] the Sixth Circuit found that the determination of habitual residence was a "simple case" given that the child lived exclusively in Germany until the child was removed by his mother, a member of the U.S. military. The court found the child's U.S. citizenship, and mother's future plans and intentions to return to the United States after the conclusion of her military service, to be irrelevant to the question of habitual residence.[350]

Following *Friedrich*'s habitual residence analysis, the district court in *Levesque v. Levesque*,[351] found that the parent's mutual agreement to allow the child to relocate to Germany for an indefinite period of time was sufficient to establish habitual residence.[352]

In *Harkness v. Harkness*,[353] the court found that the intention of the parties was not controlling where the parties had not resolved where they would settle after the father was discharged from the U.S. military. Despite the parties' previous three-year stay in the United States, the last lengthy period of residence was in Germany, where the U.S. military assigned the father. The court of appeals affirmed the trial court's holding that Germany was the children's habitual residence, concluding that there was a lack of mutual intent to abandon

---

348. *Accord* Johnson v. Johnson, 2011 WL 569876 (S.D.N.Y. 2011) (unreported disposition) (court finds that two-year stay in Italy did not support the conclusion that Italy was the children's habitual residence; from time of parties' marriage, father was posted eight times, all within the United States for periods from one to four years, and during posting to Italy, father was deployed to Afghanistan).

349. 983 F.2d 1396 (6th Cir. 1993).

350. *Id.* at 1401. *See also In re* Marriage of Witherspoon 66 Cal. Rptr. 3d 586, 971–72 (Cal. Ct. App. 2007) (parties did not dispute that children's habitual residence was in Germany, where mother was stationed in the U.S. Army, and for a period of one year the children remained there under the care of a child care provider while mother was deployed to Iraq).

351. 816 F. Supp. 662 (D. Kan. 1993).

352. *Id.* at 666.

353. 577 N.W.2d 116 (Mich. Ct. App. 1998).

Germany as the habitual residence.[354] Noting that the case differed from *Feder* because the parties' intentions to settle in one place were never solidified, the court observed:

> While we agree that "habitual residence" should not simply be equated with the last place that the child lived, the [trial] court's opinion does not indicate that this was its only consideration. As noted in *Feder*, *supra* at 224, a determination of habitual residence must take into account whether the child has been physically present in a country for an amount of time "sufficient for acclimatization."[355]

In *Shealy v. Shealy*,[356] mother was a service member in the U.S. Army. When the parties' child was a year old, mother was assigned to a three-year tour in Germany. The entire family moved to Germany. Mother filed divorce proceedings in Germany, requesting sole custody of the child. While those proceedings were ongoing, mother applied for and obtained orders transferring her back to the United States. She removed the child shortly thereafter without informing the German court or the child's father. Relying on decisions from the Third, Fourth, Sixth, and Ninth Circuits, the district court held that the child's habitual residence was in Germany. Mother did not appeal the habitual residence finding; the Tenth Circuit affirmed the district court's holding without substantial discussion.[357]

E. Age of the Child

Article 4 limits the application of the Convention to children under the age of sixteen. Even if the child is under the age of sixteen at the time of the wrongful removal or retention, if the child has reached sixteen when return is requested, the Convention does not require the child's return.[358] Both the *Pérez-Vera Report* and the *Text & Legal*

---

354. *Id.* at 123.

355. *Id.* at 596.

356. 295 F.3d 1117 (10th Cir. 2002).

357. *See also* Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (habitual residence agreed to be in Germany).

358. *Text & Legal Analysis*, *supra* note 73, at 10,504.

Analysis of the U.S. State Department interpret the age limitation as jurisdictional.[359] When a child reaches the age of sixteen, both parents and custody decision makers must, practically speaking, give consideration to the child's wishes, a concept embodied in Article 13 of the Convention.

Despite this age cutoff, Article 29 allows a court to consider a petition for return, or to enforce access rights, under the aegis of other laws that do apply to children over the age of sixteen.[360] In other words, the Convention does not restrict other laws that may provide remedies for children over the age of sixteen.[361]

The sixteen-year-old age limit in the Convention has not presented interpretive problems for courts.[362] However, this provision has

---

359. "Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday." *Pérez-Vera Report, supra* note 19, ¶ 77. "Absent action by governments to expand coverage of the Convention to children aged sixteen and above pursuant to Article 36, the Convention itself is unavailable as the legal vehicle for securing return of a child sixteen or older." *Text & Legal Analysis*, *supra* note 73, at 10,504.

360. *Id*.

361. This concept was discussed in *In re R.P.B.*, No. CA2009-07-097, 2010-Ohio-322, 2010 WL 339812 (Ct. App. 2010) (unpublished disposition), wherein a Brazilian father had visitation rights under a Brazilian decree. When the mother's new husband brought proceedings to adopt the child over father's objection, father brought an action under Article 21 of the Convention (relating to organizing access rights) to compel mother to allow visits with the child, who by then was over the age of sixteen, but still under eighteen. Father conceded that the Convention was inapplicable because the child had reached age sixteen, but contended that the Ohio juvenile court had jurisdiction to grant father relief under state law. The court of appeals disagreed with this contention, noting that father did not bring an action under state law, but brought the action under the Convention to establish his access rights. As such, the Convention by its terms did not apply, and father had not petitioned under state law to establish or enforce those access rights.

362. *See, e.g.*, Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008) (*abrogated on other grounds by* Lozano v. Montoya Alvarez, 572 U.S. ____, 134 S. Ct. 1224 (2014) (during the litigation for return of four children, the older two children had reached age sixteen and were dropped from the case)); Flynn v. Borders, 472 F. Supp. 2d 906 (E.D. Ky. 2007) (ordering younger child returned to Ireland, but older sibling not named in petition); *see also* Gaudin v. Remis, 334 F. App'x 133, 2009 WL 3345760

posed some practical challenges where a return order applies to siblings under the age of sixteen, but the court is unable to make orders with regard to another sibling who is over the age of sixteen. Such an order effectively strands the child over sixteen in a location that may strain sibling relationships unless the parents voluntarily return the older child with the younger children.

(9th Cir. 2009) (unreported disposition) (determining that where at the time of hearing the children had both attained age sixteen, the matter of the pending petition for return was moot); Mohamud v. Guuleed, No. 09-C-146, 2009 WL 1229986 (E.D. Wis. 2009) (unreported decision) (denying return where petition filed before child reached sixteen, but was sixteen at the time the hearing occurred).

III. Defenses to the Petition for Return

A. Summary

The Convention sets forth five defenses that may be raised in proceedings for the return of a child. Pursuant to the International Child Abduction Remedies Act (ICARA),[363] different burdens of proof are required depending on the defense proffered:

Preponderance of the evidence:

- Delay (Article 12)—more than one year has passed since the wrongful removal or retention occurred and the child has become settled in his or her new environment
- Consent or acquiescence (Article 13(a))—the person seeking return consented or acquiesced to the child's removal or retention
- Non-exercise of custody rights (Article 13(a))—the party seeking return was not exercising rights of custody at the time of the wrongful removal or retention

Clear and convincing evidence:

- Grave risk (Article 13(b))—return of the child would expose that child to a grave risk of harm or place the child in an intolerable situation
- Human rights (Article 20)—return of the child would be in violation of the requested state's fundamental principles relating to the protection of human rights and fundamental freedoms

In addition to these defenses, courts have entertained three other "procedural" defenses that are not specifically mentioned in the Convention: waiver, unclean hands, and fugitive disentitlement.

Article 13 contains an unnumbered paragraph that sets forth another basis for refusing return: the objection to return by a mature

363. 22 U.S.C. §§ 9001–9011 (1988).

child. The mature child's objection is not technically a defense to return, but it has been treated as a defense[364] and is subject to proof by a preponderance of the evidence.[365]

1. Narrow Interpretation of Defenses

U.S. courts have uniformly acknowledged that defenses available under the Convention should be interpreted narrowly.[366] The *Pérez-Vera Report* recognizes that the defenses must be applied "only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter."[367] The *Text & Legal Analysis* explains:

> In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof.[368]

---

364. *See, e.g.*, Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002); England v. England, 234 F.3d 268 (5th Cir. 2000); Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010); Falk v. Sinclair, 692 F. Supp. 2d 147 (D. Me. 2010).

365. *See* 22 U.S.C. § 9003(e)(2)(B) (1988).

366. *See, e.g.*, Nicolson v. Pappalardo, 605 F.3d 100, 107 (1st Cir. 2010); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008) (using Article 13(b) defense); Yang v. Tsui (*Yang II*), 499 F.3d 259, 271 (3d Cir. 2007) (using Article 13 defense); Karkkainen v. Kovalchuk, 445 F.3d 280, 288 (3d Cir. 2006); Miller v. Miller, 240 F.3d 392 (4th Cir. 2001); Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001); *England*, 234 F.3d 268; Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060 (6th Cir. 1996); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995).

367. *Pérez-Vera Report, supra* note 19, ¶ 34.

368. *Text & Legal Analysis*, *supra* note 73; *accord Rydder*, 49 F.3d at 372.

2. Court May Order Return Even If Defense Established

Article 18 of the Convention[369] asserts that even if a defense[370] to return is proven, a court may order the child returned.[371] In its majority opinion, the Supreme Court in *Lozano v. Montoya Alvarez*, [372] declined to address the issue whether Article 18 confers discretion to order a return despite the existence of an Article 12 defense, and notwithstanding the settlement of the child. In a concurring opinion, however, Justices Alito, Sotomayor and Breyer noted that Article 18 authorizes a court to exercise its discretion and return a child despite the establishment of an Article 12 defense.[373]

In *Yaman v. Yaman*,[374] the First Circuit held that courts have discretion to order the return of a wrongfully removed child despite the

---

369. The provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

370. One case has implied that Article 18 may also apply to overrule a child's valid objection to return. *See* Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010); *see also In re* B. Del C.S.B., 559 F.3d 999, 1016 (9th Cir. 2009) ("Where, as here, the child at issue is settled in her new environment and has been so for years; and where, as here, there was no showing of 'concealment' such that the reprehensibility of the abducting parent's conduct should trump the finding that the child is 'settled,' we can see no reason justifying an exercise of discretion under Article 18 to order Brianna's return to Mexico.").

371. "Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." *Text & Legal Analysis*, *supra* note 73; *see also Friedrich II*, 78 F.3d at 1067.

372. 134 S. Ct. 1224 (2014).

373. *Id.* at 1234. At note 5, the Court acknowledged the view of the U.S. State Department (the U.S. Central Authority for the United States) that the Convention "confers equitable discretion on courts to order the return of a child even if the court determines that the child is 'settled' within the meaning of Article 12," but the Court was unable to address the issue because the appellant had failed to preserve the issue on appeal to the Second Circuit. The Supreme Court has previously indicated that interpretation of treaty provisions by the Executive is given great weight. *See* discussion *supra* at page 15.

374. 730 F.3d 1 (1st Cir. 2013).

fact that the child had become settled. Reversing the district court's conclusion that discretion to return a "settled" child did not exist, the First Circuit noted (1) the existence of similar authority from other Circuits,[375] (2) the absence of text in the Convention that expressly limited discretion to return in Article 12, and (3) the retention of the "broad equitable powers" by federal courts, not limited by the enactment of ICARA, the Convention's implementing legislation in the United States.[376]

The court went on to state that

> We hold that the district court erred in finding it had no authority to order the return of a child found to be "now settled." We recognize that, taken in isolation, the text of Article 12 can be read differently by different viewers. Coupled, however, with the rest of the text of the Convention, the Convention's purposes, the inherent equitable powers of federal courts, and the insights of the Executive Branch, we conclude that the Convention confers upon a federal district court the authority to order, at its discretion, the return of a child found to be "now settled."[377]

---

375. Blondin v. Dubois (*Blondin II*), 238 F.3d 153, 164 (2d Cir. 2001); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009).

376. In *Yaman*, the court said

> Read against this backdrop of federal courts' broad equitable powers and the other articles of the Convention, Article 12 in its own terms confers upon a federal district court the authority to order the return of a "now settled" child. We add that the language of Article 18 of the Convention reinforces our reading. According to Article 18, "[t]he provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Convention, art. 18 . . . .

Yaman, 730 F.2d at 18.

377. *Id.* at 20–21. The district court noted that decisions in the United Kingdom and Australia highlighted the differences between the language of the discrete defenses set forth in Article 12 versus Articles 13 and 20. The sister-state decisions observed that the language of the Convention itself seemed to imply that (1) if an Article 12 defense is established, denying return may be mandatory, but (2) if an Article 13 or Article 20 defense is established, the Convention's language seems to indicate that return is discretionary.

Similarly, in *Blanc v. Morgan*,[378] the father's petition was filed only a few weeks after the one-year period had run. The court found that father was diligent in pursuing remedies in the courts of the habitual residence and that he had acted with reasonable diligence in pursuing the child's return. In refusing mother's proffer of an Article 12 defense, the court stated in dicta that even if mother had proven the delay defense, it would have been proper for the court to order the child returned:

> Under the Hague Convention, it is of paramount concern that courts prevent a party in a custody dispute from deriving a benefit through wrongdoing. "In fact, a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention."[379]

In *F.H.U. v. A.C.U.*,[380] a New Jersey state court held that Article 18 grants a court discretion to order a "settled" child returned despite the existence of an Article 12 delay defense.[381] In this case the trial court ordered return of the child, equitably tolling the one year period because of bureaucratic delays in obtaining counsel for the mother, obtaining the appropriate visas, and processing the application through the Central Authority (during the transition of handling incoming case from the National Center for Missing and Exploited Children (NCMEC) and the State Department). The appellate division reversed the finding of equitable tolling, but affirmed the order returning the child focusing on the wrongfulness of father's abduction of the child, and the finding that father failed to testify credibly. The following observation made by the court deserves note:

> At its essence, the Convention seeks to right a wrong by returning the factual situation to the status quo ante a child's removal. As an agreement among sovereign nations regarding their most precious

---

378. 721 F. Supp. 2d 749 (W.D. Tenn. 2010).

379. *Id.* at 765 (quoting Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996)).

380. 48 A.3d 1130 (N.J. Super. Ct. App. Div. 2012).

381. *Id.* at 1142.

> resource, the Convention resolves to ensure that permanent custody determinations are made solely through the legal procedures of a child's habitual residence. This necessarily may occasion austere results, but such is the nature of an international accord that endeavors to streamline the varied and disparate procedures of its signatory nations. Just as the Convention's drafters were cognizant of potential transactional delays, they also sought to minimize the impact of one nation's legal processes upon another.[382]

Although it appears that Article 18 confers discretion to order a child returned regardless of the type of defense that is proven, courts around the world have interpreted the breadth of this discretion in different ways.[383] Some foreign courts have pointed out that this discretion may not exist with regard to the defense described in Article 12 (delay plus settlement of the child).[384] It appears, however, that the majority view of common-law jurisdictions is that courts retain the discretion to return a child despite the establishment of an Article 12 defense.[385] In the case *Re M.,*[386] England's House of Lords held that

---

382. *Id.* at 1147.

383. Dir.-Gen. Dep't of Families, Youth and Comty. Care v. Moore, [1999] FLC 92-841; [1999] FamCA 284 [Australia] (open question); J.E.A. v. C.L.M. (2002), 220 D.L.R. 4th 577 (N.S.C.A.) [Nova Scotia Court of Appeal] (child returned after seven years of concealment); Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1 AC 1288 [U.K] (discretion exists).

384. Droit de la Famille 2785, Cour d'appel de Montreal, 5 decembre 1997, No. 500-09-005532-973 [Canada]; State Central Authority v. Ayob [1997] FLC 92-746, 21 Fam. LR 567 [Australia]. *Compare* Article 20: "[T]he judicial . . . authority of the requested State *is not bound to order the return of the child* . . . if the defenses in (a) or (b) are established." *and* Article 13(b): "The return of the child under the provisions of Article 12 *may be refused* if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." (emphasis added)

385. Dir.-Gen. Dep't of Families, Youth and Comty. Care v. Moore, [1999] 24 Fam LR 475, 150 FLR 59 [Australia] (inferring court's discretion from Article 12); Re S. (A Minor) (Abduction), [1991] Fam. 224 (EWCA (Civ.)) (Eng.); P. v. B. (No. 2) (Child Abduction: Delay), [1999] 4 I.R. 185, 2 I.L.R.M. 401 (Ir.); Soucie v. Soucie, [1995] S.C. 134, S.C.L.R. 203 (Scot.) (discussing Article 12's discretion *in dicta*); Secretary for Justice (New Zealand Central Authority) v. H.J., [2007] 2 NZLR 289

Article 18 does not establish any residual jurisdiction under the Convention to order a child's return despite the establishment of the defense of delay under Article 12. However, if provisions of domestic law exist to authorize the return of the child, then Article 18 merely clarifies that the Convention will not bar the return of the child under domestic law. For example, hypothetically, if the United Kingdom had a domestic law similar to the United State's UCCJEA, it would be possible that a return of the child pursuant to the Hague Convention would be denied on the basis of the Article 12 limitation of one year. Despite the bar of Article 12, an English court could order a child returned to Canada if Canada met all of the requirements for the child's "home state."

Both the *Pérez-Vera Report* and the *Text & Legal Analysis* state that domestic laws may authorize the return of a child, independent of the Convention.[387] The *Text & Legal Analysis* explains: "Under Article 29 a person is not precluded from seeking judicially-ordered return of a child pursuant to laws and procedures other than the Convention. Indeed, Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying *other laws and procedures* conducive to that end."[388] Courts may find this commentary helpful when adjudicating Hague petitions that raise a complex web of defenses.

(SC) (N.Z.) (stating that discretion had been conferred by virtue of New Zealand's legislation implementing the Convention).

386. Re M. and Another (Children) (Abduction: Rights of Custody), [2008] 1 A.C. 1288 (H.L.) (app. taken from Eng. (U.K.)).

387. *Pérez-Vera Report*, *supra* note 19, ¶ 112 (1981). In the United States, the UCCJEA might provide the authority for a court to order that a child be returned to another country based on a finding that the country was properly exercising jurisdiction over child custody issues.

388. Holder v. Holder (*Holder I*), 305 F.3d 854, 860 (9th Cir. 2002) (emphasis added) (citing *Text & Legal Analysis*, *supra* note 73, at 10,507–08).

B. Delay of More Than One Year

Article 12 sets forth a two-prong defense of delay: (1) the party requesting return of the child has delayed more than one year in the filing of an application for return, and (2) the child has become settled in his or her new environment.

The first two paragraphs of Article 12 provide the following:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

The one-year limitation runs from the date the wrongful removal or retention occurred. The date of a wrongful removal is usually a simple matter, since one may presume that a parent with custody rights will have an accurate understanding of when those custody rights were violated. However, the task of determining the date of a wrongful retention can be more complicated. See discussion *supra* at page 27.

U.S. courts have interpreted the term "commencement of proceedings" in Article 12 to mean that an action must be filed in court.[389] An application made to the Central Authority will not suffice.[390]

---

389. *See* 22 U.S.C. § 9003(f)(3) (1988); Muhlenkamp v. Blizzard, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (the one-year period is measured from when the petition was filed in court); *see also* Belay v. Getachew, 272 F. Supp. 2d 553, 561 (D. Md. 2003) (the court states that it has been uniformly held that the filing of the petition in court commences the judicial proceedings).

390. *See* Wojcik v. Wojcik, 959 F. Supp. 413 (E.D. Mich. 1997). *Cf. In re* A.V.P.G. 251 S.W.3d 117 (Tex. App. 2008) (although father filed an application with the Belgian Central Authority that was transmitted to the U.S. Central Authority within

1. Child Settled in New Environment

Neither the Convention nor ICARA define the term "settled" as it is used in Article 12.[391] The *Text & Legal Analysis* opines: "To this end, nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof."[392] In connection with the Article 12 defense, the Second Circuit has proposed that the term "settled"

> should be viewed to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment . . . , [and] a court may consider any factor relevant to a child's connection to his living arrangement.[393]

The question whether a child has become settled is fact-intensive.[394] Courts looking to whether a child has become settled within the

---

Article 12's one-year period, father's petition filed in a Texas court was two weeks late). Held: combined with father's immediate reporting of the abduction, securing a Belgian court order granting him custody, obtaining an international arrest warrant, and upon learning of children's location, commencing proceedings for return through the Central Authorities, father's conduct was consistent with the requirements of the Hague Convention, and his petition was allowed.

391. The Second Circuit points to a potential conflict between the "acclimatzation" second prong of *Gitter* when analyzing "settlement" for habitual residence analysis and the Article 12 provision that return may be denied if the petition for return is filed more than one year after the wrongful removal or retention and the child is "now settled" in the new environment. In *Hofmann v. Sender*, 716 F.3d 282 (2d Cir. 2013), the court raised the question: "Hypothetically, these ostensibly parallel analyses could allow for a finding that a child has become well settled in its new country before the one year time limit in Article 12 has elapsed. Because we rely solely on temporal grounds in holding that the mandatory provisions of Article 12 are not satisfied [in this case] . . .we leave for another day any potential conflict that may exist." *Id.* at 294.

392. *Text & Legal Analysis*, *supra* note 73, at 10,509.

393. Lozano v. Alvarez, 697 F.3d 41, 56 (2d Cir. 2012) (citing Duarte v. Bardales, 526 F.3d 563, 569–70 (9th Cir. 2008)).

394. *See, e.g.*, Yaman v. Yaman, 730 F.3d 1, 21–22 (1st Cir. 2013) (citing to the Amicus Brief of the United States on Cert. in *Lozano v. Alvarez,* at 11–12).

meaning of Article 12 frequently consider a diverse number of factors,[395] including

- age of the child
- language fluency
- length and stability of the child's residence in the new environment[396]
- consistent attendance at school or day care
- attendance at church
- regular participation in other community or extracurricular school activities
- respondent's employment and financial stability
- the immigration status of the child
- whether the child has friends and relatives in the new area[397]

---

395. *See, e.g.*, *In re* B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009); *see also Wojcik*, 959 F. Supp. 413 (analyzing factors like time in the new location, school attendance, parent with stable employment, day care); *In re* Robinson, 983 F. Supp. 1339 (D. Colo. 1997) (looking to involvement with extended family, participation in extracurricular activities, and friends); *In re* Koc, 181 F. Supp. 2d 136 (E.D.N.Y. 2001) (weighing child's church attendance, stability of parental employment, relatives in the area, relatives and friends in habitual residence, immigration status of parent and/or child, financial stability, ability to visit with other parent because of immigration issues); *In re* Coffield, 644 N.E.2d 662, 666 (Ohio Ct. App. 1994) (assessing child's friends and relatives, participation in organized activities, connections within community); *Blanc*, 721 F. Supp. 2d 749 (viewing child's stable home, employment, family vacations, day care, summer camp, age of the child as settlement factors); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004); *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004) (viewing child's fluency in English as a settlement factor); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); Lutman v. Lutman, No. 1:10-CV-1504, 2010 WL 3398985 (M.D. Pa. 2010) (unreported disposition) (looking to child's academic progress).

396. *See In re* B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009) (suggesting that the most important factor is the length and stability of the child's residence in the new location).

397. Lozano v. Alvarez, 697 F.3d 41, 57 (2d Cir. 2012); *B. Del C.S.B.*, 559 F.3d at 1009.

- financial stability and employment of parent
- academic progress
- immigration status[398]
- any factor that is relevant to the child's living arrangement[399]

Even though a court may find that a child has become "settled" within the meaning of Article 12, there is authority that a court may balance the fact of the child's settlement against equitable considerations, and nevertheless order the child returned.[400] In the concurring opinion of *Lozano v. Montoya Alvarez*,[401] Justice Alito observed the following:

> Even after a year has elapsed and the child has become settled in the new environment, a variety of factors may outweigh the child's interest in remaining in the new country, such as the child's interest in returning to his or her original country of residence (with which he or she may still have close ties, despite having become settled in the new country); the child's need for contact with the non-abducting parent, who was exercising custody when the abduction occurred; the non-abducting parent's interest in exercising the custody to

398. *See B. Del C.S.B.,* 559 F.3d at 1009 ("[W]e will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation."); *see also* Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009) (father expected to become U.S. citizen soon, and child would therefore be eligible for citizenship as well).

399. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998); Duarte v. Bardales, 526 F.3d 563, 569–70 (9th Cir. 2008).

400. *See* Taveras v. Morales, 22 F. Supp. 3d 219, 231 (S.D.N.Y. 2014) (court recognizes its discretion to order return of a child despite the proof of an Article 12 defense); Belay v. Getachew, 272 F. Supp. 2d 553, 555, 565 (D. Md. 2003) (balancing the equities and finding grounds for "equitable estoppel," thus barring the abducting parent from taking refuge in an Article 12 defense). *See also* F.H.U. v. A.C.U., 48 A.3d 1130, 1147 (N.J. Super. Ct. App. Div. 2012) ("[F]inding a child to be well-settled does not render a court powerless to order the child returned."); Wojcik v. Wojcik, 959 F. Supp. 413, 420–21 (suggesting that there may be equitable reasons to order a child returned despite being settled).

401. 134 S. Ct. 1224 (2014). The concurring opinion of Justice Alito was joined in by Justices Breyer and Sotomayor. *Id.* at 1237.

> which he or she is legally entitled; the need to discourage inequitable conduct (such as concealment) by abducting parents; and the need to deter international abductions generally.[402]

One Florida case found that despite the fact that the child had been present in that state for four years, the court deemed the child "not settled." In *Wigley v. Hares*,[403] the mother kept the child actively concealed, and the child never attended school or came to the attention of school authorities. Mother kept the child out of all community activities, sports, and church to avoid detection by the father. The child made none of the usual connections to the community. The court found that to find the child "settled" under these circumstances would "undermine the very purpose of the Convention."[404]

The fact that a child may have a more affluent lifestyle with one parent has no relevance for determining whether the child has become settled in that location.[405] Also, concealment of the child militates against the conclusion that the child has become settled.

2. Equitable Tolling

Equitable Tolling is a common-law equitable concept that prevents actions from being barred by a statute of limitations. The defense is based on the principle that persons may not profit by their own wrongful conduct that inhibits another from promptly asserting their legal rights.[406] A number of courts have invoked equitable tolling to deny an Article 12 delay defense.[407] In these cases, the doctrine was

---

402. *Id.*

403. 82 So.3d 932 (Fla. App. 2011).

404. *Id.* at 942. *See also Lops*, 140 F.3d at 946 (finding children not settled where children were concealed from mother and elaborate steps taken to avoid detection).

405. *See Koc*, 181 F. Supp. 2d at 152 (citing Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998)).

406. *See, e.g.*, Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–33 (1959); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994).

407. Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008); Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004); Perez v. Garcia, 198 P.3d 539 (Wash. Ct. App. 2009).

applied where the delay in petitioning for the return of a child was in whole or in part the result of the concealment of the child by the abducting parent. Other circuits, however, reasoned that equitable tolling was not available to extend the one-year period set forth in Article 12, concluding that Article 12 was not a true statute of limitations.[408]

Recognizing the circuit split on the application of equitable tolling, the Supreme Court granted certiorari in *Lozano v. Alvarez*.[409] In its unanimous 2014 decision[410] the court held that equitable tolling is not available when the one-year period in Article 12 expires because of an abductor's successful concealment of the child from the left-behind parent.[411]

The Supreme Court viewed the application of equitable tolling in Hague cases as "fundamentally a question of statutory intent."[412] The Court noted that the concept of equitable tolling was not part of the legal background of the original signatory nations to the Hague Convention, and as such, was not intended to be incorporated within the structure of the treaty.

The Court additionally held that Article 12 would not apply in any event since it did not create a statute of limitations.[413] Because the provisions of Article 12 allow for the possibility of return despite the expiration of the one-year period, the remedy of return is not altogether eliminated. As such, the common features of statutes of limita-

---

408. Lozano v. Alvarez, 697 F.3d 41 (2d Cir. 2012); Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013).

409. Lozano v. Alvarez, 133 S. Ct. 2851 (2013).

410. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014) (abrogating Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008)); Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004).

411. In *Lozano*, mother concealed the child in the United Kingdom for seven months, then came to New York. Father did not locate the child until November 2010, two years after the child's disappearance with her mother. Father exercised diligence in attempting to locate the child, but was unsuccessful in doing so until he was notified by the U.S. State Department that the mother and child had entered the United States. *Lozano*, 134 S. Ct. 1224.

412. *Id.* at 1232.

413. *Id.*

tions—including certainty as to when claims may be brought—are not present.[414]

The Court acknowledged the argument that in the absence of equitable tolling, that abducting parents might be rewarded by successfully concealing children. Rejecting this position, the Court observed that the Convention's goal to deter abductions does not apply "at any cost," given that the child's interest to remain in a settled environment may outweigh the benefits of ordering a return. The Court also observed that facts underlying a child's concealment may preclude a child from forming stable attachments, or becoming "settled" within the meaning of Article 12.[415]

In a concurring opinion, three of the justices[416] addressed the discretion of courts to order a child's return even after the child has become settled.[417] They noted that the issue of settlement is not an exclusive consideration, observing that Article 18[418] permits the exercise of a court's discretion to return a child despite the expiration of Article 12's one-year period. The concurring justices also pointed out that Article 12 places no limits on discretion conferred on a court by Article 18[419] and described other factors that might appropriately influence a decision to order a child's return.[420]

---

414. *Id.* at 1234.

415. *Id.* at 1236 (citing to Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1363–64 (M.D. Fla. 2002)); *see also* Wigley v. Hares, 82 So.3d 932, 942 (Fla. Dist. Ct. App. 2011); *In re* Coffield, 644 N.E.2d 662 (Ohio Ct. App. 1994).

416. Justices Alito, Breyer, and Sotomayor.

417. The majority opinion declined to address this issue. Despite the fact that the district court found that the child was settled, father failed in his appeal to the Second Circuit to challenge the trial court's decision not to exercise that discretion in favor of ordering the child's return.

418. "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Convention, *supra* note 11, Article 18.

419. *See* discussion at page 89 regarding the scope of authority to order returns pursuant to Article 18.

420. A concurring opinion in *Lozano* stated:

> Even after a year has elapsed and the child has become settled in the new environment, a variety of factors may outweigh the child's interest in remaining in the new

C. Consent and Acquiescence

1. Generally—Separate Defenses[421]

Article 13 provides that a court is not bound to order a child returned if

> the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention.[422]

These defenses must be proven by a preponderance of the evidence.[423] The term "consent" refers to permission given before the child is removed, whereas "acquiescence" refers to conduct after the removal.[424] Consent can be established by either statements[425] or conduct indicating that a parent has given consent to the removal and retention of a child, for an indefinite period of time or permanently.[426] Acquiescence may be proven by formalized conduct, such as a parent giving a formal

---

country, such as the child's interest in returning to his or her original country of residence (with which he or she may still have close ties, despite having become settled in the new country); the child's need for contact with the non-abducting parent, who was exercising custody when the abduction occurred; the non-abducting parent's interest in exercising the custody to which he or she is legally entitled; the need to discourage inequitable conduct (such as concealment) by abducting parents; and the need to deter international abductions generally.

Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1237 (concurring opinion).

421. *See* Nicolson v. Pappalardo, 605 F.3d 100, 103 (1st Cir. 2010).

422. Convention, *supra* note 11, Article 13(a).

423. *See* Burdens of Proof, *supra* page 23.

424. *See, e.g.*, Baxter v. Baxter, 423 F.3d 363, 371 (3d Cir. 2005).

425. *See*, *e.g.*, Pignoloni v. Gallagher, 555 F. App'x 112 (2d Cir. 2014) (provision in Italian divorce decree permitted mother to return to the United States if father defaulted in support payments. Held: the provision amounted to prior consent to remove the children if support not paid); *cf.*, Walker v. Walker, 701 F.3d 1110, 1122 (7th Cir. 2013) (father's lack of paying financial support was not relevant to issue whether father ceased to exercise his custody rights, and thus abandoned the children).

