The 1980 Hague Convention on the Civil Aspects of International Child Abduction

A Guide for Judges
Third Edition

Federal Judicial Center
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Federal Judicial Center
International Litigation Guide

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Preface

The 1980 Hague Convention entered into force in the United States in 1988. In the ensuing thirty-plus years, child abduction litigation has produced hundreds of state appellate decisions, 250 federal appellate decisions, and five 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. The second edition, published in 2015, sought to expand the discussions of federal and state issues raised by the Convention and to enhance the focus of expeditiously handling Hague Convention cases.

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. This third edition of the guide keeps pace with the expanding number of federal and state decisions shaping the body of law that guides courts as they decide on matters involving international child abduction.

John S. Cooke
Director, Federal Judicial Center

Dedicated to the Memory of Cromwell Adair Dyer

Adair Dyer was once referred to as the "Thomas Jefferson of the 1980 Hague Convention." In 1973, he was appointed to the Permanent Bureau of the Hague Conference on Private International Law, ultimately serving as deputy secretary general before his retirement in 1997. Adair was a leader within the Permanent Bureau and was instrumental to the development of the 1980 Convention that now has attracted over 100 signatory nations.

After serving as a U.S. Navy pilot, Adair received his law degree from the University of Texas at Austin and his master's degree in international law from Harvard University. At the Permanent Bureau in The Hague, Adair guided the representatives of signatory nations as they studied international child abduction and drafted the Convention.

Adair encouraged and supported the education of bar and bench throughout the world through lectures and conferences. His efforts to include judges as delegation members to the quadrennial Special Commissions held in the Netherlands contributed to the successful implementation of the 1980 Convention by Central Authorities and within judicial systems around the world.

Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction[1] is a multilateral treaty that provides authority for the expeditious physical return of a child or children who have been wrongfully removed or retained from their habitual residence, in violation of the custody rights of the left-behind parent. The 1980 Convention is the only internationally recognized remedy that compels the actual return of an abducted child.[2]

This guide provides an overview of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, focusing on the legal and procedural issues judges are likely to encounter in litigation under this treaty. It discusses the provisions of and purposes served by the Convention, provides a review of relevant statutory and case law, and offers practical suggestions for managing Hague cases.

1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 670, 1343 U.N.T.S. 89 [hereinafter Convention or 1980 Convention], https://www.fjc.gov/content/311578/text-1980-hague-convention.

2. Section 302 of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) allows a state court to enforce an order made under the Hague Conventions, but otherwise contains no provisions that authorize a court to order the actual physical return of a child across an international frontier in a non-Hague case. "The parent leaving a UCCJEA hearing with the child has obtained an order of legal and physical custody; the parent leaving a Hague Convention hearing with the child obtains nothing more than a determination as to what court will determine questions of legal custody. If the directive is to return the child to another forum, the parent who has physical custody is required to do so—such physical custody lasts just long enough to deliver the child to another jurisdiction where the question of legal and physical custody will eventually be decided." Suarez v. Castrillo, No. 11-cv-01762-MSK, 2011 WL 2729074, at *3 (D. Colo. July 13, 2011).† Cases may sometimes involve questions as to the applicability of both the UCCJEA and the 1980 Convention. *See* O'Neal v. O'Neal, No. LLIFA164016190S, 2017 WL 1484155, at *1 (Conn. Super. Ct. Apr. 7, 2017).† For a description of the background and application of the UCCJEA, see Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, U.S. Dep't of Just., Off. of Just. Programs, Dec. 2001, https://www.ojp.gov/pdffiles1/ojjdp/189181.pdf.

I.A

Overview, Purposes, and Objects of the Convention

Before the adoption of the 1980 Hague Convention, a parent whose child was abducted was faced with a Hobson's choice: either attempt to rekidnap the child or face the prospect of losing the child for the foreseeable future. Cases like these usually involved myriad heartrending challenges—children were subjected to abrupt and usually unanticipated changes of circumstance; they often lived on the run or under assumed names and were cut off from meaningful relationships with their left-behind parents.[3] The primary purposes of the Convention are to preserve the status quo that existed before a child's removal, and to deter would-be abductors from removing children to other jurisdictions in search of a more sympathetic court.[4] "It is the Convention's core premise that 'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's country of 'habitual residence.'"[5]

The objects of the Convention are set forth in Article 1:

> a) To secure the prompt return of children wrongfully removed to or retained in any contracting state
> b) To ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states[6]

The United States signed the 1980 Hague Convention in 1981, and Congress ratified the Convention in 1986. Congress passed implementing legislation, the International Child Abduction Remedies Act (ICARA), in 1988.[7] The treaty entered into force between the United States and other signatory nations on July 1,

3. Adair Dyer, Background & Overview, Presentation: Hague Convention on the Civil Aspects of International Child Abduction, Nat'l Jud. Coll., Reno, Nev. (Apr. 22, 2003).

4. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1400 (6th Cir. 1993). *See also* Abbott v. Abbott, 560 U.S. 1 (2010); Alcala v. Hernandez, 826 F.3d 161, 169 (4th Cir. 2016).

5. Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).

6. Convention, art. 1.

7. 22 U.S.C. §§ 9001–9011 (1988), Pub. L. 100–300, § 2, Apr. 29, 1988, 102 Stat. 437.

1988.[8] As of August 2022, 101 nations had ratified or acceded to the treaty.[9] It is in force between the United States and eighty of those countries.[10]

Proceedings under the Convention are civil, not criminal.[11] The situation that typically triggers the operation of the Convention is one in which a parent or relative relocates or retains a child across an international border without the consent of the left-behind parent or other person entitled to exercise rights of custody over the child. Most removals or retentions are done without a court order permitting relocation.

With the enactment of ICARA, Congress granted concurrent, original jurisdiction over Convention cases to both federal and state courts. Although this guide focuses primarily on federal case law, state-court decisions and unreported dispositions are discussed when helpful.[12] Because the 1980 Convention is an

8. 53 Fed. Reg. 23,843-01 (June 24, 1988).

9. Hague Conf. on Private Int'l L., Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

10. U.S. Hague Convention Treaty Partners, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (last visited Feb. 24, 2023). 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 processes for ratification and accession, see *infra* section II.C.

11. All fifty states and the federal government have penal statutes that criminalize parental abduction. 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. IPKCA has survived challenges for vagueness, and applies when a party abducts children from the United States (United States v. Amer, 110 F.3d 873 (2d Cir. 1997)) or retains a child who had been in the United States (United States v. Houtar, 980 F.3d 268 (2d Cir. 2020)). 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. IPKCA was intended to complement the Convention; civil proceedings under the Convention were meant to be a first recourse when a child was abducted. The IPKCA was not meant to hinder proceedings under the 1980 Convention, given that foreign jurisdictions may be reluctant to return a child to the United States if the taking parent will be facing criminal charges upon return to the United States.

12. Frequent reference to unreported dispositions is made to highlight how courts have approached certain issues. Unreported dispositions will have the symbol † added after the date of the decision to denote the decisions as unreported. Restrictions may apply to the citation of these cases for precedential value, based on federal 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. For the citation of unreported state-court dispositions, check the state or district rules of court for any limitations that might constrain the citation of those authorities as precedent.

international instrument, decisions from courts of other contracting nations are noted when relevant.[13]

"A Hague Convention case is not a child custody case."[14] It is more akin to a "provisional remedy"[15] to determine if a child was wrongfully removed or retained away from his or her habitual residence, and if so, to order the child returned to that nation. The Convention's purview does not include entry, modification, or enforcement of foreign or domestic child-custody orders.[16] All relevant authorities caution courts not to become mired in the question whether a certain parent is the "better" parent;[17] a foundational premise of the Convention is that the courts of the child's habitual residence are best positioned to determine questions regarding the child's custody.[18] The Convention addresses a far more limited issue: whether a child should be returned to his or her habitual residence, enabling the courts of that nation to rule on issues of custody and the best interests of the child.