426. *See, e.g.*, Gonzalez-Caballero v. Mena, 251 F.3d 789, 793–94 (9th Cir. 2001); *Baxter*, 423 F.3d 363.

consent order in court or a formal renunciation of rights.[427] Where the facts showing acquiescence are ambiguous, courts focus on the subjective intent of the parent who has allegedly acquiesced. These defenses, like the others, are to be interpreted narrowly.[428]

The cases tend to center around the parents' conduct occurring in the context of the end of their domestic relationship. Courts generally look at the overall conduct of the parties in determining whether consent or acquiescence has occurred, as opposed to focusing upon isolated words or conduct. The words or actions of a party should not be "scrutinized for a possible waiver of custody rights," nor should isolated statements to third parties be sufficient.[429] Consent or acquiescence should be based on clear and unambiguous conduct.[430] This defense is fact-intensive,[431] as explained in *Baxter v. Baxter*:

> Although the law construing the consent defense under the Convention is less developed, the defense of acquiescence has been held to require "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." *Friedrich*, 78 F.3d at 1070 (internal footnotes omitted). Courts have held the acquiescence inquiry turns on the subjective intent of the parent who is claimed to have acquiesced. (citations omitted)

---

427. *See* discussion from *Baxter* below.

428. *See In re* Kim, 404 F. Supp. 2d 495, 512 (S.D.N.Y. 2005) ("To view the defenses more broadly would frustrate the core purpose of the Hague Convention. . . ."); Nicolson v. Pappalardo, 605 F.3d 100, 105 (1st Cir. 2010).

429. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996); *see also* Wanninger v. Wanninger, 850 F. Supp. 78 (D. Mass. 1994).

430. *See* Simcox v. Simcox, 511 F.3d 594, 603 (6th Cir. 2007); *see also* Asvesta v. Petroutsas, 580 F.3d 1000 (9th Cir. 2009) (circuit court found that the district court should not have granted comity to a Greek court's order denying a child's return under the Convention, where the Greek court's order was based on a factually unsupported finding that father consented to the permanent removal of the child from the United States).

431. *See* Stevens v. Stevens, 499 F. Supp. 2d 891, 897 (E.D. Mich. 2007) (reviewing conflicting evidence that tends to show consent, but not to the level of a preponderance of the evidence).

> Consent need not be expressed with the same degree of formality as acquiescence in order to prove the defense under article 13(a). Often, the petitioner grants some measure of consent, such as permission to travel, in an informal manner before the parties become involved in a custody dispute. The consent and acquiescence inquiries are similar, however, in their focus on the petitioner's subjective intent. In examining a consent defense, it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country. The nature and scope of the petitioner's consent, and any conditions or limitations, should be taken into account. The fact that a petitioner initially allows children to travel, and knows their location and how to contact them, does not necessarily constitute consent to removal or retention under the Convention.[432]

2. Consent by Participation in Custody Proceedings

A party that voluntarily consents to a particular court to make final custody orders is deemed to have consented to the terms of the order. In *Larbie v. Larbie*, mother moved with the child to the United Kingdom during the pendency of divorce proceedings. Upon father's completion of military service, the parties litigated their divorce case to a final judgment in Texas, and father was given primary custody of the parties' child. Mother initiated a petition for return of the child in district court, resulting in the court granting the petition and ordering the child returned to the United Kingdom. The Fifth Circuit reversed, finding that the primary purpose of the Hague Convention is to return a child to a country that has jurisdiction to determine custody. By mother consenting to Texas's jurisdiction in the family law case, and in fact filing a counterclaim, she consented to and acquiesced in the result obtained in the state court. The district court's order of return was vacated.

---

432. Baxter v. Baxter, 423 F.3d 363, 371–72 (3d Cir. 2005).

In *Nicolson v. Pappalardo*,[433] the parties experienced marital difficulties before the birth of their daughter. Three months after the child's birth, mother and child left Australia and went to the United States. Father reluctantly consented to this travel based on the hope that allowing mother and the child to travel to the United States would result in reconciliation. After a month in the United States, mother decided not to return to Australia. She subsequently filed and received a temporary domestic violence protection order. That order was modified, with the consent of father's attorney, to provide that mother was to have temporary custody of the child. The First Circuit held that father neither consented nor acquiesced in the permanent removal of the child to the United States. Although the stipulated order to temporary custody was a strong indication of father's acquiescence, the district court found no intent on father's part to consent to permanent removal. The First Circuit deferred to that finding, noting that courts (such as *Baxter*)[434] treat the issue of acquiescence as one involving pure subjective intent.

The First Circuit revisited the issues of consent and acquiescence in *Darín v. Olivero-Huffman*.[435] In *Darín*, while in the United States, mother informed father that she was unwilling to return to Argentina, the child's habitual residence. Father, whose visa was about to expire, executed an affidavit drafted by mother. The affidavit authorized mother "to take any steps necessary to provide for the education, health care, and overall well-being of the child."[436] Provisions were also included authorizing either parent to travel with the child, and that father "was leaving the United States 'against his will,' and was not abandoning the child." The First Circuit reversed the trial court's finding of consent or acquiescence. The court found no evidence to support father consent to the unlawful retention, given that father was unaware that mother intended to remain in the United States until she

433. Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010).
434. *Baxter*, 423 F.3d at 371–72.
435. 746 F.3d 1 (1st Cir. 2014).
436. *Id.* at 6.

announced her intention.[437] The court further found that the affidavit fell well short of evidence that father acquiesced in the child remaining permanently in the United States, even though the affidavit set no date for its termination.[438] Both parents testified that the purpose of the affidavit was to allow mother to care for the child in father's absence. The court also found that father's five-month delay in filing a petition for return was not evidence of acquiescence, especially given that Article 12 deems petitions to be timely if filed within one year.[439]

3. Stranded Parents

Courts have been faced with the question whether a parent has consented to a change in the child's habitual residence when parties intend to relocate to another country as an intact family, but after removal of the child one of the parents later learns that relocation is not possible.

In *Mota v. Castillo*,[440] father left the family in Mexico and entered the United States illegally. He settled in New York, and began sending financial support for his wife and daughter. Three years later, mother and father agreed that mother and the child should join father in New York. To this end, mother arranged for the child to be smuggled across the border and into father's custody in New York. After being apprehended and incarcerated as a result of her several attempts to cross the border, mother abandoned efforts to enter the United States fearing greater punishment at the hands of U.S. authorities. Father refused mother's requests for the return of the child to Mexico. The district court granted mother's petition for return. The return order was affirmed by the Second Circuit. The trial court found that mother only intended for the child to enter and live in the United States if they were to live as a family, and father joined in this mutual intent. The mother's inability to live in the United States triggered the last shared intent of the parties, that Mexico would be the child's habitual resi-

437. *Id.* at 15–16.
438. *Id.* at 16.
439. *Id.* at 18–19.
440. 629 F.3d 108 (2d Cir. 2012).

dence. On the other hand, if father did not join in this intent that the child would stay in the United States only if mother was able to join the father and child, then no shared intent existed, and the child's habitual residence would remain in Mexico. Further, the court found that mother's agreement allowing the child to enter the United States was conditioned upon mother's ability to reunite with the family. Hence, mother did not consent to the child's acquisition of a new habitual residence within the meaning of Article 12.

Following its decision in *Mota v. Castillo*, the Second Circuit ruled in *Hofmann v. Sender*[441] that an agreed-on family relocation to New York failed to establish a new habitual residence because the father's consent to the removal of the children was contingent upon his living in the United States with mother and the children as an intact family. Pursuant to this plan, the mother and children relocated from Montreal to New York while father made preparations for a later move. Subsequent events, including mother's filing for a divorce in New York, precluded the implementation of the parent's plan to move as a family to New York. Accordingly, the district court found that the parties last shared intent was that the children remain habitually resident in Montreal.[442] The district court's order that the children be returned to Canada was affirmed.

In *Sanchez-Londono v. Gonzalez*,[443] the First Circuit held that a mother's inability to gain re-entry into the United States to join with the child and her father did not alter the parents' last shared intent that the child's habitual residence was in the United States. Pursuant to her agreement with the child's father, mother moved with the child from the United States to Colombia hoping that she would have a better chance of gaining legal admission to the United States from her native country. After moving to Colombia with the child, mother found that she was not able to obtain permission to enter the United States. After living in Colombia with the child for two-and-a-half

441. 716 F.3d 282 (2d Cir. 2013).
442. *Id.* at 292.
443. 752 F.3d 533 (1st Cir. 2014).

years, mother consented to the child's return to the United States. The return of the child was based on mother's hope that the child's presence in the United States would provide renewed grounds for mother's legal entry. Almost two years later, still unable to secure legal entry into the United States, mother petitioned for the return of the child to Colombia. The First Circuit affirmed the trial court's finding that the parents shared the intent that the United States was the child's habitual residence and subsequent barriers to mother's re-entry into the United States did not change that fact.

In *Bowen v. Bowen*,[444] the court found that a mother who allowed her son to relocate with his father from Ireland to the United States consented and acquiesced in the child's removal, even though the child relocated pursuant to a plan for the entire family to move to the United States. The parents and their three children lived primarily in Northern Ireland but mutually agreed to relocate to the United States with all three children. Mother purchased five one-way tickets to the United States. When it appeared that mother was encountering visa problems, she agreed that father would relocate to the United States with the eldest child, and mother and the other two children would join them later. When mother learned that she was subject to a ten-year ban on re-entry into the United States, she decided to remain in Northern Ireland. When father refused to return the eldest child to Northern Ireland, mother petitioned for the child's return. Although the trial court found that Northern Ireland was the child's habitual residence, it sustained father's defense that mother consented and acquiesced in the child's removal. Accordingly, mother's petition for return of the child was denied.[445]

D. Failure to Exercise Rights of Custody

The exercise of custody rights arises in two contexts under the Convention. Under Article 3(b), a party petitioning for return must make a preliminary showing that he or she was exercising custody rights be-

444. 2014 WL 2154905 (W.D. Pa. 2014).
445. *Id.* at 8–10.

fore the removal of the child.[446] Article 13(a) discusses the exercise of custody rights as an affirmative defense that must be established by a preponderance of the evidence; that is, the party resisting return may assert the affirmative defense that "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention."[447] This affirmative defense must be established by a preponderance of the evidence.

If the family was intact prior to the wrongful removal or retention, the exercise of custody rights is clear.[448] Similarly, where one parent has sole custody of the child, the exercise of custody rights by that parent is easily shown.[449] A parent need not have constant physical custody and control of a child in order to be exercising his or her rights; a parent may place a child with another party, such as a grandparent. This, in and of itself, may constitute the exercise of custody rights.[450]

Friedrich II outlined the requirements for the defense of failure to exercise custodial rights:

> Enforcement of the Convention should not to be made dependent on the creation of a common law definition of "exercise." The only acceptable solution, in the absence of a ruling from a court in the

---

446. See discussion of exercise of custody right as part of the case in chief *supra* at page 24.

447. Convention, *supra* note 11, Article 13(a).

448. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067, 1085 (9th Cir. 2001); Jenkins v. Jenkins, 569 F.3d 549 (6th Cir. 2009); Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996).

449. *See, e.g.*, Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007) (allowing custody rights for mother with sole custody who sent child to live with father while mother was undergoing medical treatment and kept contact with child as her medical condition permitted); *see also* Morrison v. Dietz, No. 07-1398, 2008 WL 4280030 (W.D. La. 2008) (unreported disposition) (children taken from mother who was their primary custodian by virtue of Mexican divorce decree).

450. *See, e.g.*, *Text & Legal Analysis*, *supra* note 73; *see also* Sampson v. Sampson, 975 P.2d 1211, 267 Kan. 175 (1999) (finding the exercise of custody rights where father placed children with his parents, supported children, and visited them on weekends).

> country of habitual residence, is to liberally find "exercise" whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.
>
> • • •
>
> We therefore hold that, if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. (footnote omitted) Once it determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts.[451]

Both state and federal courts have uniformly accepted *Friedrich II*'s analysis of this issue.

E. Grave Risk of Harm—Intolerable Situation

Under Article 13(b) of the Convention, a court may refuse to return a child if it finds 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." This defense must be proved by clear and convincing evidence.[452] A determination of grave risk is a mixed question of fact and law, and courts will use a de novo standard of review.[453]

---

451. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1065–66 (6th Cir. 1996).

452. 22 U.S.C. § 9003(e)(2)(A) provides: "In the case of an action for the return of a child, 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."

453. Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013), citing Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 896 (8th Cir. 2003); Baran v. Beaty, 526 F.3d 1340, 1342 (11th Cir. 2008); Norinder v. Fuentes, 657 F.3d 526 (7th Cir. 2011); Cuellar v. Joyce (*Cuellar I*), 596 F.3d 505, 509 (9th Cir. 2010); Simcox v. Simcox, 511 F.3d 594

As with the previous defenses, even if the grave risk defense is established, the court is not required to deny the petition,[454] and the court may exercise its discretion to order the child returned.[455]

1. Defining Grave Risk and Intolerable Situation

The language used in Article 13(b) was chosen carefully and was meant to exclude the type of evidence that is typical to a determination of the merits of a custody case.[456] Article 13(b) does not apply to "value judgment" evidence relating to economic conditions, educational benefits, lifestyles, or disparate quality of parenting styles.[457] As a result, evidence focusing on the child's "best interests" or a choice between parents is not relevant.

(6th Cir. 2007); Blondin v. Dubois (*Blondin II*), 238 F.3d 153 (2d Cir. 2001); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000); *In re* Marriage of Eaddy, 144 Cal. Rptr. 4th 1202, 1212 (Cal. Ct. App. 2006).

454. "Most experts reported that in their jurisdictions Article 13(b) is given a very narrow interpretation and that therefore few defences based upon this argument are successful." The American Society of International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 I.L.M. 225, 241, 1994 WL 327559 (1994).

455. The *Pérez-Vera Report* explains at paragraph 113: "In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion—and does not impose upon them a duty—to refuse to return a child in certain circumstances." *See also Text & Legal Analysis*, 51 Fed. Reg. at 10,510 ("Under Article 13(b), a court in its discretion need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation.").

456. "Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered." *Pérez-Vera Report, supra* note 19, ¶ 116.

457. *See, e.g.*, Cuellar v. Joyce (*Cuellar I*), 596 F.3d 505, 509 (9th Cir. 2010). The court noted that the district court had denied return on the basis that the child would suffer psychological harm if separated from her father. The court stated: "This was a very serious error. The fact that a child has grown accustomed to her new home is never a valid concern under the grave risk exception, as 'it is the *abduction* that causes the pangs of subsequent return'" (citations omitted). *Id.* at 511.

The term "grave" means "more than a serious risk."[458] The situation contemplated by Article 13(b) would include sending a child back to a "zone of war, famine, or disease" as well as "cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[459] However, grave risk is not based on poverty or conditions less favorable than what others may consider a minimum standard of living. In *Cuellar v. Joyce*, father was unsuccessful in convincing the court that living in a home without running water or indoor plumbing constituted a grave risk. The court noted that

> Billions of people live in circumstances similar to those described by [father]. If that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living. At the time the Convention was adopted, the State Department took care to emphasize that grave risk doesn't "encompass . . . a home where money is in short supply, or where educational or other opportunities are more limited."[460]

It is universally accepted that the "grave risk" defense is subject to narrow interpretation. Even when a grave risk defense is proven, the court retains discretion to order the child's return with appropriately crafted undertakings or conditions. (See discussion *supra* beginning at page 137.) But two circuits have cautioned that in situations involving grave risk, "the safety of children is paramount."[461]

In *Nunez-Escudero v. Tice-Menley*, the court relied on language from a Canadian Supreme Court case:

---

458. *See, e.g.*, Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 14 (1st Cir. 2002).

459. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1069 (6th Cir. 1996) (indicating that an intolerable situation would also arise if a parent sexually abuses a child).

460. *Cuellar*, 596 F.3d at 509 (citing 51 Fed. Reg. 10494, 10510 (1986)).

461. *See* Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007) (quoting Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005)).

> [T]he word "grave" modifies "risk" and not "harm," this must be read in conjunction with the clause "*or otherwise* place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation.[462]

However, the Eleventh Circuit, in *Baran v. Beaty*,[463] declined to follow the dicta of *Friedrich II* that courts have a duty to assess the ability of the habitual residence to protect a child from harm.[464] The *Baran* court noted that the history surrounding the adoption of the Convention failed to discuss such a condition. Although *Baran* did not prohibit courts from considering this evidence, it held that the parent requesting return had no duty to present such evidence.[465]

A majority of courts have declined to find grave risk when the abducting parent claims that an order of return will, by separating the child and the abductor, result in psychological damage to the child.[466]

Courts have defined "intolerable situation" to include sexual or physical abuse of a child.[467] While the *Text & Legal Analysis* notes that

---

462. Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (citing Thomson v. Thomson, [1994] 3 S.C.R. 551, 119 D.L.R. 4th 253 (Can. S.C.C.)).

463. 526 F.3d 1340 (11th Cir. 2008).

464. *Accord* Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005); Blondin v. Dubois, 78 F. Supp. 2d 283, 297–98 (S.D.N.Y. 2000).

465. *Baran*, 526 F.3d at 1349.

466. *See, e.g.*, Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995); Norden-Powers v. Beveridge, 125 F. Supp. 2d 634 (E.D.N.Y. 2000); *Nunez-Escudero*, 58 F.3d 374; Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295 (D.P.R. 2004); Antunez-Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800 (N.D. Iowa 2003); *but see* Steffen F. v. Severina P., 966 F. Supp. 922 (D. Ariz. 1997) (holding that proof that a child's bond with parent would suffer if ordered returned may qualify as grave risk under Article 13).

467. *See, e.g.*, *In re* Application of Adan, 437 F.3d 381, 395 (3d Cir. 2006); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002); *see also* Neves v. Neves, 637 F. Supp. 2d 322 (W.D.N.C. 2009) (finding allegations that level of neo-Nazi activities in Germany, and racial prejudice against children, insufficient to rise to the level of an intolerable situation).

an "'intolerable situation' was not intended to encompass return to a home where money is in short supply,"[468] two recent district court cases have discussed whether return to a situation with desperate financial conditions involves an "intolerable situation."[469] Both cases determined that the financial situations in question did not rise to the level of an intolerable situation, but nevertheless imposed undertakings upon the children's return, requiring the petitioning parent to defray financial expenses until the matters could be heard in the courts of the habitual residence.[470]

2. Child Abuse

It is clear from the case law and legislative history of the Convention that abuse of a child—sexual, physical, or emotional—may form the basis of an Article 13(b) defense.[471] In *Danaipour I*,[472] mother alleged that the children had been subjected to sexual abuse by their father in Sweden. The district court deferred to the courts of Sweden the issue of whether the abuse actually occurred and ordered the children returned on the condition that there would be a full forensic evaluation. The First Circuit reversed, remanding the case to district court for a determination of whether the children had been subjected to sexual abuse. The court noted the duty of trial courts to determine whether the facts underlying an Article 13(b) claim are present:

> It is not a derogation of the authority of the habitual residence country for the receiving U.S. courts to adjudicate the grave risk question. Rather, it is their obligation to do so under the Convention and its enabling legislation. Generally speaking, where a party makes a sub-

468. *Text & Legal Analysis*, *supra* note 73, at 10,510.

469. *See* Krefter v. Wills, 623 F. Supp. 2d 125 (D. Mass. 2009); Wilchynski v. Wilchynski, No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. 2010).

470. There is a question whether "undertakings" may be imposed where there is no finding of an Article 13(b) defense. See discussion *infra* beginning at page 109.

471. *Text & Legal Analysis*, *supra* note 73, at 10,510; *Pérez-Vera Report*, *supra* note 19, ¶ 2; Baran v. Beaty, 526 F.3d 1340, 1352 (11th Cir. 2008); *Danaipour I*, 286 F.3d at 15.

472. *Danaipour I*, 286 F.3d at 25–26.

> stantial allegation that, if true, would justify application of the Article 13(b) exception, the court should make the necessary predicate findings.[473]

Some courts have ordered the return of children who were subjected to abuse upon the acceptance of "undertakings" from the parent requesting return. For a discussion of undertakings, see *infra* page 137.

3. Domestic Violence

Domestic violence has been recognized as a defense pursuant to Article 13(b) that may justify a refusal to return children.[474] Some courts have allowed the defense even if the children involved were not themselves subjected to physical abuse,[475] while others have ruled that the defense is not available if the children were not the direct victims of abuse[476] or the abuse did not seriously endanger the child.[477]

"Domestic violence" is an all-inclusive term, including physical, emotional, and psychological abuse. It produces a spectrum that involves minor and isolated incidents on one end and high degrees of lethality and death on the other. In terms of Article 13(b), domestic violence may point to clear and convincing evidence that the return of a child would subject the child to a grave risk of harm or place the child in an intolerable situation; but evidence of domestic violence is not automatically dispositive. In order to bring some clarity to this

---

473. *Id.* at 18.

474. *See, e.g.*, *Walsh*, 221 F.3d 204; Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000); Blondin v. Dubois (*Blondin I*), 189 F.3d 240 (2d Cir. 1999); *In re* Application of Adan, 437 F.3d 381 (3d Cir. 2006); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005); *Baran*, 526 F.3d 1340.

475. *See, e.g.*, Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010); *see also Walsh*, 221 F.3d 204. The abuse of a parent can qualify as an Article 13(b) defense, even though the child was not physically abused.

476. *See, e.g.*, *Whallon*, 230 F.3d at 460; McManus v. McManus, 354 F. Supp. 2d 62 (D. Mass. 2005); Aldinger v. Segler, 263 F. Supp. 2d 284, 289 (D.P.R. 2003).

477. See *Souratgar v. Lee*, 720 F.3d 96, 103–04 (2d Cir. 2013), and cases cited therein acknowledging that prior abuse that was not directed toward the child may still be the basis for a 13(b) defense.

spectrum, the Sixth Circuit in *Simcox v. Simcox*[478] sought to categorize the levels of domestic violence and their importance in the Article 13(b) analysis:

> 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. (footnote omitted) 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. (citations omitted) 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. Consequently, unless "the rendering court [can] satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody," (citation omitted) the court should refuse to grant the petition. 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.[479]

The facts of *Walsh v. Walsh*[480] set forth a series of concerns that resulted in the First Circuit denying return.[481] The district court or-

---

478. *Simcox*, 511 F.3d 594.

479. *Id.* at 607–08. The *Simcox* method of analysis was recognized and followed in *Maurizio R. v. L.C.*, 201 Cal. App. 4th 616 (2011).

480. 221 F.3d 204 (1st Cir. 2000).

dered the children returned to Ireland, finding that there was no "immediate, serious threat" to the safety of the children that could not be dealt with by Irish authorities. The First Circuit reversed, finding that under Article 13(b) a risk only needed to be grave, not immediate. The court of appeals concluded that in light of father's persistent disobedience of authority—absconding from criminal charges in the United States and disobeying restraining orders and barring orders[482]—it was unlikely that he would adhere to any undertakings that a court might impose as a condition of return of the children. The court remanded the case with instructions to dismiss father's petition.[483]

Similarly, in *Acosta v. Acosta*,[484] the father had a violent temper and had abused the mother in the presence of the children. On one occasion he attacked the children's mother in the presence of Peruvian police. He also attacked mother's friends who accompanied her to gather her belongings in preparation for her move to the United States. In affirming the district court's denial of father's petition for return, the Eighth Circuit found that the children were at a high risk of abuse in the future, and that proposed undertakings were insufficient to ameliorate the threat of harm to the children.[485]

---

481. In *Walsh*, father was a serial abuser who absconded to Ireland after he was criminally charged for breaking and entering and for making threats to kill a neighbor. Mother, pregnant with a second child, followed the father to Ireland with their child. A profound history of subsequent abuse occurred over the following four years, consisting of numerous beatings and instances of physical and emotional abuse. The abuse continued despite protection orders and orders barring father from the family residence. Mother surreptitiously returned with the children to the United States. Although the abuse was directed toward the children's mother, and the children themselves were not physically abused, the parties' oldest child was diagnosed with Post Traumatic Stress Disorder (PTSD). Although this condition was in remission at the time of the trial, the child's therapist felt that if the child were returned to Ireland, that she would relapse.

482. A barring order is one that prohibits the restrained person from inhabiting or entering a home.

483. *Walsh*, 221 F.3d at 222.

484. 725 F.3d 868 (8th Cir. 2013).

485. *Id.* at 877.

Taylor v. Taylor[486] is a unique case where the Eleventh Circuit upheld the district court's determination that an Article 13(b) defense had been proven because of the combined threats against the mother from father himself and from unknown third parties. The court conceded that the child had been wrongfully removed by mother from the United Kingdom. However, the trial court further found that father was involved in fraudulent activities that precipitated the threats from unknown third parties to the entire family, and combined with father's direct threats to the mother and his continued participation in fraudulent activities, the grave risk of harm existed, precluding an order of return to the United Kingdom.

F. Violations of Human Rights and Fundamental Freedoms

Article 20 of the Convention provides:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

This provision was intended to address "the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[487] A claim under this provision first must be assessed in the context of the country where the child currently resides. That is, if a child in the United States is the subject of a return application, U.S. values regarding human rights and fundamental freedoms are the measure by which the facts are judged. In addition, those "fundamental principles" must be applied without discrimination in the requested state.

---

486. 502 F. App'x 854 (11th Cir. 2012).

487. *Text & Legal Analysis*, *supra* note 73.

As a practical matter, defenses mounted on the basis of an Article 20 violation are rare, and those raised in the United States have not been successful.[488]

In *Souratgar v. Lee*,[489] father petitioned for the return of his child from New York to Singapore. While custody proceedings in the Singapore High Court were pending, both parents agreed that they would have custody decided by the Syariah court[490] in Singapore. Despite this agreement, mother opposed the return, inter alia, on grounds that the Syariah courts in Singapore are incompatible with the provisions of Article 20 that relate to the "protection of human rights and fundamental freedoms."

Mother presented expert testimony that (1) a woman's testimony may be entitled to less weight than a man's testimony; (2) that certain presumptions in Islamic law favored fathers over mothers in custody determinations, and (3) Islamic law favored Muslims over non-Muslims. The circuit court found that mother had made an insufficient showing that the custody matter would be decided by a Syariah court, noting that while divorces between persons of the Muslim faith are required to be brought in Syariah court, any party may request leave to have custody matters determined by the Singapore secular

---

488. *See, e.g.*, Aldinger v. Segler, 263 F. Supp. 2d 284 (D.P.R. 2003) (no evidence of violation of Article 20); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M.D. Fla. 2002) (economic crisis does not amount to Article 20 violation); Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603 (E.D. Va. 2002) (family law procedures); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (police and court system); Caro v. Sher, 687 A.2d 354, 296 N.J. Super. 594 (Super. Ct. Ch. Div. 1996) (delays in Spanish court system); Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) (restraining order compelled mother to remain until divorce settled); Sewald v. Reisinger, No. 8:08-CV-2313-JDW-TBM, 2009 WL 150856 (M.D. Fla. 2009) (unreported disposition) (ex parte ruling entered without notice); *In re* Hague Child Abduction Application, No. 08-2030-CM, 2008 WL 913325 (D. Kan. 2008) (unreported disposition); McCubbin v. McCubbin, No. 06-4110-CV-C-NKL, 2006 WL 1797922 (W.D. Mo. 2006) (unreported disposition).

489. 720 F.3d 96 (2d Cir. 2013).

490. A Syariah court is one that implements Sharia law to persons of the Muslim faith.

courts. The court dismissed mother's Article 20 claim on two grounds. First, the court declined to find that the presence of a Syariah Court in Singapore is per se violative of the provisions of Article 20. Second, comity among nations signatory to the 1980 Convention is necessary for the successful operation of the Convention by protecting children wrongfully brought to the United States as well as children who are wrongfully taken from the United States. Where the Convention is in force between nations, it is presumed that foreign courts will be trusted to exercise the same concerns for safeguarding children as courts in the United States.[491]

In *Carrascosa v. McGuire*,[492] the parties, both represented by counsel, signed a "parenting agreement." This agreement prohibited either parent from traveling outside the United States with the child without the other parent's written permission. Although the parties did not seek to make the agreement a court order, the agreement was valid and enforceable under New Jersey law. In Spain, mother filed an action to annul her marriage while father filed a divorce action in New Jersey. Shortly thereafter, mother removed the child to Spain. In response to the removal of the child, the New Jersey court awarded custody of the child to father and ordered mother to return the child to the United States. Father thereafter filed a Hague Convention return case in Spain. The Spanish courts denied father's Hague application and entered an order that the child was not to be removed from Spain until her eighteenth birthday. Mother was subsequently ordered by the New Jersey court to appear with the child, which she failed to do. A warrant was issued for her arrest, resulting in her apprehension and incarceration. She continued to refuse to produce the child in New Jersey. Mother's petition for writ of habeas corpus in district court was denied and the denial was appealed to the Third Circuit.

The Third Circuit found that the Spanish courts committed several errors in denying father's Hague case: The Spanish court made custody

491. *Souratgar*, 720 F.3d 96, citing Blondin v. Dubois (*Blondin I*), 189 F.3d 240, 242, 248–49 (2d Cir. 1999).

492. 520 F.3d 249 (3d Cir. 2008).

determinations in direct violation of the Hague Convention; the court failed to consider father's custody rights under New Jersey law; it wrongly applied Spanish law to the parenting agreement that was valid under New Jersey law; and the Spanish court found that the parenting agreement violated a Spanish citizen's right to travel and thus violated Article 20 of the Hague Convention. The Third Circuit refused to grant comity to the Spanish order denying father's Hague Convention case finding that the errors committed by the Spanish courts were sufficient grounds for declining enforcement of the Spanish judgments. The denial of mother's writ of habeas corpus was affirmed.

G. Child's Objection to Return

Article 13 (in an unnumbered paragraph) recognizes that a child may object to being returned:

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The child's objection to return is sometimes referred to as the "age and maturity defense,"[493] and sometimes as the "wishes of the child" exception.[494] Note that labeling the exception in terms of the "child's wishes" may give rise to a skewed opinion of the essence of the exception. Consideration of children's wishes in the context of a child custody case may be appropriate. However, "wishes" do not rise to the level envisioned by this exception. In *Hirst v. Tiberghien*[495] the court pointed out that

> [T]he court must distinguish between a child's objections as defined by the Hague Convention and the child's wishes as in a typical child

493. *E.g.*, Felder v. Wetzel, 696 F.3d 92, 101 (1st Cir. 2012); *Larbie*, 690 F.3d 295, 306 (5th Cir. 2012).

494. Yang v. Tsui (*Yang II*), 499 F.3d 259, 265 (3d Cir. 2007); *Bowen*, 2014 WL 2154905 (W.D. Pa. 2014).

495. 947 F. Supp. 2d 578 (D.S.C. 2013).

> custody case, the former being a "stronger and more restrictive" standard than the latter. (citation omitted). Where the particularized objection is "born of rational comparison" between a child's life in the country of wrongful retention and the country of habitual residence, the court may consider the child's objections to be a mature objection worthy of consideration. See *Castillo v. Castillo*, 597 F. Supp. 2d 432, 441 (D. Del. 2009). The defense does not apply if the "objection is simply that the child wishes to remain with the abductor." Application of *Nicholson v. Nicholson*, 97–1273–JTM, 1997 WL 446432 (D. Kan. July 7, 1997); . . . Giving consideration to such wishes would place the court in the position of deciding custody, which is explicitly not the mandate of a court hearing a wrongful retention case under the Hague Convention.[496]

The party opposing the child's return must prove this defense by a preponderance of the evidence.[497] The objection of a child of sufficient age and maturity may form the sole basis for denying that child's return.[498] However, the child's objection to return does not amount to a veto power. The language of this exception to return is permissive, allowing court discretion to disregard a child's objection, even if his or her age and level of maturity supports consideration of that objection.[499]

If the child's objection is the sole basis for challenging return, courts apply a stricter standard when evaluating the child's opinion than when considering the child's testimony as part of a broader anal-

---

496. *Id.* at 597.

497. *See, e.g.*, England v. England, 234 F.3d 268, 272 (5th Cir. 2000); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008); Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008); 22 U.S.C. § 9001(a)(4) (1988).

498. *See, e.g.*, Blondin v. Dubois (*Blondin II*), 238 F.3d 153, 166 (2d Cir. 2001) ("We agree with the government that the unnumbered provision of Article 13 provides a *separate* ground for repatriation and that, under this provision, a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child.").

499. *Text & Legal Analysis*, *supra* note 73, at 10,510.

ysis of other issues in the case.[500] Article 13 must be construed narrowly.[501] A child's objection is not tantamount to "the wishes of the child." While the wishes or desires of a child may be appropriate for a court to consider in a custody case, they are not relevant in a Hague return case.[502]

A finding "of sufficient age and maturity" under Article 13 is a two-step process. First, the court assesses whether the child is sufficiently mature. Then, the court must determine if the child should be returned despite his or her objection.[503] Factors may exist that counterbalance the objections of a mature child. A court should consider

---

500. *See, e.g.*, *Blondin II*, 238 F.3d at 166. In *Blondin II*, the child was too young for the court to accept her objections to return to France. However, her opinions were properly considered as part of an Article 13(b) defense. *See also* de Silva v. Pitts, 481 F.3d 1279, 1285 (10th Cir. 2007).

501. *See, e.g.*, Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007); *England*, 234 F.3d at 272; Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010).

502. "The Hague Convention also provides a limited opportunity for the child to be heard provided it has obtained an 'age and degree of maturity' at which it is appropriate to take its views into account. But a main intention of this article was to draw a clear distinction between a child's objections, as defined in the article, and a child's wishes as commonly expressed in a custody case. This is logical, given that the Convention is not intended as an instrument to resolve custody disputes per se. It follows, therefore, that the notion of 'objections' under Article 13b is far stronger and more restrictive than that of 'wishes' in a custody case." Morrison v. Dietz, No. 07-1398, 2008 WL 4280030, p. 12 (W.D. La. 2008) (unreported disposition) (quoting Response to International Parental Kidnapping: Hearing Before the S. Comm. on Criminal Justice Oversight, 106th Cong. (1999) (statement of Catherine L. Meyer, British Embassy Co-Chair of the International Centre for Missing & Exploited Children)).

503. *See, e.g.*, Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295, 298 (D.P.R. 2004) (holding where child was found to be articulate and mature enough to express objection to return, child's objection was not conclusive given the narrow interpretation to be given to the exception); Matovski v. Matovski, No. 06 Civ. 4259(PKC), 2007 WL 2600862 (S.D.N.Y. 2007) (unreported disposition) (declining use of discretion to overrule children where court finds children's objections valid and considers return in spite of objection); Barrera Casimiro v. Pineda Chavez, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. 2006) (using discretion to overrule child's objection to return).

those factors and exercise its discretion in light of all available evidence.[504]

The *Text & Legal Analysis* cautions: "A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child."[505] Undue influence need not be the result of deliberate attempts to influence the child, but may arise from the circumstances surrounding the child's wrongful retention.[506]

The standard for review of a determination regarding a child's objections to return is based on the conclusion that such an inquiry is a factual issue.[507]

1. Age and Maturity

The court must make a factual determination of whether a child is of sufficient age and maturity to express a meaningful opinion. Courts of appeal accord deference to the discretion of the district court and will set aside a factual finding only upon a showing of clear error.[508] Given

504. *See, e.g.*, *de Silva*, 481 F.3d at 1285; Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (ordering child returned); *Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 2600862 (considering objections valid and exercising discretion, but ultimately declining to order return); *Barrera Casimiro*, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (exercising discretion to order return despite mature objection to return).

505. *Text & Legal Analysis*, *supra* note 73, at 10,510. *See also* Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603 (E.D. Va. 2002) (finding thirteen-year-old's objection was not strongly stated and appeared to be the product of suggestion of parent).

506. *See, e.g.*, *Yang II*, 499 F.3d at 280.

507. *Blondin II*, 238 F.3d 153 (2d Cir. 2001); Escobar v. Flores, 183 Cal. App. 4th 737 (2010).

508. *See, e.g.*, Simcox v. Simcox, 511 F.3d 594, 603 (6th Cir. 2007). *But see* England v. England, 234 F.3d 268, 272–73 (5th Cir. 2000) (reversing district court's order for child's return based on wishes of fourteen-year-old child with ADD, learning disabilities, and successive foster mothers, and who is on medication and is scared and confused by litigation). *Accord* Vasconcelos v. Batista, 512 F. App'x 403, 405 (5th Cir. 2013) ("Whether the child has reached an appropriate age and degree of maturity is a factual determination and thus subject to clear error review."); *Escobar*, 183 Cal. App.

the broad range of combinations of age and degree of maturity, it is difficult to generalize as to what age a child is presumptively able to express a mature opinion. Efforts to create a tipping point based on age alone have been criticized.[509] Courts have found the opinions of children as young as eight years old to be sufficiently mature,[510] whereas other courts have found the opinions of fourteen- and fifteen-year-olds failed to meet this standard.[511]

The *Pérez-Vera Report* observes that "it would be very difficult to accept that a fifteen-year-old child should be returned against its will."[512] The foregoing passage was noted in *Felder v. Wetzel*,[513] where the court remanded the case to the district court to consider the objections of a fifteen-year old girl, but also pointed out that "[n]o part of the Hague Convention requires a court to allow the child to testify or

---

4th 737 (court finds eight year old sufficiently mature to express reasoned objection to return).

509. *See* Tahan v. Duquette, 613 A.2d 486, 259 N.J. Super. 328 (Super. Ct. App. Div. 1992) (finding nine years old to be too young to consider at all); *cf.* Ngassa v. Mpafe, 488 F. Supp. 2d 514 (D. Md. 2007) (declining to speak directly to seven-year-old child); Grijalva v. Escayola, No. 2:06-cv-569-FtM-29DNF, 2006 WL 3827539, p. 4 (M.D. Fla. 2006) (unreported disposition) (finding that children, ages seven and four, were not mature enough for court to take into account their views).

510. *See, e.g.*, Anderson v. Acree, 250 F. Supp. 2d 876 (S.D. Ohio 2002); Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953, 957–58 (E.D. Mich. 2001) (ordering psychological examination to determine degree of maturity of eight year old); *cf.* Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (not allowing an eight year old to testify). *See also* Bonilla-Ruiz v. Bonilla, 2004 WL 2883247 (unreported disposition) (Mich. App. 2004) (eight-year-old child sufficiently mature).

511. *See England*, 234 F.3d at 272–73 (finding fourteen-year-old child did not meet standard); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (returning a fifteen-and-a-half year old despite objection); Barrera Casimiro v. Pineda Chavez, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. 2006) (unreported disposition) (finding fifteen year old failed to appreciate her immigration status as an incident of her nonreturn).

512. *Pérez-Vera Report*, *supra* note 19, ¶ 30.

513. 696 F.3d 92 (1st Cir. 2012).

to credit the child's views, so the decision rests within the sound discretion of the trial court."[514]

2. Manner of Hearing Child's Objection

In cases considering Article 13 objections, judges have adopted four procedures for receiving evidence of a child's objection:[515] (1) allowing the child to testify in court in an evidentiary hearing;[516] (2) interviewing the child in camera;[517] (3) requesting a psychological evaluation of the child;[518] and (4) appointing an attorney[519] or guardian ad litem[520] for the child. Courts have used all four of these methods, but the majority have employed in camera interview of the child.[521]

---

514. Citing *Kufner*, 519 F.3d at 40. In *Felder*, the court was faced with a mother's petition for the return of her daughter. The daughter was hospitalized in the United States because she was in need of psychiatric care as evidenced by her ingesting pills in an attempt to harm herself.

515. *See* James D. Garbolino, International Child Custody: Handling Hague Convention Cases in U.S. Courts (National Judicial College 2000).

516. *See, e.g.*, *In re* Skrodzki, 642 F. Supp. 2d 108 (E.D.N.Y. 2007) (submitting declaration of child); McManus v. McManus, 354 F. Supp. 2d 62 (D. Mass. 2005) (allowing children to testify at trial).

517. Vasconcelos v. Batista, 512 F. App'x 403 (5th Cir. 2013); *Escobar*, 183 Cal. App. 4th at 743 (child interviewed in chambers with attorneys for the parties, bailiff, court clerk, and court reporter).

518. *See, e.g.*, *McManus*, 354 F. Supp. 2d 62 (appointing a psychologist); *Raijmakers-Eghaghe*, 131 F. Supp. 2d 953 (ordering psychological report regarding wishes of eight year old).

519. *See, e.g.*, Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009) (appointing attorney to meet with child and to determine issue of maturity); Raveras v. Morales, 22 F. Supp. 3d 219 (S.D.N.Y. 2014).

520. *See, e.g.*, Diaz Arboleda v. Arenas, 311 F. Supp. 2d 336 (E.D.N.Y. 2004); San Martín v. Moquillaza, 2014 WL 3924646 (E.D. Tex. 2014) (unreported disposition) (Magistrate judge appointed attorney ad litem to interview the children, nine and twelve; magistrate judge interviewed the children separately, in chambers, with attorney ad litem present. *Id.* at 7.).

521. *See, e.g.*, de Silva v. Pitts, 481 F.3d 1279 (10th Cir. 2007); Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008); *Diaz Arboleda*, 311 F. Supp. 2d 336; Andreopoulos v. Nickolaos Koutroulos,

3. Generalized Desires Versus Particularized Reasons

Courts have distinguished between a child's objections to return that are expressed as "generalized desires" as opposed to articulable reasons supporting those objections. In *Yang v. Tsui (Yang II)*,[522] the district court refused to sustain the child's desire to remain in the United States on the basis that (1) the child had no particularized objection to returning to Canada, and (2) the child lacked sufficient age and maturity for her view to be considered. The Third Circuit affirmed the district court's findings on this issue and held that the district court appropriately considered that the child's desire to remain in the United States was the result of attachments made by the child while wrongfully retained. The Third Circuit commented that

> If the District Court applied the exception in this case, it would encourage parents to wrongfully retain a child for as long as possible. A lengthy wrongful retention could enable the child to become comfortable in his or her new surroundings, which may create a desire to remain in his or her new home. The application of the exception in this case would reward [father] for violating [mother's] custody rights, and defeat the purposes of the Convention.[523]

Acknowledging the cautionary language of *Yang II*, the court in *Bowen*[524] sustained the objections of a ten-year old to a return to Ireland. The child's articulated reasons for objecting to return were that he was born in the United States, he was more attached to his father than his mother, that he would be sad to return to Ireland, and the racial mix in the United States was different than that in Ireland. The child also acknowledged that he was sad that he would not be living

---

No. 09-cv-00996-WTD-KMT, 2009 WL 1850928 (D. Colo. 2009); Laguna v. Avila, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. 2008); Di Giuseppe v. Di Giuseppe, No. 07-CV-15240, 2008 WL 1743079 (E.D. Mich. 2008); McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. 2007); Kofler v. Kofler, No. 07-5040, 2007 WL 2081712 (W.D. Ark. 2007) (unreported disposition); Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007).

522. 499 F.3d 259 (3d Cir. 2007).

523. *Id.* at 280.

524. 2014 WL 2154905 (W.D. Pa. 2014).

with his mother and siblings, but nevertheless was firm in his desire to remain in the United States. The court found that the child exhibited a "marked sense of maturity," and found no evidence to suggest that the passage of time influenced the child's objection to return.[525]

In *de Silva v. Pitts*,[526] the Tenth Circuit allowed the child to remain in the United States rather than compelling his return to Canada. The thirteen-year-old boy gave specific reasons for wishing to remain in the United States, including his participation in sports, his opinion of his school, and the fact that he had "everything he needs for school."[527] The child voiced no particularized objections to returning to Canada.

4. Children's Standing to Intervene on Their Own Behalf

In *Sanchez v. R.G.L.*,[528] three Mexican children were brought into the United States by relatives without consent of the child's mother. Upon mother's demand for return of the children to her in Ciudad Juarez, Chihuahua, the relatives escorted the children to the border. The children were detained by Homeland Security when they objected to returning to Mexico out of fear of mother's boyfriend who they described as a gang member, drug trafficker, and child abuser. The children were placed in the custody of the U.S. Office of Refugee Resettlement (ORR). ORR placed the children with Baptist Services, and that organization placed the children in a foster home in San Antonio. ORR commenced legal proceedings for the children's removal and counsel was appointed to represent them in the deportation proceedings. Counsel for the children also commenced proceedings for a grant of asylum for the children. Almost a year later, mother petitioned for return of the children in the U.S. District Court for Western Texas. The relatives were named as respondents as well as the private agency responsible for the children's foster placement. At the hearing on mother's petition, the relatives who had taken the children did not appear. The agency placing the children in foster care appeared but

525. *Id.* at 16.
526. 481 F.3d 1279 (10th Cir. 2007).
527. *Id.* at 1287.
528. 761 F.3d 495 (5th Cir. 2014).

did not take a position on whether the mother's petition should or should not be granted. The district court ordered the children's return. The children appealed.

The Fifth Circuit found that the children had standing to appeal. The court followed the three-part test for standing set forth in *SEC v. Forex Asset Managment LLC*.[529] The factors are (1) "whether the non-party actually participated in the proceedings below"; (2) whether "the equities weigh in favor of hearing the appeal"; and (3) whether "the non-party has a personal stake in the outcome."[530] The attorney representing the children in deportation proceedings appeared and played an active role in the Convention proceeding. No one else meaningfully opposed mother's petition for return. The court further found that the equities and the children's personal stake in the outcome of the case weighed heavily in their favor.

The court found that no respondent was making an effort to represent the interests of the children. As a consequence, and citing Rule 17(c)(2),[531] the court ordered the appointment of a guardian ad litem on remand. The court declined, however, to order the children leave to intervene on their own behalf, given that their rights could be adequately asserted by their guardian ad litem.

529. 242 F.3d 325, 329 (5th Cir. 2001).

530. *Id.* at 502.

531. "A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2).

H. The Effect of Asylum Proceedings

An order compelling the return of a child is not trumped by a grant of asylum. While in foster care, the three children in *Sanchez v. R.G.L.*,[532] *supra*, applied for asylum. After trial on the mother's petition, the district court ordered the children returned to Mexico, but stayed the order pending appeal. Pending the appeal, the children were granted discretionary asylum in the United States.

The Fifth Circuit remanded the case to the district court to consider the grant of asylum on the children's "grave risk" defense under Article 13(b). The court noted that when a discretionary grant of asylum is made, that order is binding on the Attorney General of the United States and the Secretary of Homeland Security. However, grants of asylum do not supersede the enforceability of a court order made under the 1980 Convention. As such, the grant of asylum would not prevent the trial court from making an order of return.[533]

The grant of asylum, however, may be relevant to proceedings under the Convention as it may relate to defenses set forth in Articles 13(b) and 20.[534] *Sanchez* held that there was a "significant overlap" between prerequisites for granting asylum and a "grave risk" defense under Article 13(b).[535] The fact that asylum has been granted does not divest courts from independently determining whether an Article 13(b) defense has been proved. The Fifth Circuit remanded the case to the district court to, inter alia, "consider the asylum grants, assessments, and any related evidence not previously considered that relates to whether Article 13(b) or 20 applies."[536]

---

532. 761 F.3d 495 (5th Cir. 2014) (withdrawing previous opinion at 743 F.3d 945 (5th Cir. 2014)). *See* discussion *supra* § III.G.4.

533. *Id.* at 510.

534. *Id.*

535. *Id.*

536. *Id.* at 511.

I. Nonstatutory Defenses: Equitable Defenses

The Convention itself recognizes only those defenses set forth in Articles 12, 13, and 20. However, courts occasionally have considered the application of certain equitable principles in Hague return cases: waiver,[537] unclean hands, and fugitive disentitlement.

1. Waiver

The first U.S. case to accept a waiver defense was *Journe v. Journe*.[538] In *Journe*, the parties lived exclusively in France, where father commenced a divorce and custody action when the parties separated. Mother absconded with the children to Puerto Rico, alleging a history of spousal abuse. Some months later, father filed his Hague petition in Puerto Rico. After moving to Puerto Rico, mother voluntarily appeared in the French custody action and opposed father's request for custody of the children. Father then dismissed his French divorce action. Objecting to father's petition for return, mother argued that father's dismissal of the very action in which custody would be decided indicated he intended to have the children returned to relitigate the issue of custody—a claim he earlier withdrew. In essence, mother argued that father was attempting to get a "second bite at the apple." The district court agreed with the argument and declined to order the children returned.[539]

---

537. Courts should distinguish between a waiver of the right to proceed with a Convention case and a waiver of custody rights in connection with an Article 12 defense. Some decisions use the term "waiver" to indicate an abandonment of custody rights. *E.g.*, Nicolson v. Pappalardo, 605 F.3d 100, 107 (1st Cir. 2010). While the court in *Nicolson* referenced the holding in *Journe v. Journe*, 911 F. Supp. 43 (D.P.R. 1995), the court declined to find a waiver (acquiescence) of father's custody rights by signing of a temporary order in a domestic violence prevention case, providing that mother had rights of custody and father had limited visitation rights. *Nicolson*, 605 F.3d at 107.

538. 911 F. Supp. 43 (D.P.R. 1995).

539. The court in *Journe* found

> Dr. Journe's voluntary dismissal of his action for divorce and custody of the children acts as a waiver of his rights under the Convention. Throughout

The waiver argument was rejected in *Holder v. Holder* (*Holder I*)[540] where the Ninth Circuit held father did not waive his right to pursue a Hague claim because he contemporaneously filed an action for custody in a state court:

> This is not to say that a court, reviewing a Hague Convention Petition, could not consider as *one* of the circumstances that might indicate waiver the act of filing for custody in the jurisdiction to which a left-behind parent's children were removed. We hold that it is insufficient, however, to find an "uncoerced intent to relinquish" Hague Convention rights on this basis alone, because, as discussed above, filing for custody might simply indicate an intention to mitigate the litigation advantage that an abducting parent would obtain by wrongfully removing his or her children.[541]

Similarly, in *In re J.J.L.-P*,[542] a Texas court found that waiver did not apply where father, without knowledge of the existence of the 1980 Convention, filed an action for custody in Texas state court in response to mother's refusal to return the child to Mexico. Distinguishing the case from *Journe,* the court found that father did not knowledgeably waive his rights under the Convention, since his custody

---

this process, his petition to the French Central Authority was premised on the underlying action for divorce then pending before the French courts. His remedy under the Convention would put him in the same position he was on November 17, 1994. Once again, he would have his choice of a French forum to decide the custody issues under French law, as contemplated by the Convention. Given these circumstances, his voluntary dismissal of the action for divorce can only be characterized as indicative of an intent to relinquish his rights to have the custody issues decided by the courts of France (citation omitted). No other reasonable explanation of his conduct is possible. (footnote omitted). Having eschewed this opportunity to resolve the custody dispute in his native France, we hold that Dr. Journe has waived his right to pursue a claim under the Convention, and therefore dismiss the complaint in this case.

Id. at 48.

540. 305 F.3d 854 (9th Cir. 2002).

541. *Id.* at 873 n.7 (emphasis in original).

542. 256 S.W.3d 363 (Tex. App. 2008).

action in Texas was filed well before he returned to Mexico and learned of his rights under the Hague Convention.[543]

2. Unclean Hands

No U.S. cases have based a refusal to return a child on the doctrine of "unclean hands."[544] In *Karpenko v. Leendertz*,[545] the court declined to apply the equitable doctrine, concluding:

> [A]pplication of the unclean hands doctrine would undermine the Hague Convention's goal of protecting the well-being of the child, of restoring the status quo before the child's abduction, and of ensuring "that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, Art. 1(b).[546]

The court went on to note that child abductions occur in the context of strained relations between the parties, and both parties may be guilty of acts that compromise the custody rights of the other parent.

The doctrine has been raised in connection with requests for fee awards by successful Hague litigants. In *Saldivar v. Rodela*,[547] the court refused to apply the doctrine of "unclean hands" to defeat a successful petitioner's request for attorney fees. The court found that the conduct complained of had no relation to the wrongful removal of the child and would not operate as a bar to a fee award.[548]

In *Delgado-Ramirez v. Lopez*,[549] the court found that both petitioner and respondent had "unclean hands." The court questioned wheth-

---

543. *Id.* at 371.

544. *Cf.*, Von Wussow-Rowan v. Rowan, No. CIV.A.98-3641, 1998 WL 461843 (E.D. Pa. 1998) (where the court stated in dicta that "the 'clean hands' doctrine militates against granting the present application," where the only conduct involved by the petitioner (mother) was the abduction of the child to Switzerland, after which the father reabducted the child back to the United States).

545. 619 F.3d 259 (3d Cir. 2010).

546. *Id.* at 265.

547. 894 F. Supp. 2d 916 (W.D. Tex. 2012).

548. *Id.* at 932–33.

549. 2011 WL 692213 (W.D. Tex. 2011) (unreported disposition).

er the abduction would have occurred but for the petitioner's conduct in refusing court-ordered visitation for over ten months. Accordingly, the court denied the successful petitioner an award of fees and costs based on her conduct in deliberately thwarting the father's visitation rights before the abduction took place.[550]

3. Fugitive Disentitlement

The doctrine of fugitive disentitlement has been accepted in a few Hague cases, but has not been applied in a uniform manner, which appears to be the result of different factual contexts rather than differences in doctrinal analysis.

The first appellate case to apply the doctrine of fugitive disentitlement was *Prevot v. Prevot*.[551] In *Prevot*, father was on probation for a state court felony. Together with his wife and family, he left the United States, eventually arriving in France. Despite father's attempts to prevent mother and the children from leaving France, she succeeded in returning to the United States two years later. Father brought an action in federal court for the return of the children to France. The Sixth Circuit reversed the district court's refusal to apply the fugitive disentitlement doctrine and held:

> The fugitive disentitlement doctrine limits access to courts in the United States by a fugitive who has fled a criminal conviction in a court in the United States. The doctrine is long-established in the federal and state courts, trial and appellate. The power of an American court to disentitle a fugitive from access to its power and authority is an equitable one (citations omitted).
>
> • • •
>
> We find nothing in the Convention or the Act that purports to strip an American court of the powers inherent to it as a court. Because of the unique facts, the core of this case is not custody, or competing interests of parents, but fundamental concerns of how the United States operates its courts and how those courts may react to abuses

550. *Id.*, slip opinion at 8.
551. 59 F.3d 556 (6th Cir 1995).

> of American criminal process, to defiance of judicially imposed obligations owed to victims of crime, and to flights from financial responsibilities to our government.[552]

In *Walsh v. Walsh*,[553] the First Circuit declined to impose fugitive disentitlement upon a father who absconded felony probation from a Massachusetts state court conviction for assaultive and threatening conduct. The First Circuit analyzed the Supreme Court's consideration of fugitive disentitlement in *Degen v. United States*[554] and found that the case for disentitlement was too weak to bar father's proceedings:

> [A]pplying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights. Parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationships with their children. See generally *Troxel v. Granville*, 530 U.S. 57, ____, 120 S. Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) (plurality opinion) ("The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."). To bar a parent who has lost a child from even arguing that the child was wrongfully removed to another country is too harsh. It is too harsh particularly in the absence of any showing that the fugitive status has impaired the rights of the other parent.[555]

In *March v. Levine*,[556] the Sixth Circuit declined to extend its fugitive disentitlement analysis in *Prevot* to a conviction for civil contempt. The children in *March* were habitual residents of Mexico. Maternal grandparents wrongfully retained the children in the United States after a visit. They contested father's petition for return, arguing that the children's mother, who had been missing for four years, was presumed dead, and they secured a default judgment against father for

---

552. *Id.* at 562, 566. *Prevot* was decided prior to *Degen v. United States*, 517 U.S. 820 (1996), which clarified the use of the doctrine.

553. 221 F.3d 204 (1st Cir. 2000).

554. 517 U.S. 820 (1996).

555. *Walsh*, 221 F.3d at 216.

556. 249 F.3d 462 (6th Cir. 2001).

the wrongful death of the children's mother. The default judgment was based on a discovery sanction holding father in civil contempt. The wrongful death action was never heard on the merits. Refusing to apply the fugitive disentitlement doctrine to civil contempt, the court cautioned:

> It is worth re-emphasizing the *Degen* Court's guidance to courts in deciding whether to disentitle a claimant: there must be "restraint in resorting to inherent power" and its use must "be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823–24, 116 S. Ct. 1777.[557]

In another post-*Degen* case, the Eleventh Circuit applied the fugitive disentitlement doctrine to bar a parent from appealing the district court's grant of a return petition. In *Pesin v. Rodriguez*,[558] father's Hague Convention petition was granted by the district court, and mother was ordered to return the children to Venezuela within ten days.[559] She returned the children to Venezuela within the ten-day limit, but paid only lip service to the court's order by removing herself and the children the very next day. The district court issued an order to show cause regarding contempt and set the matter for hearing. The mother failed to attend that hearing. The court found her in contempt and indicated that the contempt could be purged by presenting the children before the district court or before a Venezuelan court; mother did neither. While still in contempt, mother appealed the order of return. Noting that the doctrine had been previously used to bar proceedings by those held in civil contempt,[560] the court held that application of the doctrine was appropriate and dismissed mother's appeal.[561] Most courts have held that the doctrine of fugitive disentitle-

---

557. *Id.* at 470.

558. 244 F.3d 1250 (11th Cir. 2001).

559. *See* Pesin v. Rodriguez, 77 F. Supp. 2d 1277 (S.D. Fla. 1999).

560. *See, e.g.*, United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997).

561. Pesin v. Rodriguez, 244 F.3d 1250, 1253 (11th Cir. 2001). *See also In re* Leslie, 377 F. Supp. 2d 1232 (S.D. Fla. 2005) (applying fugitive disentitlement to bar mother's defenses, based on criminal contempt of a Belize court in connection with the custody action there).

ment should be narrowly construed and applied under only the most compelling circumstances.

All fifty states and the federal government have penal statutes that criminalize parental abduction. The International Parental Kidnapping Crime Act (IPKCA) makes parental abduction a federal crime.[562] IPKCA was intended to complement the Convention, and its proceedings were meant to make the return of a child the first priority in the legal issues surrounding the abduction of a child.[563] This legislation responded to the concern that prosecuting authorities may be requested to pursue criminal charges against a parent who takes custody of his or her child under legally questionable circumstances and as a result becomes unable to pursue a potentially legitimate Hague claim.[564] Although criminal proceedings exist as a possibility in paren-

---

562. 18 U.S.C. § 1204 (1988). The IPKCA was partly motivated by a void in the law that existed because there was no remedy for international parental abductions involving a non-Hague country. *See, e.g.*, Mezo v. Elmergawi, 855 F. Supp. 59 (E.D.N.Y. 1994) (dismissing complaint against the Secretary of State compelling the U.S. government to pursue procedures under the Convention where children were abducted to Egypt and then Libya, both non-Hague signatories).

563. William J. Clinton, President's Signing Statement for H.R. 3378, 1993 U.S.C.C.A.N. 2424-1, 1993 WL 591942 (1993):

> Today I have signed into law H.R. 3378, the "International Parental Kidnapping Crime Act of 1993." This legislation underscores the seriousness with which the United States regards international child abduction. It makes this crime, for the first time, a Federal felony offense.
>
> H.R. 3378 recognizes that the international community has created a mechanism to promote the resolution of international parental kidnapping by civil means. This mechanism is the Hague Convention on the Civil Aspects of International Child Abduction. H.R. 3378 reflects the Congress' awareness that the Hague Convention has resulted in the return of many children and the Congress' desire to ensure that the creation of a Federal child abduction felony offense does not and should not interfere with the Convention's continued successful operation.
>
> This Act expresses the sense of the Congress that proceedings under the Hague Convention, where available, should be the "option of first choice" for the left-behind parent. H.R. 3378 should be read and used in a manner consistent with the Congress' strong expressed preference for resolving these difficult cases, if at all possible, through civil remedies.

564. *See, e.g.*, Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) (issuing state arrest warrants after mother fled jurisdiction violates state court order); Crall-Shaffer

tal kidnapping cases, it is often the case that a civil action under the Hague Convention is the more appropriate first option.[565]

J. Undertakings

An undertaking may be defined as an official promise, agreement, or concession by a party to perform, or refrain from performing, a particular task. For example, a father who had petitioned for the return of his abducted child promises or "undertakes" to not petition the court in the child's habitual residence for a modification of custody until sixty days after the child has returned to the habitual residence if the court grants the return of the child.

Undertakings include agreements to a restraining order or protective order, assumption of the cost of transportation back to the habitual residence, or providing financial support for a period of time. A party seeking return of children may offer to give certain undertakings in connection with an order of return of the children on the theory that the court would be more amenable to that party's petition for return of the children. Undertakings are most frequently utilized in common-law countries.

There is disagreement among U.S. courts as to when it is appropriate to accept undertakings. One line of cases supports the acceptance of undertakings without an established defense, primarily on the basis that undertakings may ensure the child is safely returned to the habitual residence. In *Krefter v. Wills*,[566] the court held that a court has authority to accept undertakings as part of an order returning a child, even though an Article 13(b) defense was not established. In reaching

---

v. Shaffer, 663 N.E.2d 1346, 105 Ohio App. 3d 369 (Ct. App. 1995) (finding mother in contempt of court, warrant issued for her arrest in custody proceeding).

565. *See* The American Society of International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention*, 33 I.L.M. 225, 249, 1994 WL 327559 (1994).

566. 623 F. Supp. 2d 125, 137–38 (D. Mass. 2009).

this conclusion, the court cited to *Feder v. Evans-Feder*,[567] which ruled that the lower court on remand should consider undertakings if the Article 13(b) defense is not sustained. In *Kufner v. Kufner*,[568] the district court ordered undertakings even though mother's Article 13(b) defense was denied. On appeal, the First Circuit held that awarding undertakings in this situation was appropriate.[569] The court noted that a district court's acceptance of undertakings was reversed only when an Article 13(b) defense had been established and the undertakings were insufficient to mitigate the harm.[570]

The Sixth Circuit has taken a different approach, ruling that undertakings are only appropriate where an Article 13(b) defense exists:

> Absent a grave risk finding, the Convention leaves no room for a court to establish, as the district court did in this case, ameliorative undertakings designed to protect children against the risk of harm upon their return. *See* Hague Convention, Article 13b (noting that a court is "not bound to order the return of the child" only if the exception applies). Once the district court determines that the grave

---

567. 63 F.3d 217, 226 (3d Cir. 1995) (instructing district court on remand that if the Article 13(b) defense fails, that "an unqualified return order would be detrimental" to the child, and that "the court should investigate the adequacy of undertakings . . . to ensure that [the child] does not suffer short term harm").

568. 480 F. Supp. 2d 491 (D.R.I. 2007).

569. See *In re A.L.C.*, 16 F. Supp. 3d 1075 (C.D. Cal. 2014), *vacated in part, affirmed in part, In re A.L.C.*, ___ F. App'x ___, 20115 WL 1742347 (9th Cir. 2015), where a district court found that a father's agreement to pay for separate housing for the mother and children was sufficient to alleviate any risk of physical or psychological harm pending a custody determination in Sweden. Although the court found that mother's grave risk had not been proved, the father's promises were reflected in the return order. *Id.* at 1094.

570. Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (citing to Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002)). *Danaipour I* raises the issue that undertakings accepted with the intention that a foreign court will enforce them raise issues of comity in that an expectation of enforcement may violate the foreign nation's right to determine for itself what is appropriate. *Danaipour I*, 286 F.3d at 22–25. *See also* Krefter v. Wills, 623 F. Supp. 2d 125, 138 (D. Mass. 2009) (noting that undertakings that do not require action or enforcement by foreign courts will not offend principles of comity).