13. It is clear that courts may appropriately consider foreign precedent for the purpose of interpreting the Convention. *See generally* Abbott v. Abbott, 560 U.S. 1, 16 (2010) ("In interpreting any treaty, '[t]he "opinions of our sister signatories" . . . are "entitled to considerable weight."'" (quoting Air France v. Saks, 470 U.S. 392, 404 (1985) and El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999))). 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* section II.B.3.

14. Quoting 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 freely 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).

15. Golan v. Saada, 142 S. Ct. 1880, 1888 (2022) (quoting Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020) (citing Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005))).

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

17. 22 U.S.C. § 9001(b)(4) reads, in part: "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." *See also* Jenkins v. Jenkins, 569 F.3d 549, 555 (6th Cir. 2009).

18. *See* Elisa Pérez-Vera, Explanatory Report, *in* 3 Actes et Documents de la Quatorzième session, 426–76 (1982), https://www.fjc.gov/content/311576/explanatory-report-eliza-perezvera-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.

Pendency of a Hague Convention petition for return in any U.S. court requires that custody proceedings pending in state courts must be stayed.[19] Since one of the purposes of the Convention is to return a child to the appropriate place for custody proceedings to be heard, the Hague case must be resolved before the courts can determine if the custody case has been brought in the appropriate jurisdiction. If a court conducting a custody proceeding is notified that there is a claim of wrongful removal or retention 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.[20] Likewise, if a state court is in the process of hearing a custody case and the application of the Hague Convention is raised in court, the state court must first resolve the Hague issues before it may continue with the custody case.[21] A federal court may vacate a state court's custody determination if it was entered in violation of the stay provisions of Article 16.[22]

The substantive law and fundamental elements of a cause of action for return of a child are found in the text of the Convention.[23] The procedural aspects of handling these cases are governed by ICARA. Courts may only entertain petitions for return of a child if the Hague Convention is in force between the two countries involved, and the wrongful removal or retention of a child must have occurred after the date the treaty came into force in both countries. See discussion *infra* at section II.C.

19. "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." Convention, art. 16.

20. *See id*.; *see also* Tsai-Yi Yang v. Fu-Chiang Tsui (*Yang I*), 416 F.3d 199, 203 (3d Cir. 2005).

21. *In re* Abraham A., No. F044836, 2004 WL 2092228, at *2 (Cal. Ct. App. Sept. 20, 2004)† ("Before it could reach dispositional issues in the case, the court recognized it must first decide whether the child was wrongfully removed from Mexico under the Hague Convention and consequently should be returned to Mexico."); Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685, 693 (E.D. Va. 2002) ("To address the custody dispute before the Hague Convention petition is resolved would violate the direction of the Hague Convention that courts '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.'").

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

23. *See generally* 1980 Convention.

I.B

Unique Concepts

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

I.B.1

Expeditious Handling

Petitions for the return of children are time sensitive. Two articles of the Convention underscore this point. The first clause of Article 11 states that the judicial or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children. Article 2 directs that signatories "shall use the most expeditious procedures available." The *Pérez-Vera Report*[24] characterizes this provision as encompassing two aspects: first, that the speediest procedures be used to determine the case, and second, that the cases be granted priority "so far as possible."[25] The framers of the Convention set a period of six weeks as the expected disposition time. This time frame is fixed by inference in the second paragraph of Article 11, which vests the applicant or Central Authority in the requesting state with the right to request a statement of reasons for the delay of the case, if a decision is not made within six weeks. The *Pérez-Vera Report* refers to the six-week interval as "the maximum period of time within which a decision on this matter should be taken."[26] To meet the goal of promptly deciding the case, trial and appellate courts "should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."[27] Courts have uniformly regarded the expeditious handling of these cases as essential. (See *infra* section VI.D.) In one reported case, the time from the filing of the initial petition in district court to a published affirmance in the appellate court occurred within ninety-five days.[28]

More than forty countries limit jurisdiction over international child abduction cases to a small number of courts to facilitate efficient disposition.[29] State

24. *Supra* note 18. For a further discussion concerning the report, see *infra* section II.B.2.

25. Pérez-Vera Report, *supra* note 18, at 457–58, ¶ 104.

26. *Id*. ¶¶ 104–05.

27. Chafin v. Chafin, 568 U.S. 165, 179 (2013) (citing an earlier edition of this guide).

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

29. Philippe Lortie, *Concentration of Jurisdiction Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, *in* The Judges' Newsletter on International Child Protection, Vol XX, Summer–Autumn 2013, at 2, https://assets.hcch.net/docs/ee6929b5-2244-4466-ad5a-6d2ccbd772e3.pdf.

courts are encouraged to follow this example and concentrate the jurisdiction of Hague cases.[30]

I.B.2

Role of the Executive Branch

Each 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. Department of State. The Office of Children's Issues within the Bureau of Consular Affairs at the State Department carries out the functions of the Central Authority. This office 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 their voluntary return if possible, and cooperating with counterpart authorities in other countries. After being informed that a petition for return of or access to a child has been filed in state or federal court, the State Department sends a letter to the court with general information about the Convention and includes guidance concerning key provisions of the Convention and the role of the State Department. The department also acts as a conduit for official inquiries by a U.S. or foreign court on the status of foreign law.[31] These actions do not disregard the separation of powers—rather, the State Department is fulfilling its role as the Central Authority for the United States. See further discussion of the role of the Central Authority *infra* at section II.A.5.

I.B.3

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 either the Central Authority of the country of the child's habitual residence or the Central Authority where the child is located. The Central Authority will attempt to make contact with the parent who has physical custody of the child and negotiate a voluntary return of the child. The Central Authority has no power to compel

30. According to one attorney experienced in trying international custody cases, "A judge's first Hague Convention case is likely to be that judge's last Hague Convention case." While that statement may be true in state courts, federal judges have a greater opportunity to try multiple Hague Convention cases simply because of the fewer numbers of judicial officers in the federal system. Florida State Court Judge Judith Kreeger, a former Hague Network judge, has led that state's efforts to assign Hague Convention cases to a select number of judges.

31. Convention, art. 15.

the return of the child. If efforts at voluntary return fail, the only remaining alternative under the Convention is for the left-behind parent 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 section II.B.

I.C

Elements of the Case for Return

A court 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 section VI.E.

A person or parent[32] petitioning for the return of a child must show by a preponderance of the evidence[33] that the child

- is under the age of sixteen
- has been wrongfully removed or retained
- has been wrongfully removed or retained from his or her habitual residence
- has been wrongfully removed or retained in violation of the custody rights of the left-behind parent

If the petitioner for a child's return has proved the elements above, the court must order the return of the child, unless one of the defenses (exceptions) to return is established.

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 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

32. An institution may have rights of custody if that institution has the legal responsibility for the care and support of the child. "The removal or the retention of a child is to be considered wrongful where . . . it is in breach of rights or 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. . . ." Convention, art. 3. *See, e.g.*, Sanchez v. R.G.L., 761 F.3d 495, 506–07 (5th Cir. 2014) (joinder of U.S. government as a party appropriate where the government was temporary legal custodian or selected the children's custodians).

33. 22 U.S.C. § 9003(e)(1).

must have been actually exercising his or her rights of custody. See discussion *infra* at section III.E.

- Custody Rights. Custody rights are determined according to the law of the state where the child was habitually resident immediately before the wrongful removal or retention. Under the Convention, custody rights can be established through a showing that they arise by (1) operation of law, (2) judicial or administrative decision, or (3) an agreement of the parties.[34] The term *custody rights* means more than a right of visitation or access.[35] 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 v. Abbott*[36] the Supreme Court held that custody rights also may be established under the Convention where the left-behind parent had only visitation rights, but the abducting parent violated a restraining order (ne exeat) that prohibited the removal of a child across an international border. See discussion *infra* at section III.E.8.
- Habitual Residence. The term *habitual residence* is not defined by the Convention. The term refers to the place where the child has "some degree of integration . . . in a social and family environment"[37] and "the place where a child is at home, at the time of removal or retention . . . ."[38] The term differs from the Uniform Child-Custody Jurisdiction and Enforcement Act's (UCCJEA) term *home state* because home-state jurisdiction normally requires a six-month residence for a state to acquire jurisdiction over child-custody issues. The concept of habitual residence also differs from the term *domicile* in that *domicile* includes elements of future intent, citizenship, and nationality. See discussion *infra* at section III.F.1.