> risk threshold is met, only then is the court vested by the Convention with the *discretion* to refuse to order return. It is with this discretion that the court may then craft appropriate undertakings.[571]

However, undertakings are essentially unenforceable if they will be performed in the country of habitual residence or after the child has left U.S. soil. For example, if a parent promises, as a condition of return, not to attempt to modify custody in the habitual residence for sixty days, there is a chance that upon the child's return the parent will nevertheless immediately institute proceedings to modify child custody, contravening the undertakings. The other parent may petition the court in the habitual residence and offer proof of the undertaking, but that court has no obligation to honor the promise made to another court, especially a foreign one. In addition, a U.S. court will lose jurisdiction over the matter, as the child would be subject to the jurisdiction of the habitual residence. For this reason, mirror-image orders, discussed *infra* at page 150, are sometimes used to enforce arrangements surrounding the return of the child.[572]

A court might have greater control over the performance of an undertaking if it is possible to perform the undertaking before the

---

571. Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007). Note that the court did not consider as inappropriate orders relating to logistical matters that usually occur in connection with an order of return: "We do not mean to suggest, however, that a court is powerless to deal with ordinary logistical considerations that frequently accompany the return of any child, such as deciding which parent will pay for the child's return airfare. Although these have sometimes been referred to as 'undertakings,' *see, e.g.*, Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1366 (M.D. Fla. 2002), we are speaking specifically of those conditions on return designed to ameliorate the risk of harm in the context of abusive situations." *Simcox*, 511 F.3d at 608.

Simcox also addressed the issue of undertakings in domestic violence cases by noting that undertakings would be inappropriate in situations like that found in *Walsh*. The court stated that "Where a grave risk of harm has been established, ordering return with feckless undertakings is worse than not ordering it at all." *Id.*

572. A "mirror-image" order is one that contains identical terms, and is entered in both the courts of the habitual residence and the court making a return order. Such an order allows judges in both jurisdictions to have the power to enforce the conditions of the child's return.

order of return becomes effective. If a parent promises to vacate a "chasing order" that shifted full custody of the child to that parent after the abduction, a court might order the return of the child conditioned upon proof that the "chasing order" has actually been vacated. Similarly, promises for the payment of money for housing, support, costs, or attorney fees are frequently given as undertakings.

It may be possible to make such payments available to the parent returning the child before the court sets a date for the actual return of the child. Such an approach seems reasonable, especially where a defense has been proven and the undertaking is a material part of the court's decision to return the child because the undertakings will overcome the risk of harm to the child upon return. However, if undertakings are given when no defense has been proven, a court may choose to consider whether the performance of the undertaking should be elevated to a *quid pro quo* for the return of the child.

Courts should refrain from imposing undertakings that are unrealistic or too onerous.[573] The U.S. Department of State has cautioned against the use of undertakings, noting that imposing excessive conditions on a child's return may run counter to convention purposes owing to issues of enforceability, delay in return, and unreasonable hardship on the parties.[574] One State Department official has commented that

> [U]ndertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear

573. See *Baran v. Beaty*, 526 F.3d 1340, 1350-1351 (11th Cir. 2008), discussing the reluctance of the First, Sixth, and Seventh Circuits to impose undertakings that are unenforceable, especially when an abused child is ordered returned on the assumption that undertakings will be honored.

574. Kathleen Ruckman, Deputy Director, Office of Children's Issues, U.S. Department of State, Analysis of U.S. Practice in Parental Child Abduction Cases, "Undertakings as Convention Practice: The U.S. Perspective," available at http://www.state.gov/s/l/2005/87187.htm.

> questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.[575]

For example, in *Maurizio R. v. L.C.*,[576] a California state court found that a psychologically damaged child would suffer a "grave risk" if the child was removed from his mother and returned to Italy. The trial court concluded that the child had PTSD, and despite his youth (six years old), the evidence established the possibility that the child might take his own life. In ordering return of the child, the trial assumed that mother would accompany the child on his return to Italy and imposed certain additional conditions: (1) father would secure the dismissal of the criminal complaint pending in Italy against mother for child abduction; (2) pending further custody proceedings in Italy, father would obtain a protective order in Italy protecting mother; (3) father would secure an order from an Italian court awarding mother sole legal and physical custody of the child with monitored visits to father; and (4) that father obtain an order from an Italian court (or an enforceable undertaking) obliging father to provide housing and living expenses for mother in Italy, and the expenses of weekly therapy for the child. On appeal, the appellate court sustained the finding of grave risk, but set aside the conditions imposed by the trial court. First, because the condition of the child's return was contingent on mother's cooperation, the mother could frustrate the order by simply refusing to accompany the child to Italy.[577] Second, a dismissal of criminal proceedings in Italy was beyond father's control. The trial court exceeded its authority by requiring father to obtain assurance from the Italian government that a prosecution would not occur. The case was re-

---

575. Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995), cited in *Danaipour v. McLarey*, 286 F.3d 1, 22 (1st Cir. 2002).

576. 201 Cal. App. 4th 616 (2011).

577. Citing to a provision similarly found defective by *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007), and *Fabri v. Pritikin-Fabri*, 221 F. Supp. 2d 859 (N.D. Ill. 2001).

manded to the trial court to fashion new orders relating to the child's return.[578]

Undertakings typically fall into categories designed to address certain perceived hardships that may befall parents or children compelled to return to the habitual residence. These include, but are not limited to: (1) promises relating to the entry of protective orders in the habitual residence in connection with domestic violence or child abuse;[579] (2) promises designed to minimize emotional trauma to a child threatened with separation from a primary caretaker;[580] (3) promises designed to provide temporary financial assistance to a parent required to return in the company of a child or children;[581] (4) promises to take measures to dismiss criminal prosecution for abduction or to refrain from initiating criminal proceedings;[582] and (5) promises not to seek or enforce orders that require a transfer of the

578. *Simcox*, 511 F.3d at 644.

579. *See, e.g.*, Blondin v. Dubois (*Blondin I*), 189 F.3d 240, 248 (2d Cir. 1999); Turner v. Frowein, 752 A.2d 955, 974, 253 Conn. 312, 345 (2000) (following *Blondin*); *but see* Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005) (questioning the appropriateness of undertakings in domestic violence and abuse cases); *Danaipour I*, 286 F.3d at 25 ("[U]ndertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the status quo was abusive."); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).

580. *But see Simcox*, 511 F.3d 594 (holding that undertaking that children were to be returned in the custody of their mother until Mexican court could hear issue of protective order was an invalid order compelling the mother to return to Mexico).

581. *See, e.g.*, *Krefter*, 623 F. Supp. 3d at 138 (finding airline tickets, payment of support of housing for three months in advance sufficient); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1061 (E.D. Wash. 2001) (considering lack of offer of undertakings in upholding Article 13(b) defense); *accord* Wilchynski v. Wilchynski, No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. 2010) (unreported disposition).

582. *See, e.g.*, Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (ordering father to obtain dismissal of criminal charges); Ciotola v. Fiocca, 684 N.E.2d 763, 86 Ohio Misc. 2d 24 (1997); Jaet v. Siso, No. 08-81232-CIV, 2009 WL 32570 (S.D. Fla. 2009) (unreported disposition) (dismissal of pending criminal action in Mexico).

child from the primary caretaker until there has been a final determination of the child custody case on the merits.[583]

K. Exhausting All Possible Alternatives to Refusing Return—Circuit Split

Once a court determines that a grave-risk defense has been established, the question arises whether the court should examine and consider all possible alternatives to refusing an order for the return of the child. There appears to be a division among the circuits concerning this question. The Second, Third, and Seventh Circuits point to a two-prong analysis for determining whether to grant an order for return: (1) Has the Article 13(b) defense been proven? and (2) Do measures exist to ameliorate the risk?

The First, Sixth, and Eleventh Circuits have taken the position that once an Article 13(b) defense has been proven, a court may, but is not required to, examine whether there are any alternatives or measures that will permit the court to order return of the child. Under this latter approach, once a defense has been established, a court may simply deny the child's return without inquiring into alternatives that might promote a safe return.

In *Blondin v. Dubois (Blondin I)*,[584] the court examined the issue of how far judges should go in exploring such alternatives. After the initial trial, the district court found the Article 13(b) defense had been established and denied father's return petition. The Second Circuit remanded the case to the district court with instructions to "take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that

583. *See, e.g.*, *Kufner*, 519 F.3d 33. Where a left-behind parent secures a "chasing order" granting that parent full custody of the child, such an order may result in a shift of custody from the primary caretaker. As a result, some undertakings have been negotiated to require vacating the chasing order, thus allowing the abducting parent to return to the habitual residence without fear of losing custody prior to a hearing on the merits.

584. 189 F.3d 240 (2d Cir. 1999).

can reduce whatever risk might otherwise be associated with a child's repatriation."[585] On remand, the district court again refused to order return, finding that no measures could be taken to ameliorate the grave risk to the children posed by a return to France.[586] Father again appealed, and the Second Circuit affirmed the denial of father's petition.[587] The *Blondin* approach was followed by the Third Circuit in *In re Application of Adan*[588] and the Seventh Circuit in *Van De Sande v. Van De Sande*,[589] and by at least one appellate division in California.[590]

In *Turner v. Frowein*,[591] the Supreme Court of Connecticut followed the procedure established by *Blondin*, that before a court may deny a petition for return on 13(b) grounds, it must undertake "a complete analysis of protective arrangements and legal safeguards that

585. *Id.* at 248.

586. Blondin v. Dubois, 78 F. Supp. 2d 283, 294 (S.D.N.Y. 2000) ("I again find, by clear and convincing evidence, that return of [the children] to France, under any arrangement, would present a 'grave risk' . . . for three reasons: first, removal of the children from their presently secure environment would interfere with their recovery from the trauma they suffered in France; second, returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm; and third, [one child] objects to being returned to France.").

587. Blondin v. Dubois (*Blondin II*), 238 F.3d 153 (2d Cir. 2001).

588. 437 F.3d 381 (3d Cir. 2006); *accord* Foster v. Foster, 654 F. Supp. 2d 348, 352 (W.D. Pa. 2009) ("[I]f a respondent is able to produce clear and convincing evidence of a grave risk of harm to the child, she must then demonstrate that 'the court[s] in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection'.") (citing *Adan*, 437 F.3d at 395 and *Blondin II*, 238 F.3d at 162).

589. 431 F.3d 567 (7th Cir. 2005). In *Van De Sande*, father was willing to have the court consider conditions on an order of return. "This concession alone requires that we remand the case to the district court for further consideration, for 'in order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon "undertakings" from the petitioning parent'." *Id.* at 571 (citing to Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995); Gaudin v. Remis, 415 F.3d 1028, 1035–36 (9th Cir. 2005); and *Blondin I*, 189 F.3d at 248–49).

590. Maurizio R. v. L.C., 201 Cal. App. 4th 616, 638 (2011).

591. 253 Conn. 312 (2000).

might allow the safe repatriation of the child. . . ."[592] The court followed its previous precedent in looking to decisions of the Second Circuit for persuasive authority.

> It would be a bizarre result if this court [required the trial court to make particular findings under article 13(b)] when in another courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, required [alternative findings]. . . . We do not believe that when Congress enacted the concurrent jurisdiction provisions of [ICARA] that it intended to create such a disparate treatment of plaintiffs depending on their choice of a federal or state forum.[593]

The Supreme Court of Connecticut affirmed the trial court's finding that the child had been sexually abused by his father. Relying on *Blondin*, the court remanded the case to the trial court for a review of placement options and available enforceable remedies that would enable the safe return of the child. The factors to be considered included (1) whether the child could be returned under the supervision of the non-offending parent or other third party, and (2) whether the jurisdiction receiving the child is capable of enforcing the conditions of return.[594]

The First Circuit has noted that in some cases, measures and legal safeguards that might be available in the habitual residence will have little or no effect in ameliorating the grave risk to the child.[595] In *Danaipour II*,[596] the First Circuit clarified the burden of courts to consider ameliorative measures:

---

592. *Id.* at 339.

593. *Id.* (citing *Schnabel v. Tyler*, 646 A.2d 152, 743 (Conn. 1994) (at note 4)).

594. The court noted that in following the *Blondin* approach there was at least a colorable argument that the task of determining whether the laws of the habitual residence are capable of enforcing the conditions of return is unsupported by the text of the Convention and by the *Pérez-Vera Report* at ¶ 36, limiting the relevance of the law of other nations to the question whether the child's removal was wrongful.

595. *See, e.g.*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001).

596. 386 F.3d 289 (1st Cir. 2004).

> [Father] cites to our holding in *Danaipour I* stating the standard for qualifying for the Article 13(b) exception, for the proposition that a district court cannot properly find that an Article 13(b) exception exists unless it examines the remedies available in the country of habitual residence.[Fn5]
>
> > [Fn5] Danaipour also relies heavily on a footnote in *Blondin* for the proposition that assessing the capacity of the courts of the country of habitual residence is a prerequisite to an Article 13(b) exception. 238 F.3d at 163 n.11. We do not read *Blondin* to require the court to make findings about the institutional capacity of the home country in all cases. To the extent that *Blondin* does stand for such a proposition, we disagree that Article 13(b) requires such findings in all cases.
>
> Our holding in *Danaipour I* does not stand for the proposition that every Article 13(b) analysis requires two such distinct prongs. In fact, *Danaipour I* specifically identified the limited role undertakings may play in certain situations. *See Danaipour I,* 286 F.3d at 21. *Danaipour I* also noted the great weight afforded to the State Department policy concerning undertakings in a situation involving child abuse:
>
> > "If the requested state court is presented with unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context would embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception. *Id.* at 25 (quoting Department of State Comment on Undertakings)."
>
> The district court properly followed *Danaipour I*'s mandate; its finding of the existence of sexual abuse and that the return of the children to Sweden would result in a grave risk of psychological harm was adequate to satisfy the Article 13(b) exception, and no further inquiry into remedies available to the Swedish courts was required.[597]

Quoting the First Circuit with approval, the Sixth Circuit held: "[U]ndertakings would be particularly inappropriate, for example, in

---

597. *Id.* at 303–04.

cases where the petitioner has a history of ignoring court orders. See *Walsh*, 221 F.3d at 220."[598] The circuit court found that the undertakings ordered by the district court were "unworkable"[599] and remanded the case to the district court to determine whether undertakings or other measures would be sufficient to protect the children.[600]

Similarly, in *Baran v. Beaty*,[601] the Eleventh Circuit determined that a court could consider whether authorities in a child's habitual residence were capable of ameliorating the risk of harm upon return. However, the court clearly indicated that a party resisting return had no obligation to prove that the habitual residence is unable or unwilling to take measures for such protection.[602]

---

598. Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007).

599. The court was particularly concerned about the district court's order that the children be returned in the company of their mother. Under the Convention, courts have the power to order children returned to their habitual residence, but they do not have the power to order an unwilling adult to accompany those children. *See id.* at 610.

600. *Id.* at 608. On remand, the district court found that there were no undertakings that would adequately protect the children, and the petition for return was denied. *See* Simcox v. Simcox, No. 1:07CV96, 2008 WL 2924094 (N.D. Ohio 2008).

601. 526 F.3d 1340 (11th Cir. 2008).

602. *Id.* at 1348.

IV. Issuing Orders of Return

When an order for the return of a child[603] is made, courts should focus on enforcement, specificity, and the safety of the child.[604] In most circumstances, once a child crosses the U.S. border, a court loses jurisdiction to enforce the provision of any orders made regarding the manner or conditions of the child's return. For this reason, return orders should clearly state the provisions that must be followed while the child still remains on U.S. soil.

Occasionally, a child is removed from the state making the return order and is later found in another state. The initial order of return is entitled to "full faith and credit"[605] and is enforceable in state courts "as if it were a child-custody determination."[606]

---

603. The Hague Convention does not empower courts to order a parent to relocate to another country. In *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013), the trial court ordered both the child and the mother to return to Ireland. Although the order of return to Ireland was reversed on other grounds, the court noted that "We do not know why the court thought it had authority to order Mary, a free adult citizen, to go to Ireland. As far as we can determine, neither the Hague Convention nor its implementing legislation, the International Child Abduction Remedies Act, (citations omitted) authorizes the court to order the relocation of parents." *Id.* at 735 n.1.

604. *See* Hague Conference on Private International Law, Special Commission to Review the Operation of the Hague Convention, Conclusions and Recommendations on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980, § 1.8.2 (2006) ("When considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including 'mirror' orders) made in that country before the child's return, as well as to the provisions of the 1996 Convention.").

605. 22 U.S.C. § 9003(g) (1988): "Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter."

606. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) §§ 301–302 (1997).

A. Specificity: Time, Manner, and Date of Return

Orders should clearly state the mandated time, place, and details of the child's return.[607] In order to incorporate detailed information about the transportation of the child back to the habitual residence, it may be necessary to schedule an additional brief hearing after ordering the child's return to finalize transportation arrangements and incorporate them into the order of return. The order may include any provisions that must be enforced by the U.S. Marshals Service or by any other relevant law enforcement agency.[608]

B. Mirror-Image Orders

Mirror-image orders may be more effective than undertakings in certain situations. These orders are entered in both the courts of the states hearing the petition and the courts in the child's habitual residence. The orders are "mirror images" of one another, containing the same terms with differences only in syntax. They are enforceable in both jurisdictions.[609] Mirror-image orders give some assurance that the

---

607. *See, e.g.*, Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) (ordering the dates and flight numbers of the child's return); Moreno v. Martin, No. 08-22432-CIV, 2008 WL 4716958 (S.D. Fla. 2008) (unreported disposition) (ordering U.S. Marshals Service to accompany petitioner to airport and notifying all other federal, state, and local law enforcement officers that petitioner has the right to remove the child from the United States).

608. *See* Cuellar v. Joyce (*Cuellar I*), 596 F.3d 505, 512 (9th Cir. 2010); Sullivan v. Sullivan, No. CV-09-545-S-BLW, 2010 WL 227924 (D. Idaho 2010) (unreported disposition) ("IT IS FURTHER ORDERED that the United States Marshals Service is directed to assist in the execution of this Order as necessary, and the United States Marshals Service may enlist the assistance of other law enforcement authorities, including the local police, as necessary to aid in any aspect of securing the safe return of C.S. to New Zealand.").

609. *See, e.g.*, Grammes v. Grammes, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. 2003) (unreported disposition) (entering mirror orders in Pennsylvania and Canada); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 11 (1st Cir. 2002) (noting that the district court ordered return under twelve conditions, including a mirror-image order entered in Sweden).

court of the habitual residence will enforce the order in the event that the petitioning parent defaults on obligations contained within the order.

However, there are some limitations to mirror-image orders. First, the time necessary to enter orders in both jurisdictions may cause undue delay. Second, if there is no existing custody case pending in the court of the habitual residence, there may be technical difficulties with creating a new case and requesting an order to be entered. Third, it is possible that the domestic law of the habitual residence either does not recognize or simply does not understand the concept of a mirror-image order, making it difficult to obtain such an order. In some circumstances, the courts of the habitual residence are not permitted to order the kind of relief that the mirror order requires. This is an issue that the parties' counsel should clarify, but judges should be aware of the procedural complexities that may result from dealing with the courts of another nation.

C. Safe Harbor Orders

Safe harbor orders are designed to avoid severe and immediate physical or psychological harm to the child as a result of the conditions of return. The orders may provide, *inter alia*, for delivery of the child by a parent or relative back to the habitual residence, for the involvement of a child welfare agency in the placement or monitoring of the child, or for the involvement of the habitual residence Central Authority in the physical return of the child.

First, a U.S. court that is prepared to order a child's return may direct counsel for the parent requesting return to obtain a safe harbor order from the courts of the habitual residence. The order of return may be conditioned upon obtaining such an order. Secondly, where the parties are in agreement that a safe harbor order should issue, the U.S. court may wish to engage in direct judicial communication with the appropriate court in the habitual residence and address any matters related to the order. This type of order remains in effect until the courts of the child's habitual residence assume jurisdiction over the child's welfare. A safe harbor order issued by a court in the child's

habitual residence is more likely to ensure the parties' compliance than one issued only by the court hearing the petition for return.[610]

D. Returns to Countries Other Than Habitual Residence

Both the *Pérez-Vera Report* and the *Text & Legal Analysis* interpret the Convention to mean that the child need not be returned to his or her habitual residence if the petitioning parent no longer lives in that location.[611] If this is the case, the child must be returned to the successful petitioning parent, regardless of his or her place of residence.[612]

E. Mootness and Stays

1. Mootness

If an order directing the return of a child to a foreign country is not stayed, the question arises whether the case becomes moot when the child is removed from the United States in conformity with the return order. Resolving a split among the courts of appeal on this point, the Supreme Court, in *Chafin v. Chafin*,[613] held that the removal of a child from the United States pursuant to an order of return does not cause

610. *Danaipour* describes a "safe harbor" order as one that is entered in the courts of the habitual residence before the entry of an order of return from a U.S. court. This "approach would avoid the unseemliness of a U.S. court issuing orders for a foreign court to enforce, and the foreign court's possible noncompliance . . . ." *Danaipour I*, 286 F.3d at 22.

611. "The Convention does not technically require that the child be returned to his or her State of habitual residence, although in the classic abduction case this will occur. If the petitioner has moved from the child's State of habitual residence the child will be returned to the petitioner, not the State of habitual residence." *Text & Legal Analysis*, 51 Fed. Reg. 10,494, 10,511 (Mar. 26, 1986).

612. *See, e.g.*, *Pérez-Vera Report*, *supra* note 19, ¶ 110. *See also* Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008); Von Kennel Gaudin v. Remis, 282 F.3d 1178 (9th Cir. 2002).

613. 133 S. Ct. 1017 (2013).

the case to become moot where the parties maintained a "concrete interest," however small, in the outcome of the case.[614]

In *Chafin*, mother was a citizen of the United Kingdom, and father was a U.S. serviceman. A child was born to the parties in Germany, where father was stationed. When father was deployed to Afghanistan in 2007, mother took the child to Scotland. Father was later transferred to Alabama. The child and her mother joined him there in 2010. Father subsequently filed for divorce and for custody of the child in Alabama. Mother had overstayed her visa, and was deported back to the United Kingdom in February 2011, leaving the child in father's custody in Alabama. In May 2011, mother filed a petition for the return of the child in U.S. District Court for the Northern District of Alabama. After a trial, the district court granted mother's petition and directed the child's return with mother to Scotland. Father's request for a stay of the order was denied and mother promptly returned to Scotland with the child.

Father appealed the district court's return order to the Eleventh Circuit. Citing to the holding in *Bekier v. Bekier*,[615] the Eleventh Circuit court dismissed father's appeal as moot because the child had already been return to her habitual residence.

The Supreme Court reversed. The Court pointed out that a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[616] The Court found that the parties' custody case was still viable since both parents continued to advocate their respective positions regarding the child's habitual residence, the applicability of defenses to return, and the appropriateness of an award of attorney fees to mother. The parties continued attempts to litigate child-related issues demonstrated that they still maintained a "concrete interest" in the outcome of the case and

614. *Id.* at 2287. But see *Leser v. Berridge*, 668 F.3d 1202 (10th Cir. 2011), holding that a stipulation between parents to return children to their habitual residence for the purpose of child custody proceedings in the Czech Republic caused the return case in the United States to become moot.

615. 248 F.3d 1051 (11th Cir. 2001).

616. Citing Knox v. Service Employees, 132 S. Ct. 2277, 2287 (2012).

"'however small'" that interest, it "is enough to save this case from mootness."[617] The prospects of father's success on the merits were not pertinent to whether the case was moot.

A rule equating the child's absence from the United States to mootness, the Court reasoned, would produce unwise and unintended results. If jurisdiction were lost every time a child was ordered returned to a foreign country, courts would tend toward routinely granting stays of return orders in an effort to preserve litigants appellate rights. This would result in delays in children's returns during the pendency of appeals, even in cases where the chance of reversal was remote. Additionally, the Court recognized the possibility that parents obtaining return orders might thus be motivated to immediately exit the United States with the child in order to render any appeal moot.[618]

The Court examined the question whether the district court could issue an order of "re-return"—an order that directed the child's return from the United Kingdom back to Alabama—if the Eleventh Circuit were to reverse the district court's return order. In response to mother's argument that a re-return order would be ineffectual because enforcement was not required in Scotland, the Supreme Court noted that (1) mother was still subject to personal jurisdiction in the U.S. courts, and was therefore subject to further court orders; (2) mother's refusal to obey could be met with sanctions; and (3) mother could choose to voluntarily comply with an order of re-return.

Following *Chafin*, the court in *Redmond v. Redmond*[619] found that despite the mother and child's return to Ireland as ordered by the trial court, the case was not moot. Simultaneous child custody proceedings were brought in Ireland by father and in Illinois by mother. The Illinois court deferred jurisdiction to the Irish court. The Seventh Circuit recognized that despite the Illinois decision to defer to Irish jurisdic-

---

617. Citing to *Knox*, 132 S. Ct. at 2287. The Court in *Knox* cited to the following language in *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984): "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."

618. *Chafin,* 133 S. Ct. at 1027.

619. 724 F.3d 729 (7th Cir. 2013).

tion over the custody issue, the question of the child's habitual residence would be before the district court on remand, and the resolution of the habitual residence question could influence the modification of the previous state court decision declining jurisdiction.[620]

Neither the Convention nor ICARA contain guidelines for the issuance of stays by a court hearing a Hague Convention case.[621] Granting a stay after a return order is issued is governed by the law concerning the issuance of stays generally.[622]

2. Stays

In *Chafin,* [623] the Supreme Court cautioned that the issuance of routine stays would conflict with the Convention's exhortation for prompt handling and could increase the number of appeals. Instead, the Court urged the application of the four traditional factors[624] for determining whether a stay should issue:[625]

1. the strength of the applicant's showing of a likelihood of success on appeal;
2. whether the applicant will suffer irreparable injury in the absence of a stay;

620. *Id.* at 736.

621. In *Kijowska v. Haines*, 463 F.3d 583, 589 (7th Cir. 2006), the court rejected the argument that the UCCJEA controls the issuance of stays in Hague Convention return cases. The UCCJEA prohibits the issuance of a stay of a "child custody determination" (§ 314) unless the circumstances authorize a temporary emergency order (abandonment, mistreatment, or abuse). However, a Hague Convention return case is purposely omitted from the UCCJEA's definition of a "child custody determination," because Hague cases do not result in custody awards. *See* Comment to § 102 of the UCCJEA. Hence, the UCCJEA does not control the issuance of stays for state or federal courts.

622. *See* Fed. R. Civ. P. 62(c). Pursuant to Federal Rules of Appellate Procedure 8(a)(1)(A), a party must ordinarily apply for a stay in the district court for a stay pending appeal.

623. *Chafin*, 133 S. Ct. 1017.

624. *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

625. *Chafin,* 133 S. Ct. at 1027.

3. whether the stay will cause substantial injury to parties opposed to the stay; and
4. any risk of harm to the public interest.

The factors above should be considered on a "sliding scale" so that a stronger showing on one factor may excuse a lesser showing on others.[626] However, the Supreme Court notes that the combination of granting stays and expediting proceedings are part of the "judicial tools" that allow courts to achieve the goals of the Convention:[627]

> In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests.[628]

When appellate courts issue stays in Hague cases, they frequently order expedited appeals.[629] The decision whether or not to grant a stay of an order of return lies within the sound discretion of the court.[630]

---

626. *See* Thapa v. Gonzales, 460 F.3d 323 (2d Cir. 2004).

627. *Chafin*, 133 S. Ct. at 1026–27.

628. *Id.* at 1027.

629. *See, e.g.*, Souratgar v. Lee, 720 F.3d 96 (2d Cir 2013); Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir 2010); Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010); Koch v. Koch, 450 F.3d 703, 710 (7th Cir. 2006); Simcox v. Simcox, 511 F.3d 594, 601 (6th Cir. 2007); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 11 (1st Cir. 2002); Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001).

630. *See, e.g.*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001); *Nicolson*, 605 F.3d at 103.

V. Procedural Issues

A. Appellate Standard of Review

Federal appeals courts uniformly use dual criteria to review decisions involving the 1980 Convention. The deferential standard of "clear error" is used to review factual findings in cases arising under the 1980 Convention. When the court reviews a district court's interpretation of the Convention or its application to the facts, or foreign, domestic, or international law, the appellate court reviews the district court's conclusions de novo.[631]

The elements of a prima facie case for the applicant—custody rights and habitual residence—are similarly reviewed by examining the historical or narrative facts for clear error, and legal conclusions are reviewed de novo. The defenses or exceptions to return are reviewed in the same fashion: conclusions reached regarding the defenses of consent, acquiescence, delay, settlement,[632] grave risk,[633] and vio-

631. Sanchez-Londono v. Gonzalez, 752 F.3d 533 (1st Cir. 2014); Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012); Karpenko v. Leendertz, 619 F.3d 259 (3d Cir. 2012); Bader v. Kramer, 484 F.3d 666 (4th Cir. 2007); Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013); Stern v. Stern, 639 F.3d 449 (8th Cir. 2011); Valenzuela v. Michel, 736 F.3d 1173 (9th Cir. 2013); West v. Dobrev, 735 F.3d 921 (10th Cir. 2013); Hanley v. Roy, 485 F.3d 641 (11th Cir. 2007).

632. *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009). "Thus, we review the district court's factual findings underpinning its Article 12 determination for clear error, and its ultimate conclusion that Brianna is not now settled in the United States de novo." *Id.* at 1008.

633. Blondin v. Dubois, 238 F.3d 153, 158 (2d Cir. 2001); Simcox v. Simcox, 511 F.3d 594, 601 (6th Cir. 2007) ("Whether there is a 'grave risk' of harm under the Convention is a mixed question of law and fact and thus review is de novo."); Norinder v. Fuentes, 657 F.3d 526 (7th Cir. 2011); Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013); Silverman v. Silverman (*Silverman II*), 338 F.3d 886 (8th Cir. 2003); Cuellar v. Joyce (*Cuellar I*), 596 F.3d 505 (8th Cir. 2010); Taylor v. Taylor, 502 F. App'x 854 (11th Cir. 2012).

lation of fundamental human rights, are subject to plenary (de novo) review.[634]

Purely factual determinations are subject to a clear error standard. In *Vasconcelos v. Batista*,[635] the court observed that "Although there is no case law directly on-point, it is logical to assume that the question of whether [the child] objected is fact-intensive, and thus the district court's finding that she objected is subject to clear error review."[636] Similarly, the findings whether or not parents shared an intent regarding the habitual residence is subject to the clear error standard.[637]

Most circuits use a dual standard of review for habitual residence questions.[638] Under this test a trial court's findings of fact are reviewed for clear error, and legal determinations, issues of domestic, foreign and international law are reviewed *de novo*. Courts in these circuits frequently refer to habitual residence issues as mixed questions of fact and law.[639] For example, the Eighth Circuit in *Silverman v. Silver-*

---

634. *In re* Application of Adan, 437 F.3d 381, 390 (3d Cir. 2006) ("We have not explicitly articulated a standard of review for the opposing party's burden of proving by clear and convincing evidence that an exception applies, but we agree with other circuit courts that, for all issues arising under the Convention, a District Court's determination of facts is reviewed for clear error and its application of those facts to the law, as well as its interpretation of the Convention, are reviewed de novo.").

635. 512 F. App'x 403 (5th Cir. 2013).

636. *Id.* at 407. *Accord* Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007).

637. "It then becomes the court's task to determine the intentions of the parents as of the last time that their intentions were shared. Clearly, this is a question of fact in which the findings of the district court are entitled to deference, and we consequently review those findings for clear error." Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005).

638. Neergaard-Colón v. Neergaard, 752 F.3d 526 (1st Cir. 2014); Guzzo v. Cristofano, 719 F.3d 100 (2d Cir. 2013); Feder v. Evans–Feder, 63 F.3d 217, 222 (3d Cir. 1995); Berezowsky v. Ojeda, 765 F.3d 456 (5th Cir. 2014); Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007); Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013); Silverman v. Silverman (*Silverman II*), 338 F.3d 886 (8th Cir. 2003); Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001); Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004).

639. *E.g.*, Darín v. Olivero–Huffman, 746 F.3d 1, 8–9 (1st Cir. 2014) (citing Koch v. Koch, 450 F.3d 703, 710 (7th Cir. 2006)); Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006); Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013); *Silverman II*, 338

man,[640] established the review standard for its circuit by following the Ninth and Third Circuits, finding that "habitual residence determinations raised mixed questions of fact and law and therefore should be reviewed de novo."

Only the Fourth Circuit appears to treat the habitual residence question as being subject to a clear error standard. In *Maxwell v. Maxwell*,[641] the court acknowledged the traditional review standards applicable to Hague cases:

> On appeal, the district court's findings of fact are reviewed for clear error and its legal conclusions regarding domestic, foreign, and international law are reviewed de novo. Ruiz v. Tenorio, 392 F.3d 1247, 1251 (11th Cir. 2004); Silverman v. Silverman, 338 F.3d 886, 896–97 (8th Cir. 2003) (en banc); Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001); Feder v. Evans–Feder, 63 F.3d 217, 222 n. 9 (3d Cir. 1995). Therefore, we must "accept the district court's historical or narrative facts unless they are clearly erroneous, but exercise plenary review of the court's choice of and interpretation of legal precepts and its application of those precepts to the facts." Feder, 63 F.3d at 222 n.9.[642]
>
> • • •
>
> [T]he crux of the issue on appeal is whether the district court's determination that the quadruplets' habitual residence was the United States at the time they were removed from Australia is clearly erroneous.[643]

The above-quoted language does not depart from the holdings of many other courts that have merely ruled on the question whether the

---

F.3d 886; *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009); Ruiz v. Tenorio, 392 F.3d 1247, 1252 (11th Cir. 2004). There are no cases in the Fourth or Tenth Circuits that refer to habitual residence questions as constituting mixed questions of fact and law.

640. 338 F.3d 886 (8th Cir. 2003) (en banc).

641. 588 F.3d 245 (4th Cir. 2009).

642. *Id.* at 250.

643. *Id.* at 251.

district court's findings of fact regarding a habitual residence are clearly erroneous.[644]

However, in *Reyes v. Jeffcoat*,[645] a different panel of the Fourth Circuit explained the holding in *Maxwell*, noting that

> The mother, however, urges us to depart from clear error review and to consider de novo the district court's ultimate determination regarding the child's habitual residence, arguing that "habitual residence" is a legal term rather than a fact-bound conclusion. We disagree with the mother's argument.
>
> In *Maxwell*, we explicitly stated that we were required to consider the question whether the district court's decision that the children's "habitual residence was the United States at the time they were removed . . . [was] clearly erroneous." . . . Although we have provided district courts with a conceptual focus for determining a child's habitual residence by directing courts to consider parental intent and acclimatization, this conceptual focus does not transform the factual inquiry into a legal one. Rather, in reaching a conclusion regarding the habitual residence of a child, district courts generally begin by making a series of subsidiary factual findings, such as the parents' employment and citizenship status, which ultimately shape the resulting factual finding of habitual residence. Thus, in accordance with our holding in *Maxwell*, we review for clear error the district court's determination regarding the "habitual residence" of the parties' child.[646]

In light of the language in *Reyes v. Jeffcoat*, one may not be certain whether the court in *Maxwell* intended only to restate the holdings of

---

644. *See, e.g.*, Mauvais v. Herisse, 772 F.3d 6, 14 (1st Cir. 2014); Seaman v. Peterson, 766 F.3d 1252, 1261 (11th Cir. 2014) ("So, in this case, we find no clear error in the district court's findings of historical fact supporting its ultimate legal conclusion that the habitual residence of the Peterson children was in Mexico at the time of their abduction on October 2, 2010. And, upon de novo review of that legal conclusion in light of the record as a whole, we are not left with the definite and firm conviction that a mistake has been made.").

645. 548 F. App'x 887, 891 (4th Cir. 2013) (unpublished opinion) (for rule regarding citation of unpublished opinions, see Fed. R. App. P. 32.1).

646. *Id.* at 891.

other courts granting deference to district court factual determinations in habitual residence questions or whether the *Maxwell* court intended that the "clear error" standard apply to both factual findings and the legal conclusion.

B. Expeditious Handling Required

The Convention makes very clear that abduction cases should be handled promptly and expeditiously. Article 11 states the following:

> The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

This principle is reflected in the Convention's stated purpose of protecting children from the effects of parental abduction and ensuring "their prompt return,"[647] and there are two separate provisions in the Convention discussing the expectation that judicial proceedings will be administered without delay. In addition to the requirement that courts "act expeditiously" in handling proceedings for return of children,[648] the Convention exhorts contracting states to use "the most expeditious procedures available."[649]

---

647. Convention, *supra* note 11, Preamble, Article 1.

648. *See, e.g.*, Daunis v. Daunis, 222 F. App'x 32, 2007 WL 786331 (2d Cir. 2007).

649. Convention, *supra* note 11, Article 2. *See* Holder v. Holder (*Holder II*), 392 F.3d 1009, 1022 (9th Cir. 2004) (overruling objections to use of a magistrate judge to conduct hearings pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b), and finding that the assignment of the case to a magistrate judge was in keeping with using the most expeditious procedures available). *See also Pérez-Vera Report, supra* note 19, ¶ 63.

The emphasis on prompt disposition applies to appellate proceedings as well.[650] In *Chafin v. Chafin*,[651] the Supreme Court urged both district and appellate courts to take steps to achieve expeditious handling of Hague cases,[652] noting that many courts already do so. The concurring opinion in *Chafin* also underscores the need for procedures that will enhance the speed and certainty in Hague cases. The concurring opinion cited to many courts of appeals using expedited procedures on appeal and suggested the possible adoption of formal uniform rules to implement such practices. The court also recommended the evaluation of procedures that would require leave to appeal, and the judicious use of stays to avoid competing custody proceedings in multiple jurisdictions.

Expedited procedures for briefing and handling of appeals have become common in most circuits.[653] Appellate courts have also avoided remand by identifying potential remand issues[654] and resolving factual matters where it is possible to do so based on a "well developed record."[655]

---

650. *See*, *e.g.*, *In re* Application of Adan, 437 F.3d 381, 398 (3d Cir. 2006).

651. 133 S. Ct. 1017 (2013).

652. "[C]ourts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Id.* at 1026–27.

653. *See, e.g.*, Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013); Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Kijowska v. Haines, 463 F.3d 583 (7th Cir. 2006); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005) (ordering any subsequent appeal to be assigned to the same panel and advising counsel of provisions for requesting an expedited briefing schedule); Sealed Appellant v. Sealed Appellee, 394 F.3d 338 (5th Cir. 2004); *Holder II*, 392 F.3d 1009; Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001); England v. England, 234 F.3d 268 (5th Cir. 2000); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); Chafin v. Chafin, 742 F.3d 934 (11th Cir. 2013); Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013); *cf.* Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013) *and* Whiting v. Krassner, 391 F.3d 540 (3d Cir. 2004) (denying requests for stay of return orders and expedited appeals).

654. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001); *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009).

655. *See, e.g.*, Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

For example, in *Charalambous v. Charalambous*,[656] the district court issued an order of return of a child to Cyprus. The First Circuit stayed the order of return on October 28, 2010, and expedited the appeal. Oral argument was held on December 7, 2010, and the court issued its opinion affirming the district court on December 8, 2010—57 days after the district court's decision.[657]

Although the Convention does not explicitly impose upon petitioners the correlative obligation to promptly prosecute their applications once filed,[658] one California court has held that the Convention does not deprive courts of their inherent power to manage their affairs, including the power to dismiss for delayed prosecution.[659]

1. Application of Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure govern the handling of cases arising under the 1980 Convention in the federal court system. In *Kijowska v. Haines*,[660] the Seventh Circuit found that Illinois law prohibited a stay of an order enforcing a child custody proceeding while an appeal was pending, absent exigent circumstances. However, the court noted that matters relating to procedure in federal courts are governed by federal law, not state law, and upheld the stay of an order

656. 627 F.3d 462 (1st Cir. 2010).

657. *Author's Note*: Within the three-year period from August 2011–July 2014, the First Circuit's average for adjudicating appeals, calculated from the date of the district court's decision to the issuance of its appellate opinion, was approximately 182 days per case—the lowest average amount appellate courts that handled a statistically relevant number of cases (*Source*: author's review of published and unpublished appellate opinions based on district court decisions rendered commencing August 2011).

658. Failure to file an application for return in court within one year may subject the petitioner to the defense of delay pursuant to Article 12. *See* discussion commencing at p. 94.

659. Bardales v. Duarte, 104 Cal. Rptr. 3d 899, 1270–71 (Cal. Ct. App. 2010); s*ee also* Cruz v. Cruz, 33 Conn. L. Rptr. 594 (Conn. Super. Ct. 2002) (mother waited almost two years to prosecute petition for return, during which time she had attempted no contact with the child) (unreported disposition).

660. 463 F.3d 583, 589 (7th Cir. 2006).

of return and the denial of a subsequent application to dissolve the stay pending appeal.

2. Expedited Discovery

A court may adopt an expedited discovery schedule when considering a petition for return.[661] The provisions of both the 1980 Convention and ICARA contemplate the use of expedited procedures to "guarantee that children are returned quickly to the correct jurisdiction."[662] The *Norinder* court reasoned that:

> [T]he adjudication of a petition for return of a child is much like a district court's exercise of equitable power in the context of a preliminary injunction or a temporary restraining order. In both circumstances, discovery often must proceed quickly, the district court must apprise itself of the relevant facts, and a decision must be rendered on an expedited basis.[663]

3. Relaxed Rules for Admissibility of Documents

Furthering the goal of expedited procedures, ICARA provides a "generous authentication rule"[664] that eliminates the need for authentication for documents that are submitted with the petition for return.[665]

---

661. *See*, *e.g.*, Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012).

662. Norinder v. Fuentes, 657 F.3d 526, 533 (7th Cir. 2011).

663. *Id.*

664. March v. Levine, 249 F.3d 462 (6th Cir. 2001). *See* 22 U.S.C. § 9005:

> With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

665. Brosselin v. Harless, 2011 WL 6130419 (W.D. Wash. 2011) (unreported disposition). *Brosselin* cites to *Danaipour v. McLarey* (*Danaipour II*), 386 F.3d 289 (1st Cir. 2004), wherein the First Circuit noted that the district court held that Hague Convention cases do not require the application of the Federal Rules of Evidence regarding hearsay, as such cases are summary proceedings. *Danaipour II,* 386 F.3d at 296. *Cf.* Avendano v. Smith, 2011 WL 3503330 (D.N.M. 2011) (unreported disposi-

Section 9005 of ICARA has been held to authorize consideration of translated excerpts from foreign law,[666] foreign custody decisions,[667] translated documents from foreign courts,[668] and affidavits submitted by the parties.[669]

C. Parallel Jurisdiction Issues

The grant of concurrent original jurisdiction by ICARA has resulted in Convention litigation raising issues of abstention and, to a lesser extent, removal. When a state case is pending, an abstention argument may emerge. Federal courts must then examine whether the state case involved is actually adjudicating a claim under the Convention or is principally a custody dispute.

1. *Younger* Abstention

If federal adjudication would disrupt an ongoing state proceeding, the *Younger*[670] abstention doctrine may apply. Three elements must be present for abstention under *Younger* to apply: (1) the federal plaintiff is a party in an ongoing state judicial action and federal proceedings would interfere with that action; (2) the state court litigation implicates important state interests; and (3) the state proceedings afford the

---

tion) ("This provision [9005] of the International Child Abduction Remedies statute, [22 U.S.C. §§ 9001 to 9011], which implements by congressional statute the Hague Convention, supports the Court's conclusion that the Federal Rules of Evidence apply to its consideration of the Petition, because, if the Federal Rules of Evidence did not apply, there would be no need for a statute eliminating the authentication requirement for certain documents."). See also *Walker v. Walker*, 701 F.3d 1110, 1117 (7th Cir. 2013), upholding Rule 408's ban on the admission of offers of compromise in a Hague Convention case.

666. Seaman v. Peterson, 762 F. Supp. 2d 1363 (M.D. Ga. 2011); Norinder v. Fuentes, 2010 WL 4781149 (S.D. Ill. 2010) (unreported disposition).

667. Chechel v. Brignol, 2010 WL 2510391 (M.D. Fla. 2010) (unreported disposition); Doudle v. Gause, 282 F. Supp. 2d 922 (N.D. Ind. 2003).

668. Kufner v. Kufner, 480 F. Supp. 2d 491 (D.R.I. 2007).

669. *In re* Walsh, 31 F. Supp. 2d 200 (D. Mass. 1998), *reversed in part on other grounds*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

670. Younger v. Harris, 401 U.S. 37 (1971).

parties the opportunity to raise the claims they seek to present in federal court.[671] Courts have been reluctant to apply *Younger* abstention in the context of Hague Convention cases.[672]

Where state custody proceedings are ongoing, but Hague Convention claims have not been raised in state court, the first element of *Younger* is not satisfied.[673] Article 16 of the Convention requires that the merits of any custody dispute be stayed pending the outcome of the Hague application. If a federal court has been presented with a Hague application while a state custody action is proceeding, abstention should not apply.[674]

The second element under *Younger*—that state proceedings must implicate important state interests—has been interpreted not to apply to Hague cases.[675]

---

671. *See* Yang v. Tsui (*Yang I*), 416 F.3d 199, 202 (3d Cir. 2005) (citing FOCUS v. Allegheny Cnty. Ct. Com. Pl., 75 F.3d 834, 843 (3d Cir. 1996)). *Yang* adopts a broader interpretation of the *Younger* abstention doctrine than that of the Second, Seventh, and Ninth Circuits. *See Yang I*, 416 F.3d at 202 n.1.

672. *See, e.g.*, Silverman v. Silverman (*Silverman I*), 267 F.3d 788, 792 (8th Cir. 2001) ("[A]bstention principles do not permit an outright dismissal of a Hague petition."); Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 891 (8th Cir. 2003) ("abstention does not apply in Hague Convention cases"); Barzilay v. Barzilay (*Barzilay I*), 536 F.3d 844, 850 (8th Cir. 2008) ("The pendency of state custody proceedings therefore does not support *Younger* abstention in the Hague Convention context."); *but see* Witherspoon v. Orange Cnty. Dep't of Soc. Servs., 646 F. Supp. 2d 1176 (C.D. Cal. 2009) (holding *Younger* abstention applied and federal action dismissed where mother filed Hague return petition in state court, which was stayed by state appeals court pending determination of dependency petition, whereupon mother filed identical Hague return petition in federal court).

673. *See, e.g.*, *Barzilay I*, 536 F.3d at 850.

674. *See, e.g.*, *id.*; *Yang I*, 416 F.3d at 203; Karpenko v. Leendertz, 619 F.3d 259, 262 (3d Cir. 2010).

675. *See, e.g.*, *Yang I*, 416 F.3d at 204 (finding that adjudication of a Hague return case is a federal statutory matter, entirely distinct from a state custody case); Escaf v. Rodriguez, 52 F. App'x 207, 2002 WL 31760202 (4th Cir. 2002) (finding second prong absent because the Hague Convention involves issues relating to the international movement of children, which is a federal, not a state, interest); Grieve v. Tamerin, 269 F.3d 149, 153 (2d Cir. 2001) (". . . Grieve's claim implicates a paramount federal interest in foreign relations and the enforcement of United States treaty obliga-

2. *Colorado River*[676] Abstention

Federal courts may abstain if there are parallel proceedings in state and federal courts that involve the same parties and the same issues. The consideration of "wise judicial administration" may justify a decision by a court to stay federal proceedings in deference to the parallel state proceedings.[677] Abstention under the *Colorado River* doctrine allows for either a stay of proceedings in federal court or a dismissal of the action.[678]

As with *Younger* abstention, if Hague claims have not been raised in the state action, *Colorado River* abstention does not apply.[679] In *Holder v. Holder (Holder I)*,[680] the Ninth Circuit reversed the district court's abstention pursuant to *Colorado River*, where the district court stayed proceedings in favor of California custody proceedings. In *Holder I*, father was in the U.S. Air Force, stationed in Germany. Mother brought the parties' two children to the state of Washington. Father filed a divorce action in California, where the parties previously lived. Mother filed a divorce action in Washington, but later dropped that action, conceding that jurisdiction in California was appropriate. Temporary custody orders were entered in California, placing the children in the primary custody of mother in Washington. The California court did not consider any Hague issues, but recognized that those issues might be brought "on a separate track." Father thereafter filed his Hague petition in federal court in Washington where the children were located. The district court stayed proceedings on the

---

tions. Deference to a state court's interest in the outcome of a child custody dispute would be particularly problematic in the context of a Hague Convention claim inasmuch as the Convention divests the state of jurisdiction over these custody issues until the merits of the Hague Convention claim have been resolved.").

676. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

677. Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 912 (9th Cir. 1993).

678. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

679. *Yang I*, 416 F.3d at 204 n.5; *Escaf*, 52 F. App'x 207, 2002 WL 31760202.

680. 305 F.3d 854 (9th Cir. 2002).

grounds that father had initiated the custody proceedings in state court in California, even though he did not pursue a Hague claim in that court. The district court reasoned that California's custody determination would likely result in the preclusion of father's Hague claims. The Ninth Circuit court reversed, noting that the finality of the California state custody case would not resolve the Hague Convention issues because the Hague issues were not raised in the California action.[681]

Colorado River abstention is often invoked when the parallel state proceeding includes a claim under the Hague Convention.[682] However, a federal court may choose not to abstain for other reasons. In *Lops v. Lops*,[683] the Eleventh Circuit affirmed the district court's refusal to abstain even though the petitioning mother initially filed a Hague Convention petition in state court and then filed an identical petition in federal court. The Eleventh Circuit noted that the state court could not hear the Hague proceeding for at least two months. The federal district court was prepared to, and did, hear the case on a more expedited basis. Noting that federal courts have the "virtually unflagging obligation . . . to exercise the jurisdiction given them,"[684] the court of appeals applied the factors governing whether to stay or dismiss a federal action and ultimately affirmed the district court's refusal to abstain.[685]

---

681. *Id.* at 868.

682. *See, e.g.*, Copeland v. Copeland, 134 F.3d 362, 1998 WL 45445 (4th Cir. 1998) (unpublished table decision) (upholding abstention where state court denied mother's return petition); Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002) (arguing Hague issues to state court).

683. 140 F.3d 927 (11th Cir. 1998).

684. McClelland v. Carland, 217 U.S. 268, 282 (1910).

685. Factors include "(1) whether one of the courts has assumed jurisdiction over any property in issue; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the parties' rights." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15–16, 23–27 (1983); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

3. *Rooker-Feldman* Doctrine

The *Rooker-Feldman*[686] doctrine is a narrowly applied rule that bars a losing party in a state court action from invoking federal jurisdiction to review and set aside the state judgment resting on federal law. Such a tactic is tantamount to having the federal court act as a court of appeal to the state court judgment. Similarly, federal courts must abstain from relitigating issues that are "inextricably intertwined" with the state court decision.[687]

In the context of Hague Convention actions, *Rooker-Feldman* would apply if a party filed an application for return in federal court after a state court denied the Hague petition, with the party alleging the state court decided the case erroneously.[688] Also, the doctrine applies when a party files a Hague Convention application for return of a child as an artifice to collaterally attack a state court judgment that was fully litigated.[689]

4. Removal

Removal has been mentioned in only a few Hague cases, none of which has analyzed the issue of whether the petitioner's selection of

686. Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Ct. of App. v. Feldman, 460 U.S. 462 (1983).

687. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282–86, 125 S. Ct. 1517, 1521–23 (2005).

688. *See* Holder v. Holder (*Holder I*), 305 F.3d 854 (9th Cir. 2002) (ruling district court should proceed with hearing of Hague case even though pending state court case would resolve issues of custody); *see also* Rigby v. Damant 486 F. Supp. 2d 222 (D. Mass. 2007) (finding district court could not enjoin state court from proceeding with custody determination during pendency of Hague case in the federal court—if the state court is required to stay its proceedings because of the pendency of the Hague petition in federal court, it must do so on its own).

689. *See* White v. White, 556 F. App'x 10 (2d Cir. 2014) (unreported disposition) (upholding district court's dismissal of parent's petition on the grounds of the *Rooker-Feldman* doctrine, *res judicata*, and collateral estoppel).

forum must be honored.[690] In *In re Mahmoud*,[691] mother filed a Hague petition in state court. On the first day of trial, father filed a notice of removal in both jurisdictions and advised the state court judge that the action had been removed to federal court. Mother opposed removal, arguing that she had the right to select a state court forum. The state court proceeded to hear the case and ordered the child returned to England with the mother. Father moved to vacate the state court order, principally to attack the award of attorneys' fees and costs. The district court found that once removal was effective, the entry of any order thereafter by a state court was void.[692]

D. Comity

In *Hilton v. Guyot*,[693] the Supreme Court held comity is neither a matter of absolute obligation nor of mere courtesy and good will. Rather, under the principles of international comity, the United States may recognize the judicial, executive, or legislative actions of another nation, as long as doing so is consistent with U.S. law.[694] If a court deems that according comity to a foreign judgment is appropriate, it should not readjudicate the foreign court proceeding unless there are specific and compelling reasons to do so.[695]

1. Hague Convention Orders of Other Nations

The acceptance of treaty partnership with other nations signifies a certain degree of trust that the courts of other countries will safeguard

690. *See* Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289 (1st Cir. 2004); Morrison v. Dietz, No. 07-1398, 2008 WL 4280030 (W.D. La. 2008) (unreported disposition).

691. No. CV 96 4165 (RJD), 1997 WL 43524 (E.D.N.Y. 1997) (unreported disposition).

692. *Id.* at 2 (citing Tarbell v. Jacobs, 856 F. Supp. 101, 104 (N.D.N.Y. 1994)).

693. 159 U.S. 113 (1895).

694. *Id.* at 113.

695. *Id.* For a discussion of comity as it pertains to the issue of undertakings, see *supra* note 570.

the interests of children with the same degree of concern as U.S. courts. See, for example, *Souratgar v. Lee*:[696]

> [T]he careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection. In the exercise of comity, "we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it."[697]

Notwithstanding the language of *Hilton*, U.S. courts sometimes have scrutinized the substance of foreign rulings on Hague petitions when determining whether to grant comity. In *Asvesta v. Petroutsas*,[698] mother abducted the child to Greece. Father's petition for return under the Hague Convention was denied by the Greek court on the basis that father consented to the child's removal, mother had not wrongfully retained the child, and the child would suffer grave harm if returned to the United States. Father thereafter reabducted the child back to the United States, and mother filed a petition for return. The district court granted mother's petition, according comity to the previous Greek order. The Ninth Circuit reversed, distinguishing the broad language of *Hilton* and pointing out that in the context of Hague litigation, an international legal framework has been agreed on by all contracting nations. After a review of the decisions of other circuits,[699] the court reasoned:

---

696. 720 F.3d 96 (2d Cir. 2013).

697. *Id.* at 108–09, citing *Blondin I*, 189 F.3d 240, 242, 248–49 (2d Cir. 1999).

698. 580 F.3d 1000 (9th Cir. 2009).

699. Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001) (extending comity to Greek order denying father's petition for return, while still critical of some of the conclusions reached by the Greek court); Carrascosa v. McGuire, 520 F.3d 249 (3d Cir. 2008) (denying comity to Spanish denial of Hague Convention petition where Spanish court ignored New Jersey law in determining whether father had custody rights, and impermissibly considered the merits of the custody case in deciding the Hague Convention case); Pitts v. de Silva, 2008 ONCA 9, [2008] 289 D.L.R. 4th 540

> In this context, we are in a better position to examine the merits of a foreign court's Hague decision in deciding whether that decision warrants deference. Although we recognize that our careful examination of the merits of another contracting nation's Hague adjudication could, in some circumstances, undermine the mutual trust necessary for the Convention's continued success, we also recognize that its success relies upon the faithful application of its provisions by American courts and the courts of other contracting nations. For this reason, we follow the path charted by *Diorinou*, *Carrascosa*, and *Pitts* and conclude that we may properly decline to extend comity to the Greek court's determination if it clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.[700]

2. Enforcement of Foreign Custody Decisions

Comity has been extended to the custody orders of other nations. In *Navani v. Shahani*,[701] the Tenth Circuit found that comity should be given to a family court order of England, based on the English court's interpretation of English law.[702]

Comity, however, may not be used to confer jurisdiction in a federal court that does not have subject-matter jurisdiction under any other theory. In *Taveras v. Taveras*,[703] father filed an action for return of the children to the Dominican Republic. However, the Convention

---

(Can. Ont.). In *Pitts*, appellate court in Ontario examined whether the Tenth Circuit properly handled an Article 13(b) analysis in *de Silva v. Pitts*, 481 F.3d 1279 (10th Cir. 2007). Upon determining that the circuit court did, the Ontario appellate court granted comity.

700. *Asvesta*, 580 F.3d at 1013–14. *See also Carrascosa*, 520 F.3d at 259, 263–64 (denying comity based on the finding that Spanish courts "departed from the fundamental premise of the Hague Convention and violated principles of international comity by not applying New Jersey law").

701. 496 F.3d 1121 (10th Cir. 2007).

702. *Navani*, 496 F.3d at 1128. *See also* Miller v. Miller, 240 F.3d 392 (4th Cir. 2001) (extending comity to a Canadian custody order that conflicted with a state court order); *but see* Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828 (S.D. Tex. 2006) (refusing comity to Belgian custody orders).

703. 477 F.3d 767, 783–84 (6th Cir. 2007).

had not yet entered into force between the Dominican Republic and the United States. Father argued that comity should be given to an order of the Dominican courts granting him temporary custody of the children. The district court denied father's requested relief. The decision was affirmed by the Sixth Circuit, which noted that "no court has held or suggested that the mere existence of a foreign judgment, much less an order, supplies a federal court with subject matter jurisdiction."[704]

E. Petitions for Access Only

Circuits are split[705] on the issue whether courts may entertain petitions for enforcement of access or visitation pursuant to the Convention.

In *Cantor v. Cohen*,[706] mother petitioned for return and access (visitation) with two children. The district court dismissed the access claim and mother appealed. The Fourth Circuit affirmed the dismissal of the action, finding that Article 21 of the Convention did not create an obligation upon courts to enforce access rights, since that article provides for applications to organize or secure rights of access to be presented to the Central Authorities. The court in *Cantor* reasoned that the provisions of ICARA must be read within the context of Article 21, and as such ICARA does not establish a right of action that does not exist under the Convention.[707] The court reasoned further that the limited jurisdiction of federal courts supports the conclusion

704. *Id.* at 783 n.12.

705. Circuit split recognized in *Londono v. Gonzalez*, 988 F. Supp. 2d 113 (D. Mass. 2013).

706. 442 F.3d 196 (4th Cir. 2006). *See also* Wiezel v. Wiezel-Tyrnauer, 388 F. Supp. 2d 206 (S.D.N.Y. 2005); Ly v. Heu, 296 F. Supp. 2d 1009 (D. Minn. 2003); Wiggill v. Janicki, 262 F. Supp. 2d 687 (S.D. W. Va. 2003); Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998).

707. *Id.* at 200. See *Cantor*'s discussion and rejection of contrary interpretations of *Katona v. Kovacs*, 148 F. App'x 158 (4th Cir. 2005) (unreported disposition), and *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000). *Cantor*, 442 F.3d at 202–06.

that ICARA was not meant to confer upon courts jurisdiction to hear access claims.[708]

The Second and Sixth Circuits, however, reached different conclusions. In *Ozaltin v. Ozaltin*,[709] the Second Circuit emphasized the language in § 9003 that points to the existence of the right of action to enforce access rights[710] and provisions relating to burdens of proof specific to such enforcement actions.[711] The court concluded that ". . . § 9003 unambiguously creates a federal right of action to secure the effective exercise of rights of access protected under the Hague Convention."[712]

In *Taveras v. Taveraz*,[713] the Sixth Circuit affirmed the district court's dismissal of a petition to return a child under the Alien Tort Statute.[714] In passing, the court observed that "We note that unlike The Hague Convention, the ICARA, 22 U.S.C. § 9003, does provide for judicial remedies for non-custodial parents, namely for rights of access claims (e.g., visitation)."[715]

---

708. *Id.* at 202.

709. 708 F.3d 355 (2d Cir. 2013).

710. Section 9003(b) states:

> Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

711. Section 9003(e) states:

> A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—
>
> (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
>
> (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

712. *Ozaltin,* 708 F.3d at 372. This interpretation of ICARA appears to be approved by the Sixth Circuit in dicta contained in a footnote in *Taveras v. Taveraz*, 477 F.3d 767, 778 (6th Cir. 2007).

713. 477 F.3d 767 (6th Cir. 2007).

714. 28 U.S.C. § 1350.

715. *Taveras*, 477 F.3d at 778 n.7.

The passage of the "Sean and David Goldman International Child Abduction Prevention and Return Act of 2014"[716] (hereinafter "Goldman Act") sheds little light on the question whether access rights are enforceable by court actions. Although one of the stated purposes of the Act is to "enhance the prompt resolution of abduction and access cases,"[717] the Act limits the definition of an "access case" to "a case involving an application filed with the Central Authority of the United States by a parent seeking rights of access."[718] The Act's later definition of the term "rights of access," however, provides

> The term "rights of access" means the establishment of rights of contact between a child and a parent seeking access in Convention countries—
>
> (A) by operation of law;
>
> (B) through a judicial or administrative determination; or
>
> (C) through a legally enforceable arrangement between the parties.

1. Making Access Orders

No court has offered guidance on how to "organize" or "secure" the exercise of access rights.[719] State courts are equipped to handle a wide

716. The Act was signed by President Obama on August 8, 2014. Public Law No. 113-150. The Goldman Act principally seeks to improve the return of children from both Hague Convention and non-convention countries. *Inter alia,* the Act (1) establishes procedures for dealing with abduction and access cases by directing the Secretary of State to enter into bilateral agreements and Memoranda of Understanding with non-Hague countries; (2) directs the Secretary to initiate various actions to respond to countries that are non-compliant; (3) imposes significant new reporting requirements on the State Department for abduction and access cases; and (4) establishes an interagency working group consisting of officials from the Department of State, Homeland Security and the Department of Justice.

717. *Id.* § 2(c)(4).

718. *Id.* § 3(4).

719. Article 21, however, envisions the cooperation and initiative of the Central Authority in the establishment and securing of rights of access. It is not beyond the realm of possibility that the Office of Children's Issues in the U.S. State Department (the U.S. Central Authority) may be able to assist in arranging some services for the federal courts to utilize, e.g., mediation, through cooperative agreements with established state court service providers. Where litigants in access cases have the financial

spectrum of child custody disputes, including requests to establish visitation rights, or to enforce those that have already been ordered. State courts regularly hearing custody cases have access to a broad range of services, including mediation programs, psychological evaluations, facilities for monitored exchanges or supervised visitation, counsel for children, guardians ad litem, and counseling services. Federal courts, in contrast, usually do not have such resources. However, the absence of services has not been observed as an impediment to district courts ordering visits in ongoing Hague cases.[720]

Where a party merely seeks to enforce an order that was previously issued, the challenges for enforcing access rights in federal courts are few. In *Cantor v. Cohen*, the dissenting opinion noted that

> [C]ontrary to the assumption that an action to secure access rights will force federal courts into the business of domestic law, the inquiry called for under section 9003(e) is very limited-the court need only decide whether "the petitioner has such rights" of access. . . . This limited inquiry does not require federal courts to plumb the depths of family law; in fact, it requires no greater degree of entanglement with family law than does the determination of whether a child has been removed in violation of existing custody rights.[721]

A broader reading of the language of § 9003(b) ("arrangements for organizing or securing the effective exercise of rights of access") seems to support the interpretation that proceedings to establish access or visitation rights are contemplated by the statute. Lest there be some confusion over the use of the term "organize" within the context of the 1980 Convention, this is meant to bear the same meaning as the

---

ability to pay for private services, the court may simply order that the parties participate in whatever types of service is appropriate—e.g., mediation or custody evaluation. The greater challenge will be in those cases where the parties are unable to financially support such services.