34. Convention, art. 3.

35. 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 the U.S. phrase *visitation rights*. 22 U.S.C. § 9002(7).

36. 560 U.S. 1 (2010).

37. Monasky v. Taglieri, 140 S. Ct. 719, 726 (2020) (citing OL v. PQ, 2017 E. C. R. No. C-111/17, ¶ 42 (Judgt. of June 8, 2017) (Court of Justice of the European Union decision), https://curia.europa.eu/juris/document/document.jsf?docid=191309&doclang=en).

38. *Monasky*, 140 S. Ct. at 726–27 (citing Karkkainen v. Kovalchuk, 445 F.3d 280, 291 (3d Cir. 2006)).

I.D

Defenses to Return

The Convention sets forth five narrowly defined defenses (exceptions) to petitions for return[39]:

1. Delay of over one year in bringing the petition for return (*infra* section IV.B)
2. Consent or acquiescence to removal or retention of the child (*infra* section IV.B)
3. Failure to exercise custody rights (*infra* section IV.D)
4. Exposure of the child to a grave risk of harm or subjection of the child to an intolerable situation by return (*infra* section IV.E)
5. Violation of fundamental principles relating to the protection of human rights and fundamental freedoms caused by return (*infra* section IV.F)

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.[40] 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 section IV.G.

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.[41]

Defenses to return are subject to a narrow interpretation. Underscoring this concept of narrow interpretation, courts retain the discretion to order the return of a child even if the legal elements of a defense have been established. See *infra* section IV.A.2.

39. The Convention limits the defenses to those stated. However, a handful of U.S. cases have considered procedural defenses to actions for return of a child—fugitive disentitlement, waiver, and unclean hands. *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, No. EP-11-CV-009-KC, 2011 WL 692213 (W.D. Tex. Feb. 17, 2011)† (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").

40. Convention, art. 18.

41. 22 U.S.C. § 9003(e)(2).

One of the most frequently raised defenses is *grave risk*. 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, and 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—that is, 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 with the benefits of the living conditions of another country. See discussion *infra* at section IV.E.1.b.[42]

I.E

Managing the Case for Return

I.E.1

Case-Management Conferences

Convention cases require active case management because of the shortened timelines for handling these cases to conclusion. See discussion *infra* at section VII. In federal courts, a Rule 16 conference should be scheduled promptly so that a trial date may be set and orders be made to address the types of issues set forth below. State courts should use similar procedures. Issues that are likely to be covered at the case-management conference may include

- legal representation
- the child's current situation, including whether there is a risk of reabduction or concealment, or a need for protective measures including deposit of passports or entry of nonremoval orders
- discovery plans
- identification of the substantive issues likely to be raised at trial
- selection of the method to be used for taking evidence (e.g., by telephone, videoconference, declaration or affidavits, or live testimony)
- whether the case is appropriate for summary judgment
- selection of a trial date and estimates of the length of trial

42. The Hague Permanent Bureau has recently published an extensive guide that deals specifically with the grave-risk provisions of the Convention. Hague Conf. on Private Int'l L., 1980 Child Abduction Convention: Guide to Good Practice, Part VI (2020), https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf.

I.E.2

Legal Representation

There are no provisions addressing compensation for court-appointed counsel in Hague Convention cases. Although Article 26 of the Convention prohibits contracting states from charging the applicant for provided legal services,[43] the United States made a reservation to this provision.[44] Applicants who are seeking the return of children bear the initial cost of legal services.[45] However, the U.S. Department of State will assist qualified applicants with identifying counsel who may be able to provide reduced-fee or pro bono representation. See *infra* at section VI.I.

The U.S. reservation to Article 26 did not affect the last paragraph of Article 26 that includes a fee-shifting provision in favor of the applicant who succeeds in obtaining an order for return of the child. Successful petitioners may apply to the court to obtain an award of fees, travel expenses, and costs incurred for locating the child and for the costs of legal representation.[46] The fee-shifting provision does not apply to fees and costs that are incurred on appeal.[47] Some circuits question whether the appellate court may itself award fees and costs. See *infra* at section VI.I.1. However, successful petitioners may bring a motion for such an award in district court, where that court may award fees and costs for appellate work in connection with the case.

43. "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." Convention, art. 26.

44. "Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program." United States Reservation to Article 26, third paragraph, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=652&disp=resdn.

45. *Id*. *See also* U.S. State Dep't, Hague International Child Abduction Convention, Text & Legal Analysis, 51 Fed. Reg. 10,494 (Mar. 26, 1986), https://www.federalregister.gov/citation/51-FR-10494. The International Child Abduction Remedies Act (ICARA) sets forth comparable language. 22 U.S.C. § 9007(b)(1), (2). *See also* Peter Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 Fam. L.Q. 35 (1990).

46. 22 U.S.C. § 9007(b)(3).

47. "According to the plain meaning of both the Convention and ICARA, these provisions apply only to courts 'ordering the return of the child.' Thus, this provision does not apply to this court—which is not a court ordering the return of the child, but rather a court affirming another court's order to return the child. This interpretation is supported by the decisions of sister circuits that have addressed the issue." Pliego v. Hayes, 843 F.3d 226, 238 (6th Cir. 2016) (citing Hollis v. O'Driscoll, 739 F.3d 108, 113 (2d Cir. 2014); West v. Dobrev, 735 F.3d 921, 933 n.9 (10th Cir. 2013)).

I.E.3

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 another relevant law enforcement organization. Return orders should ordinarily be very specific about the details of the child's return.

I.E.4

Undertakings, Ameliorative Measures, 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 to refrain from doing something in connection with the child's return. Undertakings may consist of offers for temporary 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; offers to pay the costs of transportation for the child's return; agreements for the entry of restraining orders; etc. By their nature, undertakings are proposed to the court hearing the petition for return, and if the court agrees, they are appended to return orders. Once the child is returned to his or her habitual residence, undertakings are usually unenforceable before the courts of the habitual residence.

A broad definition of *ameliorative measures,* suggested by the recent Supreme Court case *Golan v. Saada*,[48] is any measure taken by the parents or by the authorities of the habitual residence that could "reduce whatever risk might otherwise be associated with a child's repatriation."[49] Although the terms *undertakings* and *ameliorative measures* may have similar but distinct meanings, the Supreme Court in *Golan* noted that appellate courts use the terms interchangeably.[50] See

48. 142 S. Ct. 1880 (2022).

49. *Id*. at 1887, citing Blondin v. Dubois (*Blondin IV*), 238 F.3d 153, 163 n.11 (2d. Cir. 2001).

50. *Golan*, 142 S. Ct. at 1890 n.4. The term *ameliorative measures* appears first in *Blondin v. Dubois* (*Blondin II*), 189 F.3d 240, 248–49 (2d Cir. 1999), where the court reasoned that: "For this reason, it is important that a court considering an exception under Article 13(b) take into account any ameliorative measures . . . that can reduce whatever risk might otherwise be associated with a child's repatriation." When *Blondin* was reheard by the Second Circuit on appeal after remand (*Blondin IV*, 238 F.3d at 159–60), the court referred to its previous holding that trial courts "take into account any ameliorative measures." In the same opinion, the court referred to the measures as "undertakings."

discussion of undertakings, ameliorative measures, mirror-image orders, and safe-harbor orders, beginning *infra* at section V.B.

Some courts may consider using mirror-image orders 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 require 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 section V.C–D.