720. *See*, *e.g.*, Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013); Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008), *vacated on other grounds in* Duran v. Beaumont, 560 U.S. 921 (2010).

721. 442 F.3d 196, 212 (4th Cir. 2006).

word "establish."[722] Thus it appears that federal courts may be called upon to (1) enforce existing access orders, and (2) establish and/or enforce access orders.

2. Interim Visits Pending Trial

Neither the Hague Convention nor ICARA contain provisions relating to a left-behind parent's request for interim visits with the child pending a decision on the application for return. Nevertheless, courts have exercised their discretion in ordering such visits pending a trial on the merits.[723] The Goldman Act[724] appears to place an imprimatur on the ability of courts to order interim visitation by stating one of the purposes of the Act is to "assist left-behind parents in . . . maintaining safe and predictable contact with their child while an abduction case is pending."[725] The legislation further defines the phrase "interim contact" to mean "the ability of a left-behind parent to communicate with or visit an abducted child during the pendency of an abduction case."[726] The term "rights of interim contact" are further defined as "the rights of contact between a child and a left-behind parent, which has been provided as a provisional measure

722. "Understood thus, the first paragraph contains two important points; in the first place, the freedom of individuals to apply to the Central Authority of their choice, and secondly the fact that the purpose of the application to the Central Authority can be either the organization of access rights, *i.e., their establishment*, or the protection of the exercise of previously determined access rights. Now, recourse to legal proceedings will arise very frequently, especially when the application seeks to organize rights which are merely claimed or when their exercise runs up against opposition from the holder of the rights of custody." Pérez-Vera Report, *supra* note 19, ¶ 127 (emphasis added).

723. *See In re* S.E.O., 873 F. Supp. 2d 536 (S.D.N.Y. 2012) (unreported disposition) (ordering pendente lite visits previously granted by a Turkish court); Charalambous v. Charalambous, 751 F. Supp. 2d 255, 259 (D. Me. 2010) (ordering visitation at specific dates and times); Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012) (supervised visits granted).

724. Public Law No. 113-150 [HR 3212], Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, 22 U.S.C. §§ 9101–9141.

725. *Id.* § 2(c)(2).

726. *Id.* § 3(14).

while an abduction case is pending, under the laws of the country in which the child is located . . . ."

F. Contacting Judges in Foreign Jurisdictions

Although there are few reported examples of U.S. courts communicating directly with courts in other countries,[727] it is well known that these communications take place.[728] Direct communication with a judge in another country may be helpful in resolving issues surrounding the logistics of the return of a child or to answer questions relating to foreign law.

The 1980 Convention has enjoyed unparalleled acceptance within the international community—eighty-seven countries are now signatories. Broad acceptance of the Convention brings with it a corresponding diversity of legal systems. Notions of judicial independence may vary widely among countries. In the United States, discussions among state judges dealing with the same parties in a custody case are usually mandatory.[729] In some countries, however, any contact with any other person, even a judicial colleague in the same country, is considered both an infringement upon judicial independence and a violation of judicial ethics—in essence, an ex parte communication.

---

727. *See, e.g.*, Innes v. Carrascosa, 918 A.2d 686, 391 N.J. Super. 453 (Super. Ct. App. Div. 2007) (attempting unsuccessfully to contact judge in Spain by phone and fax); Grammes v. Grammes, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. 2003) (unreported disposition) (discussing details of mirror-image order between U.S. judge and Canadian judges).

728. "SPECIAL FOCUS: Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks," Hague Conference on Private International Law, The Judges' Newsletter on International Child Protection, Vol. XV, Autumn 2009.

729. Both the UCCJEA and its predecessor, the UCCJA, made communication with other courts a requirement where it appeared that two courts were attempting to exercise jurisdiction in a child custody matter simultaneously. The principal difference between the UCCJEA and its predecessor is that under the UCCJEA a record must be made of the communications with the other court. The language of the UCCJEA requiring communication with other states is expansive enough to include communication with courts of foreign countries.

This may be true even though there is no discussion concerning the facts or merits of the case.

Communications with judges in other countries should avoid any reference to the merits of the underlying case. The most accepted form of interjudicial communication involves obtaining information regarding: (1) an understanding of foreign law and procedure;[730] (2) how to better expedite proceedings; and (3) jurisdictional matters.[731]

An emerging guidance and statement of general principles for direct judicial communications has been prepared by the Hague Permanent Bureau as a result of the general endorsement of the Special Commission, held June 2011, on the 1980 Child Abduction Convention and the 1996 Hague Child Protection Convention. This document embodies many of the same principles set forth in the Uniform Child Custody Jurisdiction and Enforcement Act relating to judicial communications between state court judges on matters relating to the exercise of child custody jurisdiction. The principles recommended by the Permanent Bureau's Report on Judicial Communications are:

- Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.

---

730. Article 15 of the Convention provides the following:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Rather than using the procedures under Article 15, it may be more expedient to engage in judicial communication regarding the existence of the type of order envisioned by Article 15.

731. In some countries, cases are not assigned to an individual judge until there is actually a matter pending. Many countries refer to this as being "seized" with the case. If there is no case pending at all in a foreign court, one may be hard pressed to be able to effectively communicate with any judge on anything but rudimentary legal principles.

- When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.
- In Contracting States in which direct judicial communication are practiced, the following are commonly accepted procedural safeguards:
  - except in special circumstances, parties are to be notified of the nature of the proposed communication;
  - a record is to be kept of communications, and that record is to be made available to the parties;
  - conclusions reached should be in writing;
  - parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.[732]

In order to facilitate communication between judges in different countries, the Hague Permanent Bureau has created a network of judges who will assist and advise judges regarding communication with foreign counterparts. The Permanent Bureau is working on establishing a protocol to facilitate interjudicial communication. Currently this network includes more than 65 judges from 45 different nations,[733] including four U.S. network judges designated by the U.S.

732. Hague Conference on Private International Law, Special Commission to Review the Operation of the 1980 Hague Convention, Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, Including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, in the Context of the International Hague Network of Judges, Preliminary Doc. No. 3D, Dec. 2011.

733. Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, June 2011, p. 8.

State Department.[734] These judges are available to facilitate contacts with foreign judges and to provide logistical information and assistance to judges handling Hague cases.

G. Attorney Fees and Costs

1. Authority for Awards

Article 26 of the Convention provides for an award of attorney fees and incidental costs to the person who successfully obtains the return of a child. It states:

> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.[735]

ICARA implements the attorney fee and costs provision by providing that:

> Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.[736]

Note that ICARA's provisions relating to fees and costs differ from the language contained in Article 26 of the Convention. The Convention

734. The list of judges may be found on the Hague website at http://www.hcch.net/upload/haguenetwork.pdf.

735. Convention, *supra* note 11, Article 26.

736. 22 U.S.C. § 9007(b)(3) (1988).

makes an award of fees and costs discretionary, but ICARA states that the court "shall" make the award.

Based on ICARA's language it appears that courts have a mandatory obligation to make a fee award unless the aggrieved party demonstrates that making such an award would be "clearly inappropriate."[737] The burden to demonstrate inappropriateness is allocated to the abducting parent.[738] The purpose of encouraging courts to make this award is twofold: first, to place the parties in the same condition they were in prior to the wrongful removal or retention of the child; and second, to deter future similar conduct.[739]

In *Salazar v. Maimon*,[740] the parties reached a settlement that provided father would voluntarily return the child. After entry of the order of return, mother requested an award of fees. Father opposed the order on the basis that the parties settled the case, so there was no basis for an award. The Fifth Circuit found to the contrary, holding

> [T]he language in section 9007(b)(3) is unambiguous. The statute plainly states on its face that "[a]ny court ordering the return of a child pursuant to an action brought under section 9003 . . . shall order the respondent to pay necessary expenses." . . . Nothing in the language requires a finding of wrongful removal or retention of a child, or an adjudication on the merits, as a prerequisite for an award under this provision. Rather, the plain reading of this statute simply requires that the action be brought pursuant to section 9003 and that the court enter an order directing the return of the child.[741]

737. Salazar v. Maimon, 750 F.3d 514 (5th Cir. 2014).

738. 22 U.S.C. § 9007(b)(3); *see also* Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 346 (5th Cir. 2004).

739. *See Text & Legal Analysis*, *supra* note 73, at 10,511 (Mar. 26, 1986); Roszkowski v. Roszkowska, 274 N.J. Super. 620, 639 (1993), *abrogated on other grounds*, Ivaldi v. Ivaldi, 147 N.J. 190 (1996) (referring to provisions of ICARA relating to fees as a "sanction").

740. 750 F.3d 514 (5th Cir. 2014).

741. *Id.* at 518.

Legal services provided to parents seeking the return of their children are frequently provided on a pro bono or reduced-fee basis. Courts may still award fees to the petitioning parent in such cases.[742]

The provision for reimbursement of fees and costs is not reciprocal—a party that successfully defends against an application for return of a child is not entitled to an award of attorney fees or other listed costs.[743]

2. Amount of Awards

Federal courts typically apply the lodestar method of determining the amount of attorney fees to be awarded. Under this method, the court determines a reasonable hourly rate and multiplies this rate by the number of hours reasonably expended.[744] After making a lodestar determination, courts may examine whether it is necessary to adjust the lodestar figure based on other factors. Those other factors typically[745] include the following:

1. the time and labor required
2. the novelty and difficulty of the questions involved

---

742. Cuellar v. Joyce (*Cuellar II*), 603 F.3d 1142, 1143 (9th Cir. 2010); Larrategui v. Laborde, 2014 WL 2154477 (E.D. Cal. 2014); Haimdas v. Haimdas, 720 F. Supp. 2d 183, 209 (E.D.N.Y. 2010); Saldivar v. Rodela, 894 F. Supp. 2d 916, 927–28 (W.D. Tex. 2012) (fees and costs are recoverable if they are incurred "on behalf" of the petitioner, and legal aid entities are not excluded by ICARA). *Cf.* Mendoza v. Silva, 987 F. Supp. 2d 910 (N.D. Iowa 2014) (denying award of fees considering as an "equitable" factor that mother's attorney was provided by legal aid, but allowing portion of prevailing party's expenses).

743. *Cf.* Slagenweit v. Slagenweit, 64 F.3d 719 (8th Cir. 1995) (costs of depositions and translations awarded to prevailing party defending against return).

744. Neves v. Neves, 637 F. Supp. 2d 322, 339 (W.D.N.C. 2009); Distler v. Distler, 26 F. Supp. 2d 723 (D.N.J. 1998); Larrategui v. Laborde, 2014 WL 2154477 (E.D. Cal. 2014).

745. *See, e.g.*, Norinder v. Fuentes, 657 F.3d 526, 536 (7th Cir. 2011); *Neves*, 637 F. Supp. 2d 322; Ballen v. City of Redmond, 466 F.3d 736, 746 (9th Cir. 2006); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010). The twelve factors listed above are referred to as the "Johnson" factors. *See* Johnson v. Georgia Highway Exp. Inc., 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds*, Blanchard v. Bergeron, 489 U.S. 87 (1989); Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999).

3. the skill requisite to perform the legal service properly
4. the preclusion of other employment by the attorney owing to acceptance of the case
5. the customary fee
6. whether the fee is fixed or contingent
7. time limitations imposed by the client or the circumstances
8. the amount involved and the results obtained
9. the experience, reputation, and ability of the attorneys
10. the "undesirability" of the case
11. the nature and length of the professional relationship with the client
12. awards in similar cases

ICARA gives courts discretion to reduce or to eliminate[746] attorney fees and cost awards where such awards would be "clearly inappropriate."[747] In determining what factors may influence the question whether an award is "clearly inappropriate," courts have looked to some of the following factors: the impact on the abducting parent's ability to care for the child,[748] a party's lack of financial resources,[749] disparity between parties' financial resources,[750] representation by multiple law

746. Mendoza v. Silva, 987 F. Supp. 2d 910 (N.D. Iowa 2014) (considering father's mistaken but good-faith belief, and award would impair father's ability to provide support to children); East Sussex Children Servs. v. Morris, 919 F. Supp. 2d 721, 734 (N.D. W. Va. 2013)

747. Distler v. Distler, 26 F. Supp. 2d 723, 729 (D.N.J. 1998).

748. Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004); Berendsen v. Nichols, 938 F. Supp. 737 (D. Kan. 1996).

749. Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995); Saldivar v. Rodela, 894 F. Supp. 2d 916, 942–43). *But see* Kufner v. Kufner, CIV.A. 07–046 S, 2010 WL 431762, at 5 (D.R.I. Feb. 3, 2010) ("To deny any award to Petitioner would undermine the dual statutory purposes of Section 9007(b)(3)—restitution and deterrence (both general as to the public and specific as to the Respondent)"), and cases cited therein.

750. *In re* Polson, 578 F. Supp. 2d 1064 (S.D. Ill. 2008).

firms,[751] unclean hands, and failure to provide adequate financial support for the subject child.[752]

H. Findings of Fact Required

In *Khan v. Fatima*,[753] the trial court heard evidence over one day, but did not make any findings of fact. The trial court ordered the child return to Canada where father lived, and made no findings on mother's 13(b) defense based on domestic violence. The Seventh Circuit reversed, holding that the mandate of Rule 52(a)(1) to find the facts and make conclusions of law was not excused in a Hague Convention proceeding. A Minnesota state court similarly remanded a case to the trial court to make findings of fact explaining its application of the Hague Convention.[754]

In *Neergaard-Colón v. Neergaard*,[755] the trial court made its decision to return children to Singapore based on the affidavits of the parties, and without an evidentiary hearing. The First Circuit determined that although the issue of parental intent was before the court, the district court failed to make any finding whether the parties intended to abandon their previous habitual residence in the United States. Given that the First Circuit follows the *Mozes* line of cases requiring an analysis of parental intent,[756] findings on parental intent are critical to the question whether a new habitual residence has been acquired. The case was reversed and remanded back to the district court to make findings on the issue whether the parties' previous habitual residence had been abandoned.

---

751. Aldinger v. Segler, 338 F. Supp. 2d 296 (D.P.R. 2004).

752. Silverman v. Silverman, 2004 WL 2066778 (D. Minn. 2004) (unreported disposition); Aguilera v. De Lara, 2014 WL 4204947 (D. Ariz. 2014) (unreported disposition) (denying award of fees, but awarding $790 in out-of-pocket costs).

753. 680 F.3d 781 (7th Cir. 2012).

754. *In re* Application of Salah, 629 N.W.2d 99, 104 (Minn. Ct. App. 2001).

755. 752 F.3d 526 (1st Cir. 2014).

756. Darín v. Olivero–Huffman, 746 F.3d 1, 11–13 (1st Cir. 2014).

I. The Manner of Taking Evidence

At the case-management conference, the court can inquire as to how the parties intend to present their evidence.[757] Some cases can be tried by submitting the matter on the parties' declarations or affidavits.[758] Other cases require live testimony or a combination of declarations and testimony. In some cases, the petitioning parent or material witnesses may not have the ability to physically attend the trial because of the distance and expense of coming to the United States from the foreign country. The respondent, the alleged abducting parent, will almost always be available to appear and testify at the trial, as that parent will likely be within the court's geographic jurisdiction. For this reason, some latitude should be considered in the manner by which the petitioning parent is allowed to contradict the oral testimony of the parent who is actually before the court.[759]

---

757. In discussing the issue of delay in handling Hague return cases, the *Report of the Second Special Commission Meeting* noted the following:

> Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody.

The American Society of International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 I.L.M. 225, 229–30 (1994).

758. *See*, *e.g.*, Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289, 294 (1st Cir. 2004) (allowing direct testimony provided by affidavit with cross examination); Hanley v. Roy, 485 F.3d 641, 644 (11th Cir. 2007) (district court declined to take testimony and case was submitted on the pleadings, affidavits, and oral argument); Wipranik v. Superior Court, 73 Cal. Rptr. 2d 734 (Cal. Ct. App. 1998) (hearing and determining case on the parties' declarations in addition to testimony); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1114 (D. Colo. 2008).

759. *See* Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. 2010) (scheduling order in unreported disposition); Escobar v. Flores, 183 Cal. App. 4th 737 (2010) (having petitioner participate in pretrial hearing by telephone).

1. Taking Testimony by Telephone

Where no other viable alternatives exist, courts have taken testimony via telephone. In *Mota v. Castillo*,[760] the district court held a two-day trial with one party participating and presenting testimony of several witnesses by phone. See also *Valenzuela v. Michel*,[761] where the same procedure was employed for both the petitioner and her witnesses.

2. Decisions Based on Affidavits

Some cases are susceptible of disposition without the necessity of an evidentiary hearing. In *West v. Dobrev*,[762] father, while his children were visiting him in Utah, requested an emergency custody decree from a state court on the heels of the affirmance of a foreign decree granting full custody to the mother.[763] Mother petitioned in the federal district court for return of the children. At a preliminary hearing, mother presented a prima facie case entitling her to the children's return. Father's proffer of evidence consisted only of a letter from a clinical psychologist that recommended investigation of the children's living conditions with mother based on his discussions with the children. Father requested additional time to defend the case so that he could develop evidence on whether the children were being abused. Based on this record, the district court summarily granted the petition and ordered the children returned to Belgium. The Tenth Circuit affirmed. Citing to father's inability to present any evidence that would support a viable defense, the court held

> The district court did not err in ordering the return of the children to Belgium based upon the pleadings as elucidated by the parties' arguments at the preliminary hearing. Respondent received a meaning-

760. 629 F.3d 108 (2d Cir. 2012).

761. 736 F.3d 1173 (9th Cir. 2013). *See also* Fed. R. Civ. P. 43(a).

762. 735 F.3d 921 (10th Cir. 2013).

763. Father fully participated in the custody trial and later waived his right to appeal.

> ful opportunity to be heard. That is all due process requires in the context of a Hague Convention petition.[764]

3. Discovery

The expedited nature of Hague cases necessarily impacts a party's desire to conduct discovery. Some cases have held that there is no right to conduct discovery in a Hague Convention case. In *West v. Dobrev*,[765] the Tenth Circuit observed that

> [A] district court has a substantial degree of discretion in determining the procedures necessary to resolve a petition filed pursuant to the Convention and ICARA. Specifically, neither the Convention nor ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires "that discovery be allowed or that an evidentiary hearing be conducted" as a matter of right in cases arising under the Convention."[766]

Where discovery has been permitted, courts have usually noted that the discovery is expedited and/or limited in scope.[767]

4. Whether an Evidentiary Hearing Is Necessary

Many cases are decided after courts hold evidentiary hearings[768] and many are decided by summary judgment[769] or are submitted for deci-

---

764. *West*, 735 F.3d at 932.

765. 735 F.3d 921 (10th Cir. 2013).

766. *Id.* at 929 (citing March v. Levine, 249 F.3d 462, 474 (6th Cir. 2001)).

767. *See*, *e.g.*, Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012) (limited discovery permitted); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002) (date set for completing discovery on a shortened time basis); Raveras v. Morales, 22 F. Supp. 3d 219 (S.D.N.Y. 2014) (limited discovery); Skolnick v. Wainer, 2013 WL 5329112 (E.D.N.Y. 2013) (expedited discovery); Headifen v. Harker, 2013 WL 2538897 (unreported disposition) (W.D. Tex. 2013) (same); Walker v. Walker, 2013 WL 1110876 (unreported disposition) (N.D. Ill. 2013) (limited and expedited discovery); Raijmakers–Eghaghe v. Haro, 131 F. Supp. 2d 953, 957–58 (E.D. Mich. 2001) (ordering limited discovery regarding objection of child to return).

768. *See*, *e.g.*, Seaman v. Peterson, 766 F.3d 1252 (11th Cir. 2014) (five days); Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013) (nine days); Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007) (nine days); Charalambous v. Charalambous, 627 F.3d 462 (1st

sion on affidavits and documents provided by the parties.[770] Although there appear to be no hard and fast rules regarding when an evidentiary hearing should be held, courts tend to grant evidentiary hearings when genuine issues of material fact exist,[771] where experts are required, where the issues are unusually complex, or where credibility issues are difficult to determine without live testimony.[772]

In *March v. Levine*,[773] the district court granted father's motion for summary judgment and ordered the children returned to father in Mexico. The Sixth Circuit affirmed the trial court's decision granting summary judgment. The court noted that parties opposing summary judgment must provide affidavits or some other admissible evidence that sets out "specific facts showing there is a genuine issue for trial." Citing *Anderson v. Liberty Lobby, Inc.*,[774] the court stated

> To determine whether a factual dispute is genuine the court inquires "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." A mere scintilla of evidence is insufficient. Moreover, the evidence presented must be viewed through the prism of the substantive evidentiary burden, i.e., by the prepon-

---

Cir. 2010) (two days); Nixon v. Nixon, 862 F. Supp. 2d 1168 (D.N.M. 2011) (one day).

769. Fed. R. Civ. P. 56: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

770. Charalambous v. Charalambous, 751 F. Supp. 2d 255 (D. Me. 2010); Shalit v. Coppe, 182 F.3d 1124 (9th Cir. 1999); Diabo v. Delisle, 500 F. Supp. 2d 159 (N.D.N.Y. 2007); Menachem v. Frydman-Menachem, 240 F. Supp. 2d 437 (D. Md. 2003) (summary judgment granted sua sponte); McClary v. McClary 2007 WL 3023563 (M.D. Tenn. 2007) (unreported disposition).

771. *See In re* Tsarbopoulos, 243 F.3d 550 (9th Cir. 2000) (unreported disposition) (holding that the facts of the case precluded summary judgment, thus requiring an evidentiary hearing).

772. *See*, *e.g.*, Khan v. Fatima, 680 F.3d 781, 785 (7th Cir. 2012); *but see* Klam v. Klam, 797 F. Supp. 202 (E.D.N.Y. 1992) (suggesting that ICARA requires a plenary hearing). *See generally* Fed. R. Civ. P. 56.

773. 249 F.3d 462 (6th Cir. 2001).

774. 477 U.S. 242, 106 S. Ct. 2505 (1986).

> derance of the evidence or by clear and convincing evidence. The evidence of the non-movant must be believed and all reasonable inferences must be drawn in the non-movants favor.[775]

The Sixth Circuit found the denial of an evidentiary hearing appropriate because "the treaty has a number of provisions to help ensure that return proceedings are handled in such a manner and that return of children to their country of habitual residence is likely": (1) neither the Hague Convention nor ICARA requires an evidentiary hearing; (2) courts are required to use the most expeditious procedures available; (3) the Hague Convention provides for judicial notice and relaxed rules for the authentication of documents; (4) parties have rights to inquire as to any delays beyond six weeks; and (5) the treaty allows for the return of a child at any time notwithstanding the establishment of treaty defenses.[776]

Similarly, in *West v. Dobrev*,[777] after inviting the parties to make submissions on whether there was a need for an evidentiary hearing, the district court made its decision without conducting an evidentiary hearing. The Tenth Circuit affirmed the district court's granting of the petition for return, finding that the respondent had received a "meaningful opportunity to be heard."[778]

In *Van De Sande v. Van De Sande*,[779] the Seventh Circuit remanded the case to the district court to conduct an evidentiary hearing on is-

---

775. *Id.* at 255 (internal citations omitted).

776. *March*, 249 F.3d at 474–75.

777. 735 F.3d 921 (10th Cir. 2013).

778. *Id.* at 932. *See also* Stevens v. Stevens, 499 F. Supp. 2d 891 (E.D. Mich. 2007) (no evidentiary hearing conducted, and reconsideration denied, with the court noting that the request for an evidentiary hearing failed to specify what evidence would be produced that was not already in the existing record); Menachem v. Frydman-Menachem, 240 F. Supp. 2d 437, 444 (D. Md. 2003) (father had requested a full evidentiary hearing but court determined that parties had an adequate opportunity to provide affidavits and supporting documentation to present their cases and that an evidentiary hearing would simply be repetitive of the evidence already in the record). *Accord* Salazar v. Maimon, 750 F.3d 514 (5th Cir. 2014) (request for evidentiary hearing on issue of attorney fees).

779. 431 F.3d 567 (7th Cir. 2005).

sues of "grave risk" and the adequacy of petitioner's proposed conditions for return. In *Van De Sande*, the district court reviewed the affidavits of the parties and issued a summary judgment granting father's petition for return of two children to Belgium. Mother presented six affidavits attesting to the existence of serious domestic violence in the presence of the children, and on occasion, directed at the children. Mother's affidavits alleged that father threatened to kill both herself and the children. The Seventh Circuit reversed, finding that content of mother's affidavits was sufficient to constitute clear and convincing evidence of a grave risk of harm to the children. As such, the court ruled that an evidentiary hearing was necessary to determine those issues.

VI. Case Management

Effective case management of Hague Convention cases can significantly facilitate the adjudication of these time-sensitive matters.[780] As soon as a court determines that a Hague Convention return case has been filed or assigned, it should consider pretrial conferences and scheduling issues,[781] including setting a timetable for discovery[782] and motions, trial on an expedited basis, and other pretrial considerations.[783]

A. Preventing Further Removal or Concealment of the Child

As soon as possible, the court should address the issue of ensuring that the child is safe and not in danger of being reabducted. ICARA vests courts with the power to use provisional remedies available under state or federal law to secure the child.[784] These potential remedies are discussed below. The circumstances of the abduction should be considered as well as any history of threats of concealment or abduction.

---

780. *See, e.g.*, Glagola v. Glagola, No. 03-10106-BC, 2003 WL 22992591 (E.D. Mich. 2003) (unreported disposition); Pesin v. Rodriguez, 244 F.3d 1250 (11th Cir. 2001).

781. *See* Fed. R. Civ. P. 16. Different courts and jurisdictions use different labels for these conferences, such as pretrial conferences, status conferences, or case-management conferences.

782. *See* discussion regarding discovery issues, *supra* page 188.

783. *See* Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. 2010) (unreported disposition) (covering numerous issues by conference and scheduling order).

784. 22 U.S.C. § 9004(a) (1988) provides: "In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 9003(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition."

1. State Laws Regarding Removal of Child from Home Without Notice

ICARA provides that a child may not be provisionally removed from a person having physical control of the child "unless the applicable requirements of State law are satisfied."[785] This is the only situation in a Hague Convention case where state law governs procedures used in federal courts. Where a court is asked to issue an order removing a child from a parent who has physical custody of the child pending a hearing on the Hague application, the court must abide by the relevant state laws that would govern removal of the child in a state action.

In *Application of McCullough on Behalf of McCullough*,[786] mother abducted children from Canada and took them to Pennsylvania. This abduction was in furtherance of mother's plan to bring the children to Petra, Jordan, in anticipation of the Apocalypse. Mother explained, citing her religious beliefs, that she and the children would be safe there. The court granted father's ex parte application for a warrant of arrest of the children and an order to transfer the children to father's custody. The court had jurisdiction under Pennsylvania law to enter the orders and noted its authority to issue a temporary restraining order under the provisions of Federal Rule of Civil Procedure 65. The court held that the requirements for issuing a temporary restraining order had been met:

- a reasonable probability of eventual success in the litigation;
- evidence of irreparable injury;

785. 22 U.S.C. § 9004(b) (1988); *see also* Klam v. Klam, 797 F. Supp. 202 (E.D.N.Y. 1992) (denying issuance of a warrant of arrest for the children based on insufficiency of evidence that the children were in danger of removal); Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685 (E.D. Va. 2002); Casulli v. Falcone, No. Civ. 02-123-M, 2002 WL 479855 (D.N.H. 2002) (unreported disposition).

786. 4 F. Supp. 2d 411 (W.D. Pa. 1998).

and when relevant,

- the possibility of harm to other disinterested persons; and
- consideration of the public interest.[787]

2. Foster Care

In cases where there is a showing that the child is in danger of being concealed or re-abducted and no other suitable arrangements can be made, it may be necessary to place the child temporarily in foster care or the care of a third party.[788] In *Velez v. Mitsak*,[789] each parent alleged that the other constituted a flight risk should the child be placed with the other parent during the pendency of the Hague petition. As a result, the child was placed in temporary foster care by the court pending a hearing on the merits of the case.

In *Sanchez v. R.G.L.*,[790] three Mexican children were abducted by their aunt from Ciudad Juarez, Mexico, to El Paso, Texas. When the aunt attempted to return the children to their mother by bringing them to the Texas–Mexican border, the children voiced objections to return to officials from Homeland Security. Homeland Security transferred the children to the Office of Refugee Resettlement (ORR), and in turn ORR placed the children with a foster placement agency, pending hearing on mother's application for return of the children.

3. Bonds

A court may not impose a bond obligation upon a party to guarantee the payment of costs and expenses of the proceeding. Article 22 states that:

---

787. *Id.* at 415 (citing Acierno v. New Castle Cnty., 40 F.3d 645, 653 (3d Cir. 1994) (citations omitted)).

788. *See, e.g.*, Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); David S. v. Zamira S., 574 N.Y.S.2d 429, 151 Misc. 2d 630 (Fam. Ct. 1991); Velez v. Mitsak, 89 S.W.3d 73 (Tex. App. 2002).

789. *Velez*, 89 S.W.3d 73.

790. 743 F.3d 945 (5th Cir 2014).

> No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

In *Patrick v. Rivera-Lopez*,[791] the court vacated the district court's order requiring a (1) "non-resident" bond, and (2) a guarantee that the petitioner would be able to respond for damages in the event that he did not prevail in his Hague application. In doing so, the First Circuit noted the existence of cases wherein bonds were ordered posted,[792] but further observed that none of those cases questioned whether it was within the court's power to require such a bond.

It is yet to be determined whether a bond that is required to deter subsequent concealment or reabduction of the children falls within the proscriptive language of Article 22. Despite the language of Article 22, some courts have required, or considered, the posting of bonds to ensure that children are not spirited away from the jurisdiction of the court.[793] The purpose bond is to provide some measure of insurance to a left-behind parent that if the child is reabducted pending the proceedings, sufficient resources will be available to fund efforts to locate and file new litigation. For example, in *Lops v. Lops*,[794] the South Carolina state court allowed the abducted children to be placed in the cus-

---

791. 708 F.3d 15 (1st Cir. 2013).

792. Whiting v. Krassner, 391 F.3d 540 (3d Cir. 2004); Bekier v. Bekier, 248 F.3d 1051 (11th Cir. 2001); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998).

793. *See* Greene v. Greene, C.A. 89-392-II, 1990 WL 56197 (Tenn. Ct. App. 1990); David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S.2d 429 (1991). Most cases that discuss the posting of bonds relate to custody matters where it is envisioned that there is either a risk of abduction or that once a child has lawfully been taken to another country for visitation, that the child will not be returned. Bonds are required in these cases as a measure to provide the left-behind parent with the ability to fund the expenses necessary to reacquire the child. *See, e.g.*, *In re* Marriage of Saheb and Khazal, 880 N.E.2d 537, 546–49, 377 Ill. App. 3d 615, 627–29 (App. Ct. 2007); Samman v. Steber, No. 1577-04-4, 2005 WL 588313 (Va. Ct. App. 2005).

794. 140 F.3d 927 (11th Cir. 1998).

tody of the paternal grandmother subject to an "adequate security bond."[795]

4. Deposit Passports

In order to deter any threat of reabduction to another country, many courts have required that the parties deposit their passports and the passports of the children with the court or other agency.[796] This measure is one of the least invasive available and provides an effective method of securing the child in most cases involving U.S. citizens.[797] However, it is less effective for those who hold passports from other nations because of the ability of a foreign national to request the reissuance of a passport from local embassies or consulates.

B. Establishing Timelines

Given that there is an expectation that a case for return will be dealt with in a six-week period, the court has the obligation to manage the case consistent with that timeline. Many cases, if not most, are susceptible of disposition within this time frame. There will be, however, cases where complex issues of law or fact arise that require additional time to resolve. Even if complex issues arise, the case nevertheless must be expedited. Time frames for discovery, the submission of briefs, and other processes should be shortened, enabling efficient and expedited preparation for trial.

---

795. *Id.* at 948.

796. *See, e.g.*, Neves v. Neves, 637 F. Supp. 2d 322 (W.D.N.C. 2009); Kufner v. Kufner, 480 F. Supp. 2d 491 (D.R.I. 2007); Axford v. Axford, No. 09-2914, 2009 WL 2030755 (E.D. Pa. 2009) (unreported disposition).

797. The U.S. State Department operates the Children's Passport Issuance Alert Program, which allows parents to register the names of their children who are U.S. citizens, so that they can be informed if an application for a passport for that child has been made. As a practical matter, this is a stopgap measure only in situations where a court is holding the child's passport and a parent or other person makes application for issuance of another passport for the child.

C. Legal Representation

When ratifying the Convention, the United States made a reservation concerning the provisions in Article 26 relating to funding legal representation for the applicant or petitioner.[798] ICARA makes no provisions for funding court-appointed counsel. The parties are responsible for their own legal representation. The court should inquire, if it is not apparent, whether the parties intend to seek representation and, if so, how much time will be needed to secure counsel.

As Central Authority for the United States, the U.S. State Department assists applicants seeking the return of their children with identifying experienced counsel. Counsel may be available on a pro bono, reduced-fee, or full-fee basis.[799] The U.S. State Department utilizes federal poverty guidelines in assessing whether a person qualifies for pro bono or reduced-fee representation.[800] Once a person qualifies, the U.S. State Department will attempt to find attorneys from the geographic area involved. The names of counsel willing to take the case will be sent to the prospective client. This service is available only to those seeking the return of their children; it is not available to those resisting return.

Under some circumstances, courts will appoint an attorney pro bono to represent the parent who allegedly abducted the children.[801]

---

798. The second paragraph of Article 26 provides that "[A] Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

799. As a result of taking the reservation described in note 798 above, the U.S. government does not provide any funds for the payment or reimbursement of legal costs incurred by the parties.

800. The 2009 Federal Poverty Guidelines for a family of four persons is $27,563. This guideline is published by the Legal Services Corporation, 45 C.F.R. § 1611. Qualification for reduced-fee representation is $44,100 for a family of four.

801. *See, e.g.*, Krefter v. Wills, 623 F. Supp. 2d 125, 127 n.1 (D. Mass. 2009); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008); Laguna v. Avila, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. 2008) (unreported disposition).

Courts have also appointed counsel for children who are the subject of the action.[802]

D. Narrowing the Issues for Trial

As with any litigation, one of the benefits of conducting a pretrial case-management conference is the opportunity to narrow the issues for trial. In many cases, the standard form submitted to the Central Authorities to begin a case will accompany the petitioner's moving papers for return of the child. This form sets forth the facts surrounding the alleged abduction, providing the court with notice of the issues likely to be raised.[803] If an agreement among the parties can be reached concerning the facts of the case or issues deemed established, a more streamlined trial plan can be developed,[804] saving time by focusing on the issues in contention.

E. Mediation

It is possible for the parties to participate in mediation after a petition for return has been filed.[805] A court may properly inquire at a pretrial

802. *See, e.g.*, Wasniewski v. Grzelak-Johannsen, 549 F. Supp. 2d 965 (N.D. Ohio 2008); Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (appointing counsel as guardian ad litem and attorney for the children under the authority of Federal Rule of Civil Procedure 17(c)).

803. These forms are not required when a petitioner files a case directly with the court. When the petitioner has started the proceedings by contacting the Central Authority in the habitual residence or in the requested state, this form will be used.

804. *See, e.g.*, Baran v. Beaty, 526 F.3d 1340, 1342 (11th Cir. 2008) (finding mother conceded that the child was wrongfully removed from his habitual residence); Walsh v. Walsh, 221 F.3d 204, 216 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001) (finding mother conceded Ireland was the child's habitual residence); Currier v. Currier, 845 F. Supp. 916 (D.N.H. 1994) (abducting parent conceding that Germany was the child's habitual residence).

805. Gatica v. Martinez, 2011 WL 2110291 (S.D. Fla. 2011) (unreported disposition) (court referred parties to mediation); Krefter v. Wills, 623 F. Supp. 2d 125 (D. Mass. 2009) (mediation held before a magistrate judge); Philippopoulos v. Philippopoulou, 461 F. Supp. 2d 1321 (N.D. Ga. 2006) (mediation conducted pending the

or case-management conference whether the parties had considered mediation and whether they would be amenable to mediation. Mediation in the context of a pending Hague case can be challenging, owing to the high levels of anxiety of the parties, the necessity of dealing with differing legal systems, and the potential impact of different languages and cultural values. Some cases will be inappropriate for mediation because of the existence of domestic violence or because of an imbalance of power in the relationship between the parties. As an initial step, courts considering mediation might refer the parties to an experienced mediator for the purpose of determining whether mediation is appropriate.

It is essential that a court not permit a significant delay to occur because of attempts to mediate. Any delay in the litigation process inures to the benefit of the taking parent, as the passage of time increases the difficulty of restoring the relationship between the child and the left-behind parent.[806] In addition, a party resisting the return of a child may allow the taking parent to manipulate the other party by feigning good faith in the mediation process, only to resist an eventual agreement, or to fail to comply with the agreement.[807]

In the event a mediated agreement is reached, it is recommended that the agreement be structured in such a manner as to be enforceable in both U.S. courts and the courts of the other country.

---

filing of a petition for return of the child); Blondin v. Dubois, 78 F. Supp. 2d 283 (S.D.N.Y. 2000) (court appointed a mediator to assist parties in working out their custody dispute).

806. Hague Conference on Private International Law, *Preliminary Document, Draft Guide to Good Practice, Part V—Mediation, May 2011*.

807. *See, e.g.*, Van de Sande v. Van de Sande, 2008 WL 239150 (N.D. Ill. 2008) (unreported disposition) (father engaged in protracted mediation negotiations, and eventually breached an interim mediated agreement to return the children to the United States).

Appendix A: Text of the 1980 Convention

28. Convention on the Civil Aspects of International Child Abduction

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

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.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their

powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to betaken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual

residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but

not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child. However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted. Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

2) the accessions referred to in Article 38;
3) the date on which the Convention enters into force in accordance with Article 43;
4) the extensions referred to in Article 39;
5) the declarations referred to in Articles 38 and 40;
6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Appendix B: International Child Abduction Remedies Act

22 U.S.C. §§ 9001–9011

§ 9001. Findings and Declarations

(a) Findings

The Congress makes the following findings:

(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) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. 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.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

§ 9002. Definitions

For the purposes of this chapter—

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 9006(a) of this title.

§ 9003. Judicial Remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term "authorities," as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained," as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

§ 9004. Provisional Remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 9003(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 9003(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

§ 9005. Admissibility of Documents

With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

§ 9006. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act [42 U.S.C. 301 et seq.], obtain information from the Parent Locator Service.

(e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States Central Authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or

failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

§ 9007. Costs and Fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 9003 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

§ 9008. Collection, Maintenance, and Dissemination of Information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

§ 9008a. Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if—

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

§ 9009. Interagency Coordinating Group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may,

from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

§ 9010. Authorization of Appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

§ 9011. Report on Compliance with the Hague Convention on International Child Abduction

(a) In general

Beginning 6 months after October 21, 1998, and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

(1) The number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.

(2) A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return

of children, access to children, or both, submitted by applicants in the United States.

(3) A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority for the United States.

(4) Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.

(5) Information on efforts by the Department of State to encourage other countries to become signatories of the Convention.

(6) A list of the countries that are parties to the Convention in which, during the reporting period, parents who have been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or visitation order by authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court orders, the absence of a doctrine of comity, or other factors.

(7) A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the work of nongovernmental organizations within their countries that assist parents seeking the return of children under the Convention.

(b) Definition

In this section, the term "Central Authority for the United States" has the meaning given the term in Article 6 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

Appendix C: Checklist for Hague Convention Cases

Procedural Issues

Expedited Proceedings

- ☐ Goal is to complete case in six weeks

Case-Management Conference

- ☐ Safety of the child
  - o Obtain parties and children's passports
- ☐ Set timelines—determine how much time to allocate to trial
- ☐ Should a discovery plan be adopted?
- ☐ Narrow the issues to be tried
- ☐ Determine use of declarations or affidavits
- ☐ Will witnesses testify by telephone
- ☐ Are interpreters needed
- ☐ Do the parties wish to engage in mediation?
  - o Is the case appropriate for mediation? (e.g. is there a history of domestic violence?)
  - o If so, can mediation take place without resulting in a significant delay of the trial?
- ☐ Legal representation
  - o Is the petitioning parent represented by counsel? If not, consider referring that parent to the State Dept. Office of Children's Issues to see if the parent can secure counsel

Parallel Jurisdiction Issues

- ☐ Are there any state custody cases pending?
- ☐ If so, has the custody proceeding been stayed?
- ☐ Has the Hague Convention issue been litigated in state court or is it scheduled to be litigated there?

Case for Return—Burden of Proof—Preponderance of the Evidence

- ☐ Is the child under age 16?
- ☐ What country is alleged to be the child's habitual residence?
  - o Has the treaty "entered into force" between the U.S. and the other country as of the date of the wrongful removal or retention?
- ☐ On what date did the wrongful removal or retention occur?
- ☐ Was the child removed or retained in violation of the custody rights of the left-behind parent?
  - o Does the left-behind parent have rights of custody?
    - ▪ By operation of law
    - ▪ By court or administrative decision
    - ▪ By legally binding agreement
  - o Was the child removed from the habitual residence when a *ne exeat* clause or restraining order prohibited removal?
- ☐ Was the left-behind parent exercising his or her custody rights before the child was removed from the habitual residence?

Defenses—Burden of Proof—Preponderance of the Evidence

- ☐ Was the request for return filed within one year of the wrongful removal or retention?
- ☐ If it was not filed within one year, has the child become settled in his or her new environment?
- ☐ Did the left-behind parent consent or acquiesce in the removal or retention of the child?
- ☐ Does the child object to return?
  - o If so, is the child old enough and sufficiently mature for the court to take account of the child's objection?

Defenses—Burden of Proof—Clear and Convincing Evidence

- ☐ Would a return expose the child to a grave risk of physical or psychological harm or place the child in an intolerable situation?
- ☐ Would a return violate fundamental principles relating to the protection of human rights and fundamental freedoms?

Order Return Even Though Defense Established

- ☐ Should the court order the child's return even if a defense has been established?
  - o If so, consider undertakings, or mirror-image orders, or other measures to ensure the child's safe return

Making Return Orders

- ☐ Is the order for return specific as to time, manner, and date of return?
- ☐ Who is responsible for arranging the logistics of the child's return?

Attorney Fees and Costs

- ☐ Order only if petitioner prevails
- ☐ Is amount requested clearly inappropriate

Appendix D: Countries Where Convention Is In Force with United States

(Current to August 2015)

Country	Date of EIF	Country	Date of EIF
Anguilla	6/1/08	Falkland Islands	6/1/98
Argentina	6/1/91	Finland	8/1/94
Australia	7/1/88	France	7/1/88
Austria	10/1/88	Germany	12/1/90
Bahamas	1/1/94	Greece	6/1/93
Belgium	5/1/99	Guatemala	1/1/08
Belize	11/1/89	Honduras	6/1/94
Bermuda	3/1/99	Hong Kong	9/1/97
Bosnia and Herzegovina	12/1/91	Hungary	7/1/88
Brazil	12/1/03	Iceland	12/1/96
Bulgaria	1/1/05	Ireland	10/1/91
Burkina Faso	11/1/92	Isle of Man	9/1/91
Canada	7/1/88	Israel	12/1/91
Cayman Islands	8/1/88	Italy	5/1/95
Chile	7/1/94	Japan	4/1/14
Colombia	6/1/96	Latvia	5/1/07
Costa Rica	1/1/08	Lithuania	5/1/07
Croatia	12/1/91	Luxembourg	7/1/88
Cyprus	3/1/95	Macau	3/1/99
Czech Republic	3/1/98	Republic of Macedonia	12/1/91
Denmark	7/1/91	Malta	2/1/03
Dominican Republic	6/1/07	Mauritius	10/1/93
Ecuador	4/1/92	Mexico	10/1/91
El Salvador	6/1/07	Monaco	6/1/93
Estonia	5/1/07	Montenegro	12/1/91

Country	Date of EIF	Country	Date of EIF
Montserrat	3/1/99	Singapore	5/1/12
Morocco	12/1/12	Slovakia	2/1/01
Netherlands	9/1/90	Slovenia	4/1/95
New Zealand	10/1/91	South Africa	11/1/97
Norway	4/1/89	Spain	7/1/88
Panama	6/1/94	Sri Lanka	1/1/08
Paraguay	1/1/08	Sweden	6/1/89
Peru	6/1/07	Switzerland	7/1/88
Poland	11/1/92	Trinidad and Tobago	8/1/13
Portugal	7/1/98	Turkey	8/1/00
Republic of Korea	11/1/13	Ukraine	9/1/07
Romania	6/1/93	United Kingdom	7/1/88
Saint Kitts and Nevis	6/1/95	Uruguay	9/1/04
San Marino	1/1/08	Venezuela	1/1/97
Serbia	12/1/91	Zimbabwe	8/1/95

Table of Authorities

Cases

A.L.C., *In re,* 16 F. Supp. 3d 1075, 2014 WL 1571274 (C.D. Cal. 2014) 138
A.L.C., *In re,* ___ F. App'x ___, 2015 WL 1742347 (9th Cir. 2015) 76, 77, 138
A.V.P.G., *In re,* 251 S.W.3d 117 (Tex. App. 2008) 94
Abbott v. Abbott, 542 F.3d 1081 (5th Cir. 2008) 48
Abbott v. Abbott, 560 U.S. 1, 130 S. Ct. 1983 (2010) .. xii, xiii, 2, 12–16, 31, 41, 48–50
Acierno v. New Castle County, 40 F.3d 645 (3d Cir. 1994) 195
Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013) 109, 116, 157
Aguilera v. De Lara, 2014 WL 4204947 (D. Ariz. 2014) 185
Ahumada Cabrera, *In re*, 323 F. Supp. 2d 1303 (S.D. Fla. 2004) 28, 41, 71, 73, 96
Air France v. Saks, 470 U.S. 392 (1985) 2, 14
Aldinger v. Segler, 263 F. Supp. 2d 284 (D.P.R. 2003) 15, 114, 118
Aldinger v. Segler, 338 F. Supp. 2d 296 (D.P.R. 2004) 22, 185
Alonzo v. Claudino, 2007 WL 475340 (M.D.N.C. 2007) 72
Altamiranda Vale v. Avila, 538 F.3d 581 (7th Cir. 2008) 41, 43, 44
Anderson v. Acree, 250 F. Supp. 2d 876 (S.D. Ohio 2002) 124
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 189
Andreopoulos v. Nickolaos Koutroulos, 2009 WL 1850928 (D. Colo. 2009) 125
Antunez-Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800 (N.D. Iowa 2003) ...8, 112
Application of Adan, *In re*, 437 F.3d 381 (3d Cir. 2006) 45, 66, 112, 114, 144, 158, 162
Application of McCullough on Behalf of McCullough, 4 F. Supp. 2d 411 (W.D. Pa. 1998) 40, 194
Application of Ponath, *In re*, 829 F. Supp. 363 (D. Utah 1993) 69, 70
Application of Salah, *In re,* 629 N.W.2d 99, 104 (Minn. App. 2001) 185
Armiliato v. Zaric-Armiliato, 169 F. Supp. 2d 230 (S.D.N.Y. 2001) 33
Asvesta v. Petroutsas, 580 F.3d 1000 (9th Cir. 2009) 16, 24, 88, 90, 102, 171, 172
Avendano v. Smith, 2011 WL 3503330 (D.N.M. 2011) 164
Axford v. Axford, 2009 WL 2030755 (E.D. Pa. 2009) 197
B. Del C.S.B., *In re,* 559 F.3d 999 (9th Cir. 2009) 72–73, 89, 96, 97, 157, 158, 162
Bader v. Kramer (*Bader I*), 445 F.3d 346 (4th Cir. 2006) 39–40
Bader v. Kramer, 484 F.3d 666 (4th Cir. 2007) 25, 157

Ballen v. City of Redmond, 466 F.3d 736 (9th Cir. 2006) 183
Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).....3, 16, 88, 109, 112, 113, 114, 140, 142, 147, 199
Bardales v. Duarte, 181 Cal. App. 4th 1262 (2010) 163
Barrera Casimiro v. Pineda Chavez 2006 WL 2938713 (N.D. Ga. 2006) ..122, 123, 124
Barzilay v. Barzilay (*Barzilay I*), 536 F.3d 844 (8th Cir. 2008).....46, 166
Barzilay v. Barzilay (*Barzilay II*), 600 F.3d 912 (8th Cir. 2010) 16, 35–36, 46–47, 64, 66
Bates, *In re*, [1989] No. CA 122-89, High Court of Justice, Family Div., Royal Courts of Justice (U.K.) 51, 55, 65–66
Baxter v. Baxter, 423 F.3d 363 (3d Cir. 2005) 24, 101, 102–03, 104
Bekier v. Bekier, 248 F.3d 1051 (11th Cir. 2001) 153, 196
Belay v. Getachew, 272 F. Supp. 2d 553 (D. Md. 2003) 27, 94, 97
Berendsen v. Nichols, 938 F. Supp. 737 (D. Kan. 1996).....184
Berezowsky v. Ojeda, 765 F.3d 456 (5th Cir. 2014) 158
Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010).....28, 63, 78, 91, 96
Blanchard v. Bergeron, 489 U.S. 87 (1989) 183
Blondin v. Dubois (*Blondin I*), 189 F.3d 240 (2d Cir. 1999) 114, 119, 142, 143, 144, 145, 171
Blondin v. Dubois (*Blondin II*), 238 F.3d 153 (2d Cir. 2001) 90, 110, 121, 122, 123, 144, 157
Blondin v. Dubois, 78 F. Supp. 2d 283 (S.D.N.Y. 2000) 112, 144, 200
Bonilla-Ruiz v. Bonilla, 2004 WL 2883247 Mich. App. (2004) 124
Bowen v. Bowen, ___ F. Supp. ___, 2014 WL 2154905 (W.D. Pa. 2014)..... 107, 120, 126
Brennan v. Cibault, 643 N.Y.S.2d 780, 227 A.2d 965 (1996) 22
Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998) 30, 173
Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) 43, 55, 63, 79, 136
Brosselin v. Harless, 2011 WL 6130419 (W.D. Wash. 2011) 164
Brown v. Orange County Department of Social Services, 91 F.3d 150 (9th Cir. 1996) 31
C v. S (Minor: Abduction: Illegitimate Child), [1990] 2 All E.R. 961 (Eng.) 53
Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006).....88, 173, 176
Caro v. Sher, 296 N.J. Super. 594 (1996) 118
Carrascosa v. McGuire, 520 F.3d 249 (3d Cir. 2008) 45, 119, 171, 172
Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009) 15, 97, 125
Casulli v. Falcone, 2002 WL 479855 (D.N.H. 2002) 194
Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002).....168

Chafin v. Chafin, 133 S. Ct. 1017 (2013) ..... vii, 81, 152–55, 156, 162
Chafin v. Chafin, 742 F.3d 934 (11th Cir. 2013) 81, 154, 162
Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010) ..... xi, 156, 163, 188
Charalambous v. Charalambous, 751 F. Supp. 2d 255 (D. Me. 2010) 177, 189
Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. 2010) 186, 193
Chechel v. Brignol, 2010 WL 2510391 (M.D. Fla. 2010) 165
Ciotola v. Fiocca, 86 Ohio Misc. 2d 24 (1997) 142
Coffield, *In re*, 96 Ohio App. 3d 52, 644 N.E.2d 662 (1994) 96, 100
Cohen v. Cohen, 158 Misc.2d 1018, 602 N.Y.S.2d 994 (1993) 52, 61
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) .. 167–68
Copeland v. Copeland, 134 F.3d 362 (4th Cir. 1998) 168
Courdin v. Courdin, 375 S.W.3d 657 (Ark. App. 2010) 56
Crall-Shaffer v. Shaffer, 105 Ohio App. 3d 369, 663 N.E.2d 1346 (1995) 136
Croll v. Croll, 229 F.3d 133 (2d Cir. 2000) 48–49
Cruz v. Cruz, 33 Conn. L. Rptr. 594 (2002) 163
Cuellar v. Joyce (*Cuellar I*), 596 F.3d 505 (9th Cir. 2010) 109, 110, 111, 150, 157
Cuellar v. Joyce (*Cuellar II*), 603 F.3d 1142 (9th Cir. 2010) 183
Currier v. Currier, 845 F. Supp. 916 (D.N.H. 1994) 199
D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983) 44, 169
Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002) 88, 111, 112, 113, 138, 141, 142, 146, 150, 152, 156, 188
Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289 (1st Cir. 2004) 145, 164, 170, 186
Darín v. Olivero-Huffman, 746 F.3d 1 (1st Cir. 2014) 74, 104, 158, 185
Daunis v. Daunis, 222 F. App'x 32 (2d Cir. 2007) 82, 161
David S. v. Zamira, 151 Misc. 2d 630, 574 N.Y.S.2d 429 (1991) 195, 196
de Silva v. Pitts, 481 F.3d 1279 (10th Cir. 2007) 122, 123, 125, 127, 171, 172
Degen v. United States, 517 U.S. 820 (1996) 134, 135
Delgado-Ramirez v. Lopez, 2011 WL 692213 (W.D. Tex. 2011) 7, 132–33
Delvoye v. Lee, 329 F.3d 330 (3d Cir. 2003) 66, 75, 77
Diabo v. Delisle, 500 F. Supp. 2d 159 (N.D.N.Y. 2007) 31, 189
Diaz Arboleda v. Arenas, 311 F. Supp. 2d 336 (E.D.N.Y. 2004) 125
Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001) 42, 88, 156, 162, 171, 172
Director-General Dept. of Families, Youth and Community Care v. Moore, (1999) FLC 92-841; [1999] FamCA 284 [Australia] 92
Distler v. Distler, 26 F. Supp. 2d 723 (D.N.J. 1998) 183, 184

Doudle v. Gause, 282 F. Supp. 2d 922 (N.D. Ind. 2003) 165
Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008) 85, 95, 97, 98, 99
Duran v. Beaumont, 560 U.S. 921 (2010) 176
East Sussex Children Servs. v. Morris, 919 F. Supp. 2d 721 (N.D. W. Va. 2013) 184
El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) 2
Ellis v. Railway Clerks, 466 U.S. 435 (1984) 154
England v. England, 234 F.3d 268 (5th Cir. 2000) 88, 121, 122, 123, 124, 162
Escaf v. Rodriguez, 52 F. App'x 207 (4th Cir. 2002) 166, 167
Escobar v. Flores, 183 Cal. App. 4th 737 (2010) 123, 125, 186
Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) 169
F.H.U. v. A.C.U., 427 N.J. Super. 354, 48 A.3d 1130 (2012) 91, 97
Fabri v. Pritikin-Fabri, 221 F. Supp. 2d 859 (N.D. Ill. 2001) 141
Falk v. Sinclair, 692 F. Supp. 2d 147 (D. Me. 2010) 29, 88
Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003) 49
Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) 8, 33, 40, 51, 53, 56–57, 63, 64, 84, 138, 144, 158
Felder v. Wetzel, 696 F.3d 92 (1st Cir. 2012) 120, 124–25
Flores v. Contreras, 981 S.W.2d 246 (Tex. App. 1998) 75
Flynn v. Borders, 472 F. Supp. 2d 906 (E.D. Ky. 2007) 85
FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834 (3d Cir. 1996) 166
Foster v. Foster, 654 F. Supp. 2d 348 (W.D. Pa. 2009) 144
Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) 78, 108, 118, 150
Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396 (6th Cir. 1993) 52, 53, 54, 55, 57, 62, 63, 65, 77, 78, 80, 83
Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060 (6th Cir. 1996) 8, 39, 88, 89, 91, 102, 108–09, 111, 112
Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004) 49, 98, 99
Gatica v. Martinez, 2011 WL 2110291 (S.D. Fla. 2011) 199
Gaudin v. Remis, 334 F. App'x 133 (9th Cir. 2009) 85
Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005) 4, 144, 162
Geiser v. Valentine, No. 80286/07, slip op. 52046(U), 851 N.Y.S.2d 65 (Sup. Ct. 2007) 23
Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004) 39, 41, 71, 73, 96
Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005) 54, 55, 67, 95, 158
Glagola v. Glagola, 2003 WL 22992591 (E.D. Mich. 2003) 193
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959) 98

Gonzales v. Gutierrez, 311 F.3d 942 (9th Cir. 2002) 41, 49
Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295 (D.P.R. 2004) 112, 122
Gonzalez-Caballero v. Mena, 251 F.3d 789 (9th Cir. 2001) 101
Grammes v. Grammes, 2003 WL 22518715 (E.D. Pa. 2003).....150, 178
Greene v. Greene, 1990 WL 56197 (Tenn. App. 1990) 196
Grieve v. Tamerin, 269 F.3d 149 (2d Cir. 2001) 22, 166
Grijalva v. Escayola, 2006 WL 3827539 (M.D. Fla. 2006).....124
Guzzo v. Cristofano, 719 F.3d 100 (2d Cir. 2013) 55–56, 66, 158
Hague Child Abduction Application, *In re*, 2008 WL 913325 (D. Kan. 2008) 118
Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010).....88, 89, 122, 125, 183
Hanley v. Roy, 485 F.3d 641 (11th Cir. 2007).....33, 157, 186
Harkness v. Harkness, 577 N.W.2d 116, 227 Mich. App. 581 (Ct. App. 1998) 83, 84
Harsacky v. Harsacky, 930 S.W.2d 410 (Ky. Ct. App. 1996) 22, 56
Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603 (E.D. Va. 2002) 118, 123, 194
Headifen v. Harker, WL 2538897 (W.D. Tex. 2013) 188
Hilton v. Braunskill, 481 U.S. 770 (1987) 155
Hilton v. Guyot, 159 U.S. 113 (1895) 170, 171
Hirst v. Tiberghien, 947 F. Supp. 2d 578 (D.S.C. 2013) 120–21
Hofmann v. Sender, 716 F.3d 282 (2d Cir. 2013).....95, 106
Holder v. Holder (*Holder I*), 305 F.3d 854 (9th Cir. 2002).....11, 93, 131, 167, 169
Holder v. Holder (*Holder II*), 392 F.3d 1009 (9th Cir. 2004) 51, 68, 80–81, 161, 162
Hollis v. O'Driscoll, 739 F.3d 108 (2d Cir. 2014).....52
Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630 (S.D. Tex. 2007).....41
In re (see party name)
Innes v. Carrascosa, 391 N.J. Super. 453 (2007).....178
Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908 (9th Cir. 1993).....167
Ish-Shalom v. Wittman, 797 N.Y.S.2d 111 (App. Div. 2005) 49
Ivaldi v. Ivaldi, 147 N.J. 190 (1996).....182
J.E.A. v. C.L.M. (2002), 220 D.L.R. (4th) 577 (N.S.C.A.) [Nova Scotia Court of Appeal] 92
J.G., *In re,* 301 S.W.2d 376 (Tex. App. 2009) 55
J.J.L.-P., *In re,* 256 S.W.2d 363 (Tex. App. 2008) 23
Jaet v. Siso, 2009 WL 32570 (S.D. Fla. 2009) 142
Janakakis-Kostun v. Janakakis, 6 S.W.3d 843 (Ky. Ct. App. 1999) 70, 118
Jenkins v. Jenkins, 569 F.3d 549 (6th Cir. 2009) 3, 4, 47–48, 108
Johnson v. Georgia Highway Exp. Inc., 488 F.2d 714 (5th Cir. 1974).....183

Johnson v. Johnson, 493 S.E.2d 668, 26 Va. App. 135 (Ct. App. 1997) 63, 78
Johnson v. Johnson, 2011 WL 569876 (S.D.N.Y. 2011) 83
Journe v. Journe, 911 F. Supp. 43 (D.P.R. 1995) 7, 130–31
Kamstra, *In re,* 307 S.W.3d 581 (Tex. App. 2010) 17
Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006).....16, 28, 53, 64, 68, 88, 158
Karpenko v. Leendertz, 619 F.3d 259 (3d Cir. 2010) 7, 132, 157, 166
Katona v. Kovacs, 148 F. App'x 158 (4th Cir. 2005) 173
Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012).....164, 177, 185, 189
Kijowska v. Haines, 463 F.3d 583 (7th Cir. 2006).....6, 52, 71–72, 75, 155, 162, 163
Kim, *In re*, 404 F. Supp. 2d 495 (S.D.N.Y. 2005) 22, 102
Klam v. Klam, 797 F. Supp. 202 (E.D.N.Y. 1992).....189, 194
Knox v. Service Employees, 567 U.S. ___, 132 S. Ct. 2277 (2012).....153, 154
Koc, *In re*, 181 F. Supp. 2d 136 (E.D.N.Y. 2001) 71, 73, 96, 98
Krefter v. Wills, 623 F. Supp. 2d 125 (D. Mass. 2009) 113, 137, 138, 142, 198, 199
Kufner v. Kufner, 480 F. Supp. 2d 491 (D.R.I. 2007) 138, 165, 197
Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008).....42–43, 124, 125, 138, 142, 143, 199
Kufner v. Kufner*,* CIV.A. 07–046 S, 2010 WL 431762 (D.R.I. Feb. 3, 2010).....184
L.H. v. Youth Welfare Office of Wiesbaden, 150 Misc. 2d 490, 568 N.Y.S.2d 852 (Fam. Ct. 1991) 31
Laguna v. Avila, 2008 WL 1986253 (E.D.N.Y. 2008) 126, 198
Lakhera-Bonnefoy v. Lakhera-Bonnefoy, 12 Misc.3d 1214(a), 836 N.Y.S.2d 486 (N.Y. Sup. Ct. 2006) 33
Lalo v. Malca, 318 F. Supp. 2d 1152 (S.D. Fla. 2004).....42
Langa v. Langa, 549 F. App'x 114 (3d Cir. 2014) 61–62
Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012) 54, 63–64, 66, 75, 82, 103, 120, 157
Larrategui v. Laborde, 2014 WL 2154477 (E.D. Cal. 2014) 183
Leser v. Berridge, 668 F.3d 1202 (10th Cir. 2011) 153
Leslie, *In re*, 377 F. Supp. 2d 1232 (S.D. Fla. 2005).....22, 135
Levesque v. Levesque, 816 F. Supp. 662 (D. Kan. 1993) 61, 83
Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008) 41, 42, 121, 125, 186, 198
Londono v. Gonzalez, 988 F. Supp. 2d 113 (D. Mass. 2013).....173
Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008) 73, 121
Lops v. Lops, 140 F.3d 927 (11th Cir. 1998).....11, 96, 97, 98, 162, 168, 195, 196–97
Lozano v. Alvarez, 697 F.3d 41 (2d Cir. 2012).....95, 96, 99