I.E.5

Direct Judicial Communication

There is an emerging acceptance of judges communicating directly with their counterparts in foreign nations. These exchanges may be helpful in resolving logistical issues concerning the return of a child. Eighty-nine countries have designated one or more "International Hague Network Judges" to assist judges who wish to contact a foreign judge.[51] Contacts between judges usually deal with the details of foreign law or the availability of resources to assist with the transition of a child back to the habitual residence. See *infra* section VI.H.

The number of return cases is increasing as modern methods of communication and transportation contribute to the expanding ease of international travel and settlement.[52]

51. *See* https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj.

52. Nigel Lowe & Victoria Stephens, A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Global Report, Hague Conf. on Private Int'l L. (2018), https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf.

II

Operation of the Convention

II.A

Legal Framework

II.A.1

The Hague Conference on Private International Law

The 1980 Convention was proposed for adoption by the Hague Conference on Private International Law. The Hague Conference is a global independent intergovernmental organization, founded in 1955.[53] The Conference meets at the Peace Palace in The Hague, Netherlands, in order to prepare or monitor its treaties.[54] In 1980, countries belonging to the Hague Conference—including the United States—approved the Child Abduction Convention for adoption. It first entered into force on December 1, 1983, when it was ratified by three nations (France, Canada, and Portugal). Currently, 101 nations have signed that Convention, representing countries with legal systems based on common law, civil law, Sharia law,[55] and various combinations thereof.

Seated in The Hague, Netherlands, the Conference develops instruments on a variety of international law topics ranging from recognition and enforcement

53. *See* https://www.hcch.net.

54. Dyer, *supra* note 3.

55. Morocco is the first country with an Islamic law system to become bound by the Convention. The Convention entered into force between Morocco and the United States on December 1, 2012. Pakistan acceded to the treaty in 2016. The Convention came into force between the United States and Pakistan on October 1, 2020. Singapore is another nation with some Islamic courts. The Convention entered into force between Singapore and the United States on May 1, 2012. *See* Souratgar v. Lee (*Souratgar I*), 720 F.3d 96, 106 (2d Cir. 2013).

of judgments to banking and commercial transactions.[56] The Hague Conference operates similarly to the Uniform Law Commission[57] by proposing model acts (international documents are referred to as *conventions*) for adoption by foreign states. 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.[58]

The Hague Conference held eight special commissions on the operation of the 1980 Convention on International Child Abduction between 1989 and 2017. Reports of the Conclusions and Recommendations of each Special Commission are published on the Hague Permanent Bureau website.[59] The reports may be valuable aids to guide the interpretation and operation of the Convention.[60]

II.A.2

The Text of the Convention

The text of the Convention is available on the website of the Hague Conference on Private International Law.[61] Links to the Convention may also be found on the websites of the Federal Judicial Center and the U.S. Department of State.

56. *E.g.*, 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf; 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf; 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, https://www.hcch.net/en/instruments/conventions/full-text/?cid=69; 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

57. Also known as the National Conference of Commissioners on Uniform State Laws.

58. The reports of Special Commissions relating to the 1980 Hague Convention may be found on the Federal Judicial Center's Special Topics Page, https://www.fjc.gov/research/special-topics. The Permanent Bureau has also published a compilation of Conclusions and Recommendations that are still relevant at this time. *See* Hague Conf. on Private Int'l L., Prel. Doc. No. 6 (July 2017), https://assets.hcch.net/docs/a093695a-5310-42df-92bb-068abfde67c2.pdf.

59. Special Commission Meetings, https://www.hcch.net/en/instruments/conventions/publications1/?dtid=57&cid=24.

60. Abbott v. Abbott, 560 U.S. 1, 18 (2010) (ne exeat rights are "rights of custody"); Walsh v. Walsh, 221 F.3d 204, 213 (1st Cir. 2000) (executing order for child's return pending appeal); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 14 (1st Cir. 2002) (exceptions to the general rule of expedient return, including art. 13(b), are to be construed narrowly); Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1222 (D.C. Cir. 2019) (no deference given to French Central Authority's rejection of a petitioner's request for assistance).

61. https://www.hcch.net/en/instruments/conventions/full-text/?cid=24.

II.A.3

International Child Abduction Remedies Act

The International Child Abduction Remedies Act[62] (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. The substantive law of the individual states of the United States does not impact the application of the Convention except in one area: no court, state or federal, may peremptorily remove a child from a parent having physical control of that child unless provisions of state law are satisfied.[63]

II.A.4

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.[64] This can give rise to issues relating to removal,[65] parallel actions,[66] and abstention.[67] See *infra* section VI.E.

II.A.5

Role of the Central Authority

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. As such, the Central Authority has a two-way responsibility: It both receives and initiates direct requests for assistance.[68] The responsibilities of the Central Authority are as stated in Article 7:

> a) to discover the whereabouts of a child who has been wrongfully removed or retained;[69]

62. 22 U.S.C. §§ 9001–9011.

63. 22 U.S.C. § 9004(b). *See* discussion *infra* section VII.A.1.

64. *See* 22 U.S.C. § 9003(a).

65. *See* 28 U.S.C. § 1441.

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

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

68. Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 Fam. L.Q. 35, 38 (1994).

69. Lozano v. Montoya Alvarez (*Lozano III*), 572 U.S. 1 (2014); *In re* R.V.B., 29 F. Supp. 3d 243, 255 (E.D.N.Y. 2014).

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;[70]
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;[71]
d) to exchange, where desirable, information relating to the social background of the child;
e) to provide general information about national law in connection with the application of the Convention;[72]
f) to initiate or facilitate judicial or administrative proceedings for a child's return and, in a proper case, to organize or secure the effective exercise of rights of access;[73]
g) where the circumstances so require, to provide or facilitate legal guidance, including the participation of legal counsel and advisers;[74]
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;[75]
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.

After the Department of State is informed of a filed petition, usually by the applicant's attorney, the department sends the court a letter including information

70. *See, e.g.*, Cooper v. Fewer, No. 1 CA-CV 13-0074, 2014 WL 1388378, at *1 (Ariz. Ct. App. Apr. 8, 2014)† (request for court order to place abductor's name on U.S. State Department Office of Children's Issues DHS Prevent Departure list).

71. Panteleris v. Panteleris, 30 F. Supp. 3d 674, 679 (N.D. Ohio 2014), *aff'd*, 601 F. App'x 345 (6th Cir. 2015); Wojcik v. Wojcik, 959 F. Supp. 413, 415 (E.D. Mich. 1997) (attempt to effect voluntary return). *See also* Sundberg v. Bailey, No. 1:17-cv-00300-MR-DLH, 2017 WL 5760104, at *1 (W.D.N.C. Nov. 28, 2017).†

72. Ramirez v. Buyauskas, No. 11-6411, 2012 WL 606746, at *5 (E.D. Pa. Feb. 24, 2012), *amended*, 2012 WL 699458 (E.D. Pa. Mar. 2, 2012)† (request for proof of custody rights).

73. Garcia v. Varona, 806 F. Supp. 2d 1299, 1308 (N.D. Ga. 2011) (filed an application for the return of the children with Office of Children's Issues, U.S. State Dep't (OCI)); Benitez v. Hernandez, No. 17-917 (KM), 2017 WL 1404317, at *3 (D.N.J. Apr. 18, 2017).†

74. Saldivar v. Rodela, 894 F. Supp. 2d 916, 927 (W.D. Tex. 2012) (referring qualified applicants to legal aid programs); *see also* Habrzyk v. Habrzyk, 759 F. Supp. 2d 1014, 1019 (N.D. Ill. 2011) (provided with a list of potential pro bono attorneys); Fernandez-Trejo v. Alvarez-Hernandez, No. 8:12-cv-02634-EAK-TBM, 2012 WL 6106418, at *3 (M.D. Fla. Dec. 10, 2012)† (resources provided through U.S. Hague Network Judges).

75. González v. Preston, 107 F. Supp. 3d 1226, 1240 (M.D. Ala. 2015) (contact with Office of Children's Issues regarding safe return of children).

on available resources that may be of assistance to the court.[76] Under Article 15,[77] at the request of a U.S. court, the U.S. State Department may act as a conduit for inquiries on whether the removal or retention of a child was wrongful under the law of the country where the child lived before removal. The State Department will forward the request for information through diplomatic channels to the Central Authority of the foreign country. When the foreign court or the Central Authority for that country provides an answer, it is transmitted through the State Department back to the initiating court.[78]

Most Hague Convention cases should be resolved in six weeks. Under Article 11 of the Convention, the U.S. State Department may request reasons for the delay of a case beyond six weeks, to keep applicants or sister Central Authorities informed about the case's progress.[79]

II.B

Interpretation

II.B.1

Supreme Court Guidelines

Between 2010 and 2022, the Supreme Court issued five decisions interpreting the Hague Convention. These cases explored the impact of a ne exeat clause on custody rights (*Abbott v. Abbott*),[80] equitable tolling and Article 12's one-year period

76. *See, e.g.*, R.S. v. D.O., 950 N.Y.S.2d 725, at *3 (N.Y. Sup. Ct. 2012) (unreported table decision) (Court notes receipt of letter from OCI stating: "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.").

77. Article 15 provides:

> 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.

78. *See* Radu v. Shon, 62 F.4th 1165, 1173–74 (9th Cir. 2023) (district court did not err by communicating with the U.S. Department of State on a legal question involving German law).

79. Convention, art. 11; *see supra* section I.B.1.

80. 560 U.S. 1, 18 (2010).

for filing a return petition (*Lozano v. Montoya Alvarez* (*Lozano III*)),[81] mootness (*Chafin v. Chafin*),[82] the definition of *habitual residence* (*Monasky v. Taglieri*),[83] and whether a court is required to examine ameliorative measures before denying an order for return of a child on the grounds of grave risk (*Golan v. Saada*).[84]

II.B.1.a

Treaty Interpretation

Treaties are compacts between independent nations.[85] Courts ascertain the intent of parties to a treaty by looking to the document's text and context.[86] In *Abbott*, the Supreme Court reiterated that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."[87] To ascertain the meaning of "custody rights," the Court also looked to the law of habitual residence and construed these legal principles in light of the Convention's text and purpose. The Court noted that deference to the Convention's text ensures the consistency across nations,[88] a principal objective of ICARA.[89] Examining the father's ne exeat rights under Chilean law, the Court found that within the context of the Convention, these rights conferred joint authority to decide the child's residence. This shared authority together with the father's visitation rights were deemed enforceable rights of custody under the Convention.[90]

The Court revisited the importance of international consistency in *Lozano v. Montoya Alvarez* (*Lozano III*), where it considered whether equitable tolling applied to Article 12's one-year period for filing a petition for return of a child. Noting that the concept of equitable tolling is unique to American jurisprudence, the Court concluded it is not part of the "*shared* expectations of the contracting

81. 572 U.S. 1 (2014).

82. 568 U.S. 165 (2013).

83. 140 S. Ct. 719, 726–27 (2020).

84. 142 S. Ct. 1880 (2022).

85. Medellín v. Texas, 552 U.S. 491, 505 (2008).

86. *Lozano III*, 572 U.S. 1, 11 (2014) (citing United States v. Choctaw Nation, 179 U.S. 494, 535 (1900)). *See also* Monasky v. Taglieri, 140 S. Ct. at 726 ("We begin with 'the text of the treaty and the context in which the written words are used.'" (citing Air France v. Saks, 470 U.S. 392, 397 (1985))).

87. Abbott v. Abbott, 560 U.S. 1, 10 (2010).

88. *Id.* at 12.

89. "In enacting this chapter the Congress recognizes . . . the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B).

90. *Abbott*, 560 U.S. at 15.

parties."[91] In deference to the intent of those who drafted the Convention, equitable tolling is not available to extend the one-year period set forth in Article 12.

In *Monasky v. Taglieri*, the Court again invoked the text and objectives of the Convention. The mother argued that an explicit mutual agreement was necessary to establish a child's habitual residence. The Court rejected this argument, noting that there is no such requirement in the text of the Convention and that requiring an actual agreement is inconsistent with the treaty's objectives. [92]

In *Golan v. Saada*, the Court held that neither the text of the Convention nor ICARA required that courts consider ameliorative measures before denying a child's return on the basis of a grave-risk exception. Courts retain the discretion to consider such measures upon proper presentation by the parties, or as suggested by the circumstances of the case.[93]

II.B.1.b

Executive Interpretation of Treaties

The opinions of the executive branch concerning interpretation of the Convention are entitled great weight.[94] The *Text and Legal Analysis*[95] is a document that was prepared by the State Department for the U.S. Senate as part of the ratification process. The document is a significant interpretative tool for the official

91. *Lozano III*, 572 U.S. at 12 (emphasis in original; internal citation omitted). "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, 2 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 is 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).

92. Monasky v. Taglieri, 140 S. Ct. 719, 728 (2020). *Accord Lozano III*, 572 U.S. 1, 16 (2014) (equitable tolling—while the Convention was designed to discourage child abduction, it does not "pursue that goal at any cost." The child's interest—in remaining where he or she resides, avoiding physical or psychological harm, or his or her interest in settlement—may overcome the return remedy.).

93. Golan v. Saada, 142 S. Ct. 1880, 1893 (2022).

94. *See* Abbott v. Abbott, 560 U.S. 1, 15 (2010) (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184 n.10 (1982)).

95. Text & Legal Analysis, *supra* note 45, at 10,509.

interpretation of the 1980 Convention and is frequently cited in U.S. cases.[96] In *Abbott* and *Golan*, the Court gave deference to the opinions of the Office of Children's Issues and the U.S. Department of State.[97]

II.B.1.c

Sister-State Decisions

Appellate decisions emphasize the importance of consistency with the judgments of sister-state signatories to the Convention.[98] This is especially true now that 101 countries are signatories to the Convention. Uniform interpretation can be undermined by a foreign state's undue reliance on local domestic practices, legal concepts, and value-laden presumptions.

In *Abbott*, the Supreme Court explicitly stated that "[t]he 'opinions of our sister signatories' . . . are 'entitled to considerable weight,'"[99] when interpreting a treaty. Similarly, in *Lozano III*, the Court observed that treaties must be read in a manner "consistent with the *shared* expectations of the contracting parties"[100] and looked to decisions from other countries, including the United Kingdom, Canada, New Zealand, and Hong Kong[101] to discern what the Court in *Monasky* described as a clear trend when assessing habitual residence: "a fact-driven inquiry into the particular circumstances of the case."[102]

96. *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).

97. *Abbott*, 560 U.S. at 15 ("The United States has endorsed the view that *ne exeat* rights are rights of custody. In its brief before this Court the United States advises that 'the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected "rights of custody."'"); *Golan*, 142 S. Ct. at 1894 n.9 ("The Department of State expressed this view [courts prohibited from resolving underlying custody disputes] in a 1995 letter to a United Kingdom official, emphasizing that any ameliorative measures ordered to facilitate return 'should be limited in scope and further the Convention's goal of ensuring the prompt return of the child' and that measures that 'address in great detail issues of custody, visitation, and maintenance' would be 'questionable' given the Convention's reservation of custody issues for resolution in the country of the child's habitual residence.").

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

99. Abbott v. Abbott, 560 U.S. 1, 16 (2010) (citing El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985))).

100. *Lozano III*, 572 U.S. 1, 12 (2014).

101. *Id.* at 12–13.

102. Monasky v. Taglieri, 140 S. Ct. 719, 727–28 (2020) (citing Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398, 421, para. 43, 423, para. 50 (Can.)).

II.B.2

Pérez-Vera Report

The *Pérez-Vera Report*[103] is the document prepared by the official reporter of the 1980 sessions of the Hague Conference that led to the approval of the Convention.[104] The report is recognized as the official negotiating and drafting history and commentary to the Hague Convention. It is a "source of background on the meaning of the provisions of the Convention."[105] U.S. courts routinely cite to this report for guidance on interpreting the 1980 Convention.[106] In *Abbott v. Abbott*, the Supreme Court noted that "we need not decide whether this Report should be given greater weight than a scholarly commentary."[107]

II.B.3

International Child Abduction Database (INCADAT)

The Permanent Bureau of the Hague Conference on Private International Law has compiled a searchable database of decisions of signatory nations called the International Child Abduction Database, or INCADAT.[108] 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. It has been cited by U.S. courts as a resource.[109]

103. *See* Pérez-Vera Report, *supra* note 18.

104. Elisa Pérez-Vera, Magistrate of the Constitutional Court of Spain, 2001–2012.

105. Text & Legal Analysis, *supra* note 45, at 10,503–06.

106. *See, e.g.*, *Monasky*, 140 S. Ct. at 726; Chafin v. Chafin, 568 U.S. 165, 182 (2013); Abbott v. Abbott, 560 U.S. 1, 19 (2010); Barzilay v. Barzilay (*Barzilay III*), 600 F.3d 912, 916–17 (8th Cir. 2010); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009).

107. *Abbott*, 560 U.S. at 19. *See also Monasky*, 140 S. Ct. at 727. Professor Pérez-Vera recognized that 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." Pérez-Vera Report, *supra* note 18, at 427–28, ¶ 8. Despite this self-effacing comment, the report is cited as authority in over 200 cases emanating from federal courts.

108. https://www.incadat.com/en.

109. *See, e.g.*, Blackledge v. Blackledge, 866 F.3d 169, 185 (3d Cir. 2017); Pliego v. Hayes, 843 F.3d 226, 234 (6th Cir. 2016); Rodriguez v. Yanez, 817 F.3d 466, 478 (5th Cir. 2016); Valenzuela v. Michel, 736 F.3d 1173, 1179 (9th Cir. 2013).

II.C

Requirement That Convention Is "in Force"

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;[110] and (2) the wrongful removal or retention of the child must have occurred after the date the treaty entered into force between both countries.[111]

II.C.1

Member States

The issue of whether the Convention is "in force" between states can be complex, depending in some cases on whether the countries 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.[112] With Japan's ratification in 2014,[113] the Convention is now in force between all member states. Under Article 37, nations that were "Members of the Hague Conference on Private International Law at the time of its Fourteenth Session" could sign the Convention and then have the subsequent ratification of the signature deposited with the Ministry of Foreign Affairs in the Netherlands.[114] "The United States signed the Convention in 1981 and ratified it in 1988, thereby becoming a Contracting State, and the Convention entered into force in the United States on July 1, 1988."[115]

110. *Souratgar I*, 720 F.3d 96 (2d Cir. 2013).

111. Convention, art. 35. In *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007), the father brought suit against his former spouse to compel the return of the parties' two children to the 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 appeals 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.

112. Convention, art. 37.

113. Japan signed the 1980 Convention on January 24, 2014, and the treaty entered into force between all other member states with its ratification on April 1, 2014. *See* Hague Conf. on Private Int'l L., Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

114. Convention, art. 37.

115. Safdar v. Aziz, 933 N.W.2d 708, 714 (Mich. Ct. App.), *appeal denied*, 932 N.W.2d 784 (Mich. 2019) (citing Marks *ex rel.* SM v. Hochhauser, 876 F.3d 416, 420 (2d Cir. 2017)).

II.C.2

Party States

Party states are countries that did not belong to the Hague Conference on Private International Law at the time of the Fourteenth Session in 1980. Party states become bound by the Convention through the process of accession.[116] A party state accedes by depositing its instrument of accession with the Ministry of Foreign Affairs for the Kingdom of the Netherlands. The Convention enters into force on the first day of the third calendar month after the accession instrument is deposited.[117]

The legal significance of ratification versus accession is important. As noted above, 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. However, when a member state ratifies the Convention, it does not automatically enter into force between the member state and a party state that previously acceded to the Convention.[118] A member state must accept the party state's accession before the Convention comes into force between the two.

The same principle applies to the accession of one party state in relation to another acceding state. That is, the accession must be specifically accepted by the previously acceding state. For example, in the accession of party state 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's accession. Until such formal acceptance is made, the Convention has not entered into force between these two nations.

The Convention only applies to abductions that take place after the Convention enters into force between the two countries involved.[119] In *Marks ex rel. SM v. Hochhauser*,[120] a father petitioned for the return of his children from the United States to Thailand. The Second Circuit dealt with two significant dates: the date of the children's retention and the date of entry into force between Thailand and the United States. The father contended that the act of retention was a continuing act that ran from the time the mother unequivocally communicated her intention

116. Convention, art. 38.

117. *Id.*

118. *Safdar*, 933 N.W.2d 708 (Pakistan acceded to the Convention on December 22, 2016, but the United States did not yet recognize the accession—hence, the treaty was not in force between the United States and Pakistan at the time of the child's abduction.).

119. "The Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States." Convention, art. 35.

120. 876 F.3d 416 (2d Cir. 2017).

not to return with the children. The father further argued that Thailand acceded to the Convention in 2002, and therefore it was in force between the two countries from that date. The court rejected the father's interpretation and found that retention was a singular act, and that in this case, the retention date preceded U.S. acceptance of Thailand's accession.[121] Therefore, when the children were taken from Thailand, the treaty was not in force between the United States and Thailand.

Marks specifically declined to follow a contrary holding in *Viteri v. Pfluck-er*,[122] where the Illinois district court held that "Article 35 requires only that the wrongful removal or retention at issue occur after the Convention enters into force individually in the acceding State and in the State to which the child was removed to or is retained." The Second Circuit noted that *Viteri*'s conclusion was inconsistent with the plain wording of the Convention,[123] and that the *Viteri* court lacked the benefit of the State Department's interpretation of Article 35.

Similarly, in *Alikovna v. Viktorovich*,[124] the petitioner claimed that the Convention was in force between the Russian Federation and the United States at the time of the alleged abduction because both states were parties to the Convention. The Russian Federation acceded to the Convention in 2011, but the United States has yet to accept the Russian Federation's accession.[125] For this reason, the court had no jurisdiction to entertain a petition for return of the child because there was an absence of subject-matter jurisdiction.[126]

Practical reasons support *Marks*'s interpretation of Article 35. The successful operation of the Convention depends largely on the ability of Central Authorities to discharge their administrative obligations,[127] including locating children, exchanging background information concerning a child, providing legal assistance to applicants, ensuring measures that pertain to the safe and expeditious return of children, and other duties. To the extent that a country acceding to the Convention fails to designate a Central Authority—or the designated Central Authority lacks the capacity to perform its required tasks, including communicating effectively with counterparts in other nations—the operation of the Convention

121. *Id.* at 423.
122. 550 F. Supp. 2d 829 (N.D. Ill. 2008).
123. *Marks*, 876 F.3d at 424.
124. No. 19-cv-23408-BLOOM/Louis, 2019 WL 4038521 (S.D. Fla. Aug. 27, 2019).†
125. As of this writing, April 2021.
126. *Alikovna*, 2019 WL 4038521, at *2.
127. *See supra* section II.A.5.

is rendered null.[128] Hence, it is necessary for the United States to ensure that a foreign Central Authority is capable of discharging its responsibilities before accepting that country's accession.

II.C.3

Special Administrative Regions

The Convention is in force in two special administrative regions in China: Hong Kong and Macao. Special administrative regions are territories that belong to a sovereign country, but that maintain separate political and sometimes economic systems. They are treated as member states and can accept accessions by other countries.[129]

While Hong Kong and Macao are parties to the Convention, the People's Republic of China is not. Authority over Macao was transferred from Portugal to China in 1999. The date the Convention entered into force with Hong Kong was September 1, 1997, through an extension by the United Kingdom of Great Britain and Northern Ireland.[130]

Hong Kong became a party to the 1980 Convention as a special administrative region, enjoying a "high degree of autonomy."[131] By virtue of the 1984 treaty between the United Kingdom and China, Hong Kong was restored to the authority of China effective July 1, 1997.[132] In 2020, the People's Republic of China enacted national security legislation applicable to Hong Kong.

In *Wan v. Debolt*,[133] two children were removed from their home in Hong Kong to the United States. The children were retained in Illinois by their mother, who refused to return them to their Hong Kong home. The mother moved to dismiss the father's petition for return of the children, alleging that the 2020 Presidential Executive Order 13936 effectively removed Hong Kong from the operation of the Convention. The district court denied the motion to dismiss on the grounds that

128. Years ago, one foreign judicial counterpart of the author commented candidly on the lack of an effective Central Authority in his country: "Our Central Authority is a post-office box."

129. *See* Hague Conf. on Private Int'l L., China's Acceptance of Accessions, https://www.hcch.net/en/instruments/conventions/status-table/acceptances/?mid=493.

130. Declaration from Ambassador of the United Kingdom to the Ministry of Foreign Affairs of the Netherlands, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=918&disp=type.

131. Declaration from Ambassador of the People's Republic of China to the Ministry of Foreign Affairs of the Netherlands, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=918&disp=resdn.

132. *Id.*

133. No. 20-cv-3233, 2020 WL 6274992 (C.D. Ill. Oct. 26, 2020).†

although the executive order provided that Hong Kong was no longer sufficiently autonomous to be entitled to differential treatment as to some international laws and agreements, the 1980 Convention was not mentioned in the executive order, and as such, the Convention remains enforceable between the United States and Hong Kong.

III

The Case in Chief for the Return of a Child

III.A

Summary

The Convention provides two methods for requesting the return of a child: (1) administrative requests[134] and (2) court proceedings. An administrative request 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 receiving the request will usually attempt to negotiate a return of the child directly with the parents involved.[135] 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 a timely application to a court where the child is located and secure a court order for the child's return.[136]

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 in court, delays may occur that could

134. The Convention provides in part that a Central Authority shall "take all appropriate measures . . . to secure the voluntary return of the child or to bring about an amicable resolution of the issues. . . ." Convention, art. 7(c).

135. An example of this process is set forth in Hirst v. Tiberghien, 947 F. Supp. 2d 578, 585 (D.S.C. 2013).

136. 22 U.S.C. § 9003(b); Monzon v. De La Roca, 910 F.3d 92, 99 (3d Cir. 2018).

have been prevented by a petitioner's earlier notice, should resources of the Central Authority be needed later.[137]

III.B

The Cause of Action for Return

III.B.1

Children Must Be Within the United States

Hague Convention cases filed in the United States are limited to requests for children located in the country. Children located in a foreign country are not subject to the jurisdiction of U.S. courts. Under the provisions of the International Child Abduction Remedies Act (ICARA), a Hague petition for the return of a child must be filed in a U.S. court that has jurisdiction over the child. In *Stone v. U.S. Embassy Tokyo*,[138] the father filed his petition for return of a child that had been taken from the United States by the mother, requesting that the U.S. court order the return of the child from Japan. The court denied the father's request, finding that the child was outside the jurisdiction of the court.[139] Similarly, in *Rizvi v. Department of Social Services*,[140] a child was removed from a father's care in Massachusetts by an order of the juvenile court; the mother removed the child to Switzerland. The Third Circuit refused the use of the Convention as a vehicle for securing the child's return to the United States, citing *Monzon v. De La Roca*[141] and §9003(b).

In the United States, a petition for the return of a child may be filed in either state or federal court.[142]

137. 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 provides other services, such as assistance in locating counsel for petitioners; 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. *See supra* section II.A.5.

138. No. 19-3273 (RC), 2020 WL 4260711 (D.D.C. July 24, 2020).†

139. *Id*. at *3.

140. 828 F. App'x 818 (3d Cir. 2020).†

141. 910 F.3d at 99.

142. 22 U.S.C. § 9003(a).

III.B.2

Elements, Generally

The five elements of a prima facie cause of action for return are as follows:

1. The child was wrongfully removed or retained.
2. The child was removed or retained from his or her habitual residence.
3. There was a breach of the left-behind parent's custody rights under the law of the child's habitual residence.
4. The left-behind parent was exercising those custody rights.
5. The child is under the age of sixteen.

These elements must be proved by a preponderance of the evidence.[143]

When a Hague petition is filed, a state court entertaining the merits of a custody case must stay any pending custody matters pursuant to Article 16[144] of the Convention.

No particular form of action is required to begin a case for return.[145] It is advised, however, that an action filed in court at least contain the information for applications through the Central Authority that is required by Article 8, including

- the identity of the applicant, the child, and the person alleged to have removed or retained the child
- the child's date of birth
- the basis of applicant's claim for return of the child
- all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be

143. 22 U.S.C. § 9003(e)(1).

144. "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." Convention, art. 16.

145. Text & Legal Analysis, *supra* note 45, at 10,508.

Both the U.S. Department of State[146] and the Hague Conference[147] websites provide downloadable application forms for the return of a child or children.

Because custody matters are not within the jurisdiction of federal courts,[148] 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).[149] A petition for return is sometimes accompanied by a request for a warrant in lieu of habeas corpus.[150] In state courts, however, return petitions are raised in a wide range of legal proceedings.[151] In one case,[152] a father requested an ex parte order for custody of a child. Recognizing that the facts of the case implicated the Hague Convention, the judge transferred the case sua sponte to the court's designated Hague judge and scheduled a Hague status conference. While the matter was awaiting an evidentiary hearing in state court, the mother filed an application for return of the child in federal district court. The district court found that the mother had waived her right to object to the state-court proceeding and concluded that abstention was not required, since

146. U.S. Dep't of State, Application Under the Hague Convention for return of or access to a child, https://travel.state.gov/content/dam/childabduction/forms/Hague%20Applicaiton%20English%20ds3013.pdf.

147. Hague Conf. on Private Int'l L., Request for Return, https://assets.hcch.net/upload/recomm28e.pdf.

148. Before ICARA conferred jurisdiction on both state and federal courts to hear cases under the 1980 Convention, federal courts were reluctant to enter the "thicket of domestic relations." Walker v. Walker, 509 F. Supp. 853, 854 (E.D. Va. 1981).

149. 22 U.S.C. § 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.

150. 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.*, Lozano v. Alvarez (*Lozano I*), 697 F.3d 41, 47 (2d Cir. 2012); Ohlander v. Larson, 114 F.3d 1531, 1535 (10th Cir. 1997); Torres Garcia v. Guzman Galicia, No. 2:19-cv-00799-JAD-BNW, 2019 WL 4197611 (D. Nev. Aug. 15, 2019);† *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); Leslie v. Noble, 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).

151. *See, e.g.*, People *ex rel.* Ron v. Levi, 719 N.Y.S.2d 365, 367 (N.Y. App. Div. 2001) (habeas corpus); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 845 (Ky. Ct. App. 1999) (motion for return of child); Harsacky v. Harsacky, 930 S.W.2d 410 (Ky. Ct. App. 1996) (raising return of child issue in child-custody action); Brennan v. Cibault, 643 N.Y.S.2d 780 (N.Y. App. Div. 1996) (addressing return of child issue during action to modify custody and access); Geiser v. Valentine, 851 N.Y.S.2d 65 (N.Y. Sup. Ct. 2007)† (unreported table decision) (raising return of child issue in action for writ of habeas corpus).

152. Barron v. Kendall, No. 20-cv-00648-AJB-KSC, 2020 WL 2521915 (S.D. Cal. May 18, 2020).†

the state court was prepared to give the petitioner a full and fair hearing. The federal court dismissed the mother's petition and declined to vacate the order of the state court.

Petitions for return may be filed in existing custody cases, or they may be filed as independent actions.[153] In *In re J.J.L.-P*,[154] a father filed a petition for return as part of a previously filed custody case. The mother opposed the petition on jurisdictional grounds, arguing that ICARA required that the action be filed independently. The Texas court noted that the language of ICARA as set forth in § 9003(b) was permissive on how petitions for relief are filed, and thus held that the father had the discretion to file his petition for return in an existing custody case or as a separate and distinct lawsuit.[155]

III.B.3

Abductors

Alleged abductors are most often related to the child, but a familial relationship or legal claim to custody of the child is not required for the person to be subject to the jurisdiction of a court hearing a Convention case. The most recent research on the operation of the 1980 Convention was conducted by Lowe and Stephens for the Special Commission held in The Hague in October 2017.[156] Lowe and Stephens gathered data from seventy-six contracting states and estimated in their report that they captured 97% of all applications for both incoming and outgoing cases.[157] Globally, 73% of parents who took children out of the country were mothers and 24% were fathers. The remaining 3% included grandparents, other relatives, and institutions. Of the alleged abductors, 80% were primary caretakers; of those, 20% were sole primary caretakers, and 60% were joint primary caretakers. The ratio of women to men as abductors has remained fairly constant from 1999 through 2015.

Nonrelatives may become parties to Hague Convention cases. In *Jacquety v. Baptista*,[158] the mother's friend Waghiri assisted in planning and executing the

153. 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. 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. Ct. App. 2009).

154. 256 S.W.3d 363 (Tex. App. 2008).

155. *Id*. at 370.

156. Lowe & Stephens, *supra* note 52.

157. *Id.* at 2.

158. No. 19 Civ. 9642 (VM), 2020 WL 5946562 (S.D.N.Y. Oct. 7, 2020).†

children's removal from Casablanca, Morocco, to New York. Waghiri's efforts included assisting in drafting a letter with false allegations of abuse, making transportation plans, obtaining an attorney, and providing housing for the mother and children in New York. The naming of Waghiri as an additional respondent was approved, with the court referencing a provision of ICARA (22 U.S.C.A. § 9002(6)) that defines a respondent broadly as "any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention." The district court found that the father had standing to assert the court's jurisdiction over Waghiri, focusing on the element of *redressability*, a showing that a favorable decision is likely to redress the injury claimed. The court relied on a Fifth Circuit case, *Sanchez v. R.G.L.*[159] In *Sanchez*, the court approved naming the director of a foster care service based upon the director's knowledge of the children's location, and her authority to direct the children's placement in foster care. The *Jacquety* court also noted a Vermont case, *Litowchak v. Litowchak*,[160] where the court approved joinder of the children's maternal grandfather as a respondent, given the grandfather's role in the abduction (purchasing plane tickets for the mother and children to leave Australia, contacts with the petitioner's employer seeking reimbursement of expenses relating to the children, providing housing for the mother and children, and participation in concealing the children's location).

The *Jacquety* court also alluded to the redressability principle: a decision against Waghiri might not completely remedy the harm, but it could potentially lessen the injury. Waghiri had knowledge of the child's whereabouts, could play a role in the child's return, and could be held responsible for the payment of the father's fees and costs.[161]

159. 761 F.3d 495 (5th Cir. 2014).

160. No. 2:15-cv-185, 2015 WL 7428573 (D. Vt. Nov. 20, 2015).†

161. *Accord id.* at *2.

III.C

Burdens of Proof

ICARA sets forth the burdens of proof for both the case in chief and defenses to return.[162] The case in chief (i.e., proof that the child is under sixteen years old, that the child was wrongfully removed from the child's habitual residence, and that removal was in violation of the custody rights of the left-behind parent) requires proof of each element by a preponderance of the evidence.[163]

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.[164] There are two provisions in the Convention that deal with the exercise of custody rights: (1) Article 3(b)[165] requires a showing in the petitioner's case in chief (where only preliminary evidence is needed), and (2) Article 13 refers to nonexercise of custody rights as an affirmative defense.[166]

162. 22 U.S.C. § 9003(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.

163. *See* 22 U.S.C. § 9003(e)(1)(A).

164. *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).

165. Convention, art. 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."

166. *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, *supra* note 18, provides, in paragraph 73: "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 45, 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.").

III.D

Wrongful Removal and Retention

III.D.1

Generally

The Convention establishes a strong presumption favoring return of a wrongfully removed child.[167] A wrongful removal or retention exists where both the following are true:

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 where 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.[168]

In everyday parlance, the term *wrongful* usually implies some sort of *mens rea*, or evil or criminal intent. In the context of the Convention, however, *wrongful* simply indicates that a person has engaged in conduct that is actionable under the terms of the Convention as set forth in subsections (a) and (b) of Article 3 above—that is, actionable in the civil sense.[169]

III.D.2

Wrongful Removal and Wrongful Retention Distinguished

The one-year time period to file an action under Article 12 begins to run from the date of the wrongful conduct, be it retention or removal. If a petition for return is filed within the one-year period, Article 12 mandates that the child "shall" be

167. Whallon v. Lynn, 230 F.3d 450, 460 (1st Cir. 2000); *see also* Turner v. Frowein, 752 A.2d 955, 970 (Conn. 2000); *Danaipour I*, 286 F.3d 1, 14 (2d Cir. 2002).

168. Convention, art. 8.

169. Text & Legal Analysis, *supra* note 45, at 10,505; *See* Thomson v. Thomson, [1994] 3 S.C.R. 551, ¶ 53 (Can.) (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 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.")).

ordered returned "forthwith"[170] and the well-settled defense cannot be raised.[171] "By contrast, if a petition is filed after this one year period and the child is deemed settled in its new environment, the court may decline to order return."[172] It is therefore important to fix the specific date of the retention or removal.

The facts surrounding a wrongful removal are often unequivocal, meaning that there is a fair degree of certainty about the removal date, and therefore the commencement of the one-year period.[173] Typically, wrongful removal involves a parent unilaterally taking children from the habitual residence without the knowledge or permission of the left-behind parent.[174]

In contrast, determining the commencement date of wrongful retention can be complicated. Cases dealing with wrongful retention frequently involve a party leaving the child's habitual residence with the child for an agreed-upon visit or vacation in another country.[175] When the traveling party refuses to return the child according to the previous agreement, this conduct may become a wrongful retention.

170. Defenses to return are exceptions to the "forthwith" return. Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1214 (D.C. Cir. 2019).

171. Malmgren v. Malmgren, 747 F. App'x 945, 946 (4th Cir. 2019) (citing Miller v. Miller, 240 F.3d 392, 398 (4th Cir. 2001)).

172. *Lozano III*, 572 U.S. 1, 6 (2014) (citing Abbott v. Abbott, 560 U.S. 1, 9 (2010)).

173. Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013) (citing an earlier edition of this guide); *See also, e.g.*, Belay v. Getachew, 272 F. Supp. 2d 553 (D. Md. 2003).

174. *See, e.g.*, Yaman v. Yaman, 919 F. Supp. 2d 189, 191 (D.N.H.), *aff'd but criticized*, 730 F.3d 1 (1st Cir. 2013) (plan to abscond with the children from Turkey); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (children removed from Argentina while their father was on vacation; concealed whereabouts of the children); Matas-Vidal v. Libbey-Aguilera, No. 2:13CV422 DAK, 2013 WL 3995300, at *5 (D. Utah Aug. 5, 2013);† Delgado v. Osuna, No. 4:15-CV-00360-CAN, 2015 WL 5095231, at *11 (E.D. Tex. Aug. 28, 2015),† *aff'd*, 837 F.3d 571 (5th Cir. 2016) (parent surreptitiously removed the children from Mexico to the United States); Patrick v. Rivera-Lopez, No. 12-1501(CVR), 2013 WL 708947, at *11 (D.P.R. Feb. 26, 2013);† *In re* J.J.L.-P, 256 S.W.3d 363 (Tex. App. 2008) (abducting parent "secretly" left the countries noted with children); Perez v. Garcia, 198 P.3d 539, 541 (Wash. Ct. App. 2009) (mother secretly took child from Mexico to Shelton, Washington); Lops v. Lops, 140 F.3d 927, 931 (11th Cir. 1998) (obtained passports by fraud; children abducted and concealed by father and grandmother); Headifen v. Harker, No. A-13-CA-340-SS, 2013 WL