Lozano v. Montoya Alvarez, ___ U.S. ___, 134 S. Ct. 1224 (2014) 14, 15, 49, 85, 89, 97, 99, 100–01
Lutman v. Lutman, 2010 WL 3398985 (M.D. Pa. 2010) 96
Ly v. Heu, 296 F. Supp. 2d 1009 (D. Minn. 2003).....173
Mahmoud, *In re*, 1997 WL 43524 (E.D.N.Y. 1997) 170
March v. Levine, 249 F.3d 462 (6th Cir. 2001) 7, 134, 164, 188, 189–90
Marriage of Eaddy, *In re,* 144 Cal. App. 4th 1202 (2006) 110
Marriage of Saheb and Khazal, *In re*, 377 Ill. App. 3d 615 (Ill. App. 2007).....196
Marriage of Witherspoon, *In re,* 155 Cal. App. 4th 964 (2007) 31, 32
Marriage of Witherspoon, *In re,* 66 Cal. Rptr. 3d 586 (Cal. App. 2007).....83
Maurizio R. v. L.C., 201 Cal. App. 4th 616 (2011) 115, 141, 144
Mauvais v. Herisse, 772 F.3d 6 (1st Cir. 2014) 160
Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009) 54, 66, 70, 159, 160, 161
McClary v. McClary, 2007 WL 3023563 (M.D. Tenn. 2007) 51, 126, 189
McClelland v. Carland, 217 U.S. 268 (1910) 168
McManus v. McManus, 354 F. Supp. 2d 62 (D. Mass. 2005) 114, 125
Medellin v. Texas, 552 U.S. 491 (2008) 13
Menachem v. Frydman-Menachem, 240 F. Supp. 2d 437 (D. Md. 2003).....189, 190
Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M.D. Fla. 2002) 41, 100, 118, 139
Mendoza v. Silva, 987 F. Supp. 2d 910 (N.D. Iowa 2014) 183, 184
Meredith v. Meredith, 759 F. Supp. 1432 (D. Ariz. 1991) 75
Mezo v. Elmergawi, 855 F. Supp. 59 (E.D.N.Y. 1994).....17, 136
Miller v. Miller, 240 F.3d 392 (4th Cir. 2001) 51, 66, 88, 172
Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010).....73, 74, 114
Mohamud v. Guuleed, 2009 WL 1229986 (E.D. Wis. 2009).....86
Moreno v. Martin, 2008 WL 4726958 (S.D. Fla. 2008) 150
Morris, *In re*, 55 F. Supp. 2d 1156 (D. Colo. 1999) 57–58, 63, 78
Morrison v. Dietz, 2008 WL 4280030 (W.D. La. 2008).....108, 122, 170
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).... 167, 168
Mota v. Castillo, 629 F.3d 108 (2d Cir. 2012) ...52, 67, 68, 71, 105, 106, 157, 187, 188
Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).....xiv, 6, 16, 24, 53, 54, 55, 56, 57, 60, 61, 62, 63, 64, 66, 67, 70, 71, 76, 78, 80, 81, 82, 83, 108, 158, 162, 185
Muhlenkamp v. Blizzard, 521 F. Supp. 2d 1140 (E.D. Wash. 2007) 94
Murphy v. Sloan, 764 F.3d 1144 (9th Cir. 2014).....60
Neergaard-Colón v. Neergaard, 752 F.3d 526 (1st Cir. 2014).....68, 158, 185

Neves v. Neves, 637 F. Supp. 2d 322 (W.D.N.C. 2009) 112, 183, 197
Ngassa v. Mpafe, 488 F. Supp. 2d 514 (D. Md. 2007).....124
Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010).....16, 54, 75, 88, 101, 102, 104, 130, 156, 162
Nixon v. Nixon, 862 F. Supp. 2d 1168 (D.N.M. 2011).....189
Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003) 44
Norden-Powers v. Beveridge, 125 F. Supp. 2d 6334 (E.D.N.Y. 2000) 112
Norinder v. Fuentes, 2010 WL 4781149 (S.D. Ill. 2010) 165
Norinder v. Fuentes, 657 F.3d 526 (7th Cir. 2011) 54, 109, 164, 183
Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995).....69, 75, 77, 111–12
Obo v. Steven B., 687 S.E.2d 496 (N.C. App. 2009) 23
Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994).....98
Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013) 31–32, 174
P. v. B. (No. 2) (Child Abduction: Delay), [1999] 4 I.R. 185, 2 I.L.R.M. 401 (Ir.).....92
Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807 (2005) 98
Panteleris v. Panteleris, ___ F. Supp. 2d ___, 2014 WL 3053211 (N.D. Ohio 2014) 78
Patrick v. Rivera-Lopez, 708 F.3d 15 (1st Cir. 2013).....40, 196
People *ex rel*. Ron v. Levi, 719 N.Y.S.2d 365, 279 A.D.2d 860 (2001) 53
Perez v. Garcia, 148 Wash. App. 131, 198 P.3d 539 (Wash. App. 2009) 40, 98
Pesin v. Rodriguez, 244 F.3d 1250 (11th Cir. 2001) 7, 135, 193
Pesin v. Rodriguez, 77 F. Supp. 2d 1277 (S.D. Fla. 1999) 41, 135
Philippopoulos v. Philippopoulou, 461 F. Supp. 2d 1321 (N.D. Ga. 2006) 29, 199
Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008) 29–30, 152
Pignoloni v. Gallagher, 2014 WL 642596 (2d Cir. 2014) 101
Pitts v. De Silva, 2008 ONCA 9, [2008] 289 D.L.R. 4th 540 (Can. Ont.).....171–72
Polson, *In re*, 578 F. Supp. 2d 1064 (S.D. Ill. 2008).....184
Prevot v. Prevot, 59 F.3d 556 (6th Cir. 1995).....7, 133, 134
Quinn v. Settel, 682 So.2d 617 (Fla. App. 1996) 63, 79
R.P.B., *In re*, 2010 WL 339812 (Ohio App. 2010).....85
R.S. v. D.O., 34 Misc.3d 1239(a), 950 N.Y.S.2d 725 (2012) 12
Radu v. Toader, 463 F. App'x 29 (2d Cir. 2012).....30
Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953 (E.D. Mich. 2001).....124, 125, 188
Raveras v. Morales, ___ F. Supp. 2d ___, 2014 WL 2038318 (S.D.N.Y. 2014)..... 125, 188
Re M. and Another (Children) (Abduction: Rights of Custody), [2007] UKHL 55, [2008] 1 AC 1288.....92
Re S. (A Minor) (Abduction), [1991] Fam. 224 (EWCA (Civ.)) (Eng.).....92

Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013) 6, 34, 37–38, 54, 64, 66, 75, 149, 154, 157, 158, 162
Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999).....183
Reyes v. Jeffcoat, 548 F. App'x 887 (4th Cir. 2013).....79, 160
Rigby v. Damant, 486 F. Supp. 2d 222 (D. Mass. 2007) 169
Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007) 53, 63, 64, 66, 68, 158, 162, 188
Robinson, *In re*, 983 F. Supp. 1339 (D. Colo. 1997).....96
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 44, 169
Roszkowski v. Roszkowska, 274 N.J. Super. 620 (1993).....52, 182
Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004) 51, 66, 67, 68, 158, 159
Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) 6, 52, 65, 88, 112, 184
S.E.O., *In re*, 873 F. Supp. 2d 536 (S.D.N.Y. 2012).....177
S.J.O.B.G., *In re*, 292 S.W.3d 764 (Tex. App. 2009).....31
Salazar v. Maimon, 750 F.3d 514 (5th Cir. 2014).....182, 190
Saldivar v. Rodela, 894 F. Supp. 2d 916 (W.D. Tex. 2012) 132, 183, 184
Samman v. Steber, 2005 WL 588313 (Va. App. 2005).....196
Sampson v. Sampson, 267 Kan. 175 (1999).....108
San Martín v. Moquillaza, 2014 WL 3924646 (E.D. Tex. 2014).....125
Sanchez v. R.G.L., 743 F.3d 945 (5th Cir. 2014) 129, 195
Sanchez v. R.G.L., 761 F.3d 495 (5th Cir. 2014) 127, 129
Sanchez v. Suasti, 140 So.3d 658 (Fla. App. 2014) 49
Sanchez-Londono v. Gonzalez, 752 F.3d 533 (1st Cir. 2014) 66, 67, 106–07, 157
Schroeder v. Vigil-Escalera Perez, 76 Ohio Misc. 2d 25 (1995).....28
Sealed Appellant v. Sealed Appellee, 394 F.3d 338 (5th Cir. 2004).....162, 182
Seaman v. Peterson, 766 F.3d 1252 (11th Cir. 2014) 188
Seaman v. Peterson, 762 F. Supp. 2d 1363 (M.D. Ga. 2011) 160, 165
SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325 (5th Cir. 2001) 128
Secretary for Justice (New Zealand Central Authority) v. H.J., [2007] 2 NZLR 289 (SC) (N.Z.) 92–93
Sewald v. Reisinger, 2009 WL 150856 (M.D. Fla. 2009) 118
Shalit v. Coppe, 182 F.3d 1124 (9th Cir. 1999).....39, 58, 189
Silverman v. Silverman (*Silverman I*), 267 F.3d 788 (8th Cir. 2001).....166
Silverman v. Silverman (*Silverman II*), 338 F.3d 886 (8th Cir. 2003) 33, 51, 64, 66, 69, 78, 109, 158–59, 166
Silverman v. Silverman, 2004 WL 2066778 (D. Minn. 2004).....185
Simcox v. Simcox, 2008 WL 2924094 (N.D. Ohio 2008).....147

Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007).....3, 16, 102, 109, 111, 114, 115, 123, 139, 141, 142, 147, 156, 157, 162, 166
Skolnick v. Wainer, 2013 WL 5329112 (E.D.N.Y. 2013) 188
Skrodzki, *In re*, 642 F. Supp. 2d 108 (E.D.N.Y. 2007) 125
Slagenweit v. Slagenweit, 64 F.3d 719 (8th Cir. 1995) 183
Slagenweit v. Slagenweit, 841 F.Supp. 264 (N.D. Iowa 1993) 28
Sorenson v. Sorenson, 559 F.3d 871 (8th Cir. 2009).....66, 78
Sorenson v. Sorenson, 2008 WL 750531 (D. Minn. 2008) 33
Soucie v. Soucie, [1995] S.C. 134, S.C.L.R. 203 (Scot.).....92
Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013).....114, 118–19, 156, 162, 171, 176, 188
Steffen F. v. Severina P., 966 F. Supp. 922 (D. Ariz. 1997).....112
Stern v. Stern, 639 F.3d 449 (8th Cir. 2011).....53, 64, 66, 157
Stevens v. Stevens, 499 F. Supp. 2d 891 (E.D. Mich. 2007) 102, 190
Sullivan v. Sullivan, 2010 WL 227924 (D. Idaho 2010) 150
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) 15
Tahan v. Duquette, 259 N.J. Super. 328 (1992).....124
Tarbell v. Jacobs, 856 F. Supp. 101 (N.D.N.Y. 1994).....170
Taveras v. Morales, 22 F. Supp. 3d 219 (S.D.N.Y. 2014) 65, 97
Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007).....17, 172, 173, 174
Taylor v. Taylor, 502 F. App'x 854 (11th Cir. 2012) 117, 157
Thapa v. Gonzales, 460 F.3d 323 (2d Cir. 2004).....156
Thomson v. Thomson, [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253 (Can. S.C.C.) 26, 112
Toren v. Toren, 191 F.3d 23 (1st Cir. 1999).....28, 29, 59
Troxel v. Granville, 530 U.S. 57 (2000) 134
Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) 84, 123, 124, 125, 183
Tsarbopoulos, *In re*, 243 F.3d 550 (9th Cir. 2000) 189
Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045 (E.D. Wash. 2001) 70, 142
Turner v. Frowein, 253 Conn. 312 (2000).....142, 144–45
United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997).....135
Valenzuela v. Michel, 736 F.3d 1173 (9th Cir. 2013).....79, 157, 187
Van de Sande v. Van de Sande, 2008 WL 239150 (N.D. Ill. 2008).....200
Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005).....42, 111, 112, 114, 142, 144, 190–91
Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828 (S.D. Tex. 2006).....42, 172
Vasconcelos v. Batista, 512 F. App'x 403 (5th Cir. 2013).....123, 125, 158
Vela v. Ragnarsson, 386 S.W.3d 72 (Ark. App. 2011) 45

Velez v. Mitsak, 89 S.W.3d 73 (Tex. App. 2002) 195
Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008).....176
Viragh v. Foldes, 415 Mass. 96, 612 N.E.2d 241 (1993).....30, 42
Viteri v. Pflucker, 550 F. Supp. 2d 829 (N.D. Ill. 2008) 15, 19
Von Kennel Gaudin v. Remis, 282 F.3d 1178 (9th Cir. 2002).....152
Von Wussow-Rowan v. Rowan, 1998 WL 461843 (E.D. Pa. 1998).....132
Walker v. Walker, 701 F.3d 1110 (7th Cir. 2013).....24, 34, 101, 165
Walker v. Walker, WL 1110876 (N.D. Ill. 2013).....188
Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).....110, 112, 114, 115–16, 134, 139, 145, 156, 165, 199
Walsh, *In re*, 31 F. Supp. 2d 200 (D. Mass. 1998).....165
Wanninger v. Wanninger, 850 F. Supp 78 (D. Mass. 1994) 22, 102
Wasniewski v. Grzelak-Johannsen, 549 F. Supp. 2d 965 (N.D. Ohio 2008) 199
Welsh v. Lewis 740 N.Y.S.3d 3355 (App. Div. 2002) 49
West v. Dobrev, 735 F.3d 921 (10th Cir. 2013) 157, 187, 188, 190
Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000).....39, 40, 41, 114, 173
Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004).....184
White v. White, 718 F.3d 300 (4th Cir. 2013).....34
White v. White, 556 F. App'x 10 (2d Cir. 2014).....169
Whiting v. Krassner, 391 F.3d 540 (3d Cir. 2004) 54, 58, 63, 66, 68, 162, 196
Wiezel v. Wiezel-Tyrnauer, 388 F. Supp. 2d 206 (S.D.N.Y. 2005).....173
Wiggill v. Janicki, 262 F. Supp. 2d 687 (S.D. W. Va. 2003) 173
Wigley v. Hares, 82 So.3d 932 (Fla. App. 2011) 98, 100
Wilchynski v. Wilchynski, 2010 WL 1068070 (S.D. Miss. 2010).....113, 142
Wipranik v. Superior Court, 63 Cal. App. 4th 315 (1998) 62, 186
Witherspoon v. Orange County Dep't of Social Services, 646 F. Supp. 2d 1176 (C.D. Cal. 2009).....166
Wojcik v. Wojcik, 959 F. Supp. 413 (E.D. Mich. 1997) 94, 96, 97
Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013) 12–13, 89–90, 95, 99, 162
Yang v. Tsui (*Yang I*), 416 F.3d 199 (3d Cir. 2005).....6, 166, 167
Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007) 39, 40, 88, 108, 120, 122, 123, 126, 158
Younger v. Harris, 401 U.S. 37 (1971) 165–66, 167
Zuker v. Andrews, 1999 WL 525936 (1st Cir. 1999).....54
Zuker v. Andrews, 181 F.3d 81 (1st Cir. 1999) 66
Zuker v. Andrews, 2 F. Supp. 2d 134 (D. Mass. 1998) 28, 59

Statutes

8 U.S.C. § 1158 74
18 U.S.C. § 1204 ..... ix, 136
22 U.S.C. § 9001 ..... x, 5
22 U.S.C. § 9001(b)(3)(B) 13
22 U.S.C. § 9001(b)(4) ..... ix, 3
22 U.S.C. § 9002(7) ..... xiii, 30
22 U.S.C. § 9003(a) 5, 11
22 U.S.C. § 9003(b) 22, 174
22 U.S.C. § 9003(e) 5, 23
22 U.S.C. § 9003(e)(1)(A) 24
22 U.S.C. § 9003(e)(2)(A) 109
22 U.S.C. § 9003(e)(2)(B) 88
22 U.S.C. § 9003(f)(3) 94
22 U.S.C. § 9003(g) 149
22 U.S.C. § 9004(a) 193
22 U.S.C. § 9004(b) 10, 194
22 U.S.C. § 9005 ..... 5, 164, 165
22 U.S.C. § 9007(b) 5
22 U.S.C. § 9007(b)(3) 181, 182, 184
28 U.S.C. § 636(b)(1)(B) 161
28 U.S.C. § 1350 ..... 17, 174
28 U.S.C. § 1441 11

Other Authorities

The American Society of International Law, Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 33 I.L.M. 225, 241, 1994 WL 327559 (1994). ... 110

William J. Clinton, President's Signing Statement for H.R. 3378 (1993) 993 U.S.C.C.A.N. 2424-1 136

James D. Garbolino, "International Child Custody: Handling Hague Convention Cases in U.S. Courts" National Judicial College, 2000 125

Hague Conference on Private International Law, Conclusions and Recommendations adopted by the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions, June 2011 ..... 33, 180

Hague Conference on Private International Law, Preliminary Document, Draft Guide to Good Practice, Part V – Mediation, May 2011 200

Hague Conference on Private International Law, Special Commission to Review the Operation of the Hague Convention, Conclusions and Recommendations on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980, § 1.8.2 (2006) 149

Hague Conference on Private International Law, Special Commission to Review the Operation of the Hague Convention, Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, Including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, in the Context of the International Hague Network of Judges 180

Law No. 16,618, Julio 22, 1966, Diario Oficial [D.O.] (Chile) 49

Nigel Lowe, Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law, 2011 xvii

Pérez-Vera Report 3, 16, 24, 25, 32, 36, 39, 45, 50, 52, 64, 84, 85, 88, 93, 110, 113, 124, 145, 152, 161, 177

Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention (1993), 33 I.L.M. 225 ..... 110, 137

Response to International Parental Kidnapping: Hearing Before the Sen. Comm. on Criminal Justice Oversight, (1999) (statement of Catherine L. Meyer, British Embassy Co-chair of the International Centre for Missing & Exploited Children); 1999 WL 988418 (F.D.C.H.) 122

Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 175

Uniform Child Custody Jurisdiction and Enforcement Act ..... xiii, 6, 93, 149, 155, 178

Rules

Federal Rule of Appellate Procedure 8(a)(1)(A) 155

Federal Rule of Appellate Procedure 32.1 2

Federal Rule of Civil Procedure 16 ..... xv, 193

Federal Rule of Civil Procedure 17(c) 199

Federal Rule of Civil Procedure 17(c)(2) 128

Federal Rule of Civil Procedure 44.1 39

Federal Rule of Civil Procedure 56 189

Federal Rule of Civil Procedure 62(c) 155

Federal Rule of Civil Procedure 65.....194
Federal Rule of Civil Procedure 72(b).....161

Treatises

E.M. Clive, "The Concept of Habitual Residence," The Juridical Review part 3 75
Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005).....4, 15

Regulations

53 Fed. Reg. 23,843-01.....2
Exec. Order No. 12648, 53 Fed. Reg. 30,637 (1988) 11
U.S. State Department Text & Legal Analysis, 51 Fed. Reg. 10,494 (1986) 8, 15, 16, 22, 24, 40, 42, 45, 50, 85, 88, 89, 93, 95, 108, 110, 112, 113, 117, 121, 152, 182

Convention Articles

Preamble 6, 161
Article 1 .....7, 161
Article 2 161
Article 3 .....7, 24, 26, 30, 31, 38, 44, 45, 94, 179
Article 3(a).....7, 13, 26, 30
Article 3(b) 7, 24, 26, 107
Article 4 .....50, 85
Article 5 47
Article 7 11
Article 7(b) 193
Article 11 .....xi, 12, 161
Article 12 .....8, 12, 14, 24, 27, 29, 64, 65, 71, 72, 73, 87, 89–100, 105, 106, 117, 130, 157, 163
Article 13 .....8, 24, 85, 89, 90, 112, 120, 121, 122, 125, 130
Article 13(a).....8, 87, 101, 103, 108
Article 13(b) 8, 23, 69, 73, 87, 88, 92, 109, 110, 111, 113–17 122, 129, 137, 138, 142, 143, 144, 146, 172, 185
Article 16 .....6, 22, 166
Article 17 .....43, 44
Article 18 .....89, 90, 92, 93, 100

Article 20 .....8, 23, 87, 90, 92, 109, 117–20, 129, 130
Article 21 .....85, 173, 175
Article 22 195
Article 26 .....181, 198
Article 29 85
Article 31 40
Article 34 93
Article 35 17
Article 36 85
Article 38 17
Article 42 198

Websites

http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2779&dtid=3....16
http://travel.state.gov/abduction/attorneysjudges/attorneysjudges_4306.html.....9
http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html.....17
http://www.hcch.net/index_en.php?act=conventions.text&cid=24.....9
http://www.hcch.net/upload/haguenetwork.pdf.....181
http://www.incadat.com/index.cfm?act=text.text&lng=1.....17

Index

abstention
Colorado River 167
duty to exercise jurisdiction 168
Rooker-Feldman 169
Younger 165
access
distinguished from custody 30, 47
accession
acceptance of 18
acclimatization 66
factors 67
infants 68
overriding parental intent 67
acclimatized
vs. settled 64
acquiescence
burden of proof 101
generally 101
subjective intent 103
written document evidencing 104
administrative procedure xi
Afghanistan 81, 83, 153
age
age and maturity defense 120
jurisdiction 85
agreement to return child
anticipatory breach 28
Alien Tort Statute 17
alternatives to return 143
Argentina 42, 59, 74, 104
Article 12
discretion to return 92
Article 15 32
finding 33
procedure 33
Article 18 89
asylum 73, 127
conditions 74
grounds for grave risk 129
priority of return order 129
relevance 129
attorney fees and costs
amount 183
authority for 181
clearly inappropriate 184
lodestar 183
purposes 182
unclean hands 132
Attorney General 129
Australia 33, 56, 70, 76, 104
barring order 116
Belgium 77
bonds
posting of 196
restrictions on 195
Brazil 85
British Columbia 39
burden of proof
case in chief 23
clear and convincing evidence .. 26, 109
defenses 25
generally 23
Canada 40, 54, 58, 127
case for return
basic elements ..... xiii, 7
case management
appointed counsel 198
conference 199
generally ..... xv, 193
security of child 193
timelines 197
Central Authority ..... xi, 15, 19, 21, 94, 131, 151, 161, 202, 204, 205, 206, 208, 209, 210
role 11
chasing orders 33, 143
child abuse
intolerable situation 112
child custody ..... ix, 3
child settled 95
defense 94
Children's Passport Issuance Alert Program 197
Chile 49
circuit split
habitual 53
clear and convincing evidence xv

coercion
generally ... 69
non-removal order ... 70
Colombia ... 106
comity
as basis for exercising jurisdiction ... 173
denial of ... 171
enforcement of foreign custody orders ... 172
examining foreign orders ... 171
refusal to grant ... 120
commencement of proceedings ... 94
defined ... 94
common-law countries
undertakings used in ... 137
communication
between judges ... xvii, 180
concurrent jurisdiction
removal ... 169
Congress ... 10, 13, 52, 136
consent ... 101
conduct of parent ... 102
participant in custody case ... 103
contempt ... 135
Convention
purposes generally ... ix, 14
signed ... 2
counsel for children ... 199
criminal proceedings ... 136, 142
Custody agreements
definiteness ... 45
custody case
merits ... ix
petition filed in ... 23
custody decree
enforcement of ... 36
recognition of ... 35
custody rights
Abbott decision ... 49
administrative agencies holding ... 30
broad definition ... 49
burden in case in chief ... 24
by agreement ... 44
change in ... 38
establishing ... 39
generally ... xiii
holders of ... 30
judicial or administrative decision ... 42
non-exercise ... 24
operation of law ... 39
order approving, necessity ... 45
orders ... 43
temporary custody order ... 42
Cyprus ... 73, 74
Czech Republic ... 153
defenses
basic elements ... xiv, 7
burdens of proof ... 87
discretionary ... 90
generally ... 87
interpretation ... 88
narrow interpretation ... xv
narrowly defined ... 7, 25
non-discretionary ... 92
procedural ... 87
delay
more than a year ... 94
reasons for ... xi, 12
two prongs of defense ... 94
deportation ... 71
threat of ... 73
discovery ... 188
no right to ... 188
schedule ... 164, 193, 197
domestic violence
clear and convincing evidence ... 114
degrees of ... 115
directed at parent only ... 114
generally ... 114
in presence of children ... 116
mediation ... 200
threats ... 117
domicile ... 52
Dominican Republic ... 17, 172
educational opportunities
limited ... 111
Egypt ... 136
England ... 43, 170, 172
entry into force
date ... 2
equitable defenses
generally ... 130

equitable tolling 98
evidence
declarations or affidavits 186
live testimony 186
evidentiary hearing
denial of 190
when necessary 185
ex parte
custody decree 42
exercise of custody rights
acts constituting 108
defined 108
placement of child with third party .. 108
expeditious handling
appeals 162
generally ..... x, 161
reasons for delay 161
trial courts 162
Federal Rules of Civil Procedure
applicability 163
foreign courts
trust in 119
foreign law
proof of 39
forensic evaluation 113
form of action 22
forum shopping 52
foster care 127, 195
France 63, 122, 130, 133, 144
fugitive disentitlement 130, 133, 135
full faith and credit 42, 44, 149
inapplicable to foreign judgments 42
fundamental purposes ..... ix, 6
Germany ... 29, 39, 43, 61, 80, 82, 83, 84, 112, 167
Goldman Act 175
grave risk
asylum affecting 129
child abuse 113
courts unable to provide protection 111
defined 111
domestic violence 114
generally ..... xv, 109
interpretation 111
separation from caregiver 112
sexual abuse 113
Greece 70, 102, 171
habeas corpus 119
warrant in lieu 22
habitual residence
acclimatization 63
after only one day 55
agreements establishing 46
asylum 73
change by wishful thinking 55
change in geography required 47
coercion 69
contractual agreement 36
different territorial units 40
domicile 52
duration of stay 57
fact driven 51
generally ..... xiii, 50
immigration status 71
infants 74, 77
intent to abandon 53, 70
lack of mutual intent 61, 84
length of stay 58
majority view 54
military families 80
mutual intent to change 56
mutual settled intent 56
nationality and citizenship 53
not defined by Convention 50
only one 63
orders fixing place of 46
parent intent negated 63
parents change in residence 59
physical abuse 69
physical presence 84
right to determine residence 48
rights relating to care of child 48
settled purpose 51
UK definition 51
Hague Judicial Network ..... xvii, 180
Hague Permanent Bureau ..... xii, 17, 179, 180
hearing
evidentiary 188
on affidavits 189
summary judgment 188
Hilton, William M., Esq. 3
Homeland Security 127

House of Lords 92
Iceland 45, 82
immigration status 71
  acclimatization 71
  affecting habitual residence 71
  child settled 72
implementing legislation 2
in camera interviews 125
INCADAT 17
incoming cases xi
individual territories
  within countries 40
infants
  habitual residence does not follow mother 77
International Child Abduction Remedies Act (ICARA) ..... x, 3, 5, 10, 13, 23, 25, 28, 87, 95, 155, 165, 181, 182, 193, 194, 198
interpretation 13
  executive interpretation 15
  uniform international interpretation 13
intervene
  child's standing to 127
intolerable situation
  financial conditions 112
  generally ..... xv, 109
IPKCA ..... ix, 136
Iraq 82, 83
Ireland 37, 107, 116
Islamic law 9, 118
Israel 28, 46, 47, 48, 58, 61
Italy 83, 141
Japan 18
Jordan 194
judicial communication
  concerning merits of case 179
  direct xvii
  generally 178
  judicial independence 178
  logistics 178
  safeguards 180
judicial independence 180
jurisdiction
  concurrent 11
  original, concurrent xii
  personal 154
  where child is located 22
legal aid 183
legal representation
  pro bono and reduced fee 198
Libya 136
mediation
  agreements 200
  delay caused by 200
  generally 199
member states 18
  approval of Convention 9
mens rea 26
Mexico 40, 72, 78, 79, 89, 105, 134, 189
military
  families 51, 80
  parent in 84, 167
mirror-image orders ..... xvii, 139, 150
  limitations 151
  recognition of 151
moot case 155
  "concrete interest" 153
National Conference of Commissioners on Uniform State Laws 9
Native Americans 31
ne exeat 13, 48, 49, 50, 230
negotiations
  for return by Central Authority 21
Netherlands 29
non-Hague country 136
Northern Ireland 107
objection to return
  age and maturity 121
  age of child 124
  burden of proof 121
  court's discretion 121
  generalized desires 126
  in camera interviews 125
  length of wrongful retention 126
  manner of hearing 125
  objections vs. wishes 122
  preponderance of the evidence 121
  sole basis for denial of petition 121
  two-step process 122
  undue influence 123
  vs. child's wishes 120
Office of Refugee Resettlement 195

official history and commentary 16
outgoing cases xi
Panama 42
parallel jurisdiction
issues 165
passports
deposit of 197
patria potestas 40
defined 41
personal belongings
sale of 82
Peru 116
Poland 71
posting
military 83
poverty 111
preponderance of the evidence ..... xv, 25
prima facie case
generally 22
primary caretaker 143
abduction by 35
pro bono 183
procedures
most expeditious x
prompt return 161
protection of human rights and fundamental freedoms
generally 117
provisional remedy ..... ix, 4, 193
PTSD 116, 141
Puerto Rico 130
racial prejudice
constituting grave risk 112
ratification
member states and party states 18
versus accession 18
re-abduction 132, 193, 195, 196, 197
reconciliation 104
of marriage 70
relocation
acquiescence 107
for limited time 57
inability 105
indefinite period of time 60
legal entry 107
re-entry 106
removal of case 170
res judicata 46
restraining orders 116
return
administrative request for 21
return orders
generally ..... xvi, 149
particularity 150
safety of child 149
to other than habitual residence 152
under other laws 93
return refused
alternatives to 143
alternatives, duty to consider 143
ameliorative measures 143
Roman Law 40
Romania 30
safe harbor orders
defined ..... xvii, 151
sanctions 154
Scotland 26, 81, 153
selection of forum 170
settled 98
child concealed 98
defined 95
equitable factors 97
factors 95
return despite 90, 91
vs. acclimatized 64
settled purpose 66
sexual abuse 113
shuttle custody 78
signatories
number of 15
Singapore 118
sister state signatories
cooperation with 11
decisions of 12
member states 18
number of 15
party states 18
Spain 119, 178
standing
test for 128
state law
application of 10

removal of child from custodial parent 194
status quo ante 6, 35
stays
appellate courts issuing 156
child custody proceedings 5
discretion 156
factors for granting 155
generally 155
judicious use of 162
stipulation
for return 153
summary judgment 189
Sweden 63, 113, 138
Switzerland 34, 57, 132
Syariah court 118
temporary restraining order 194
testimony
affidavits in lieu 187
telephone 187
threats
concealment or abduction 193
Turkey 31
U.S. Marshals Service ..... xvi, 150
U.S. service members
posting 80
U.S. State Department ..... xi, 8, 12, 15, 16, 21, 181, 198
Central Authority for U.S. 11
Children's Passport Issuance Alert Program 197
informs courts of cases filed 12
locating counsel for applicants 198
Office of Children's Issues ..... xi, 15
Text & Legal Analysis 16, 85, 88, 93, 95, 112, 152
views on interpretation of Convention 12
UCCJEA ..... xiii, 6, 93, 149, 155, 178
unclean hands 130, 132
undertakings 114, 142
absent Article 13(b) defense 138
appropriate use 138
enforceability 139
extensive 146
financial assistance 142
generally ..... xvi, 137
parent to accompany child 147
primary caretaker 142
protective orders 142
vacating chasing orders 143
when inappropriate 146
United Kingdom 51, 81, 93, 153
decisions 90
Venezuela 43, 44, 79, 135
waiver 130, 131
wrongful removal
commencement date 27
defined 7, 26
generally 26
under law of habitual residence 32
vs wrongful retention 27
wrongful retention
anticipatory breach 29
by grandparents 134
commencement date 27
defined 26
determining date of 94
wrongfulness
defined ..... xiii, 26
Younger abstention 165
zone of war 111

The Federal Judicial Center

Board

The Chief Justice of the United States, Chair
Judge Catherine C. Blake, U.S. District Court for the District of Maryland
Judge Curtis L. Collier, U.S. District Court for the Eastern District of Tennessee
Magistrate Judge Jonathan W. Feldman, U.S. District Court for the Western District of New York
Judge Kent A. Jordan, U.S. Court of Appeals for the Third Circuit
Judge Michael J. Melloy, U.S. Court of Appeals for the Eighth Circuit
Judge Kimberly J. Mueller, U.S. District Court for the Eastern District of California
Chief Judge C. Ray Mullins, U.S. Bankruptcy Court for the Northern District of Georgia
James C. Duff, Director of the Administrative Office of the U.S. Courts

Director

Judge Jeremy D. Fogel

Deputy Director

John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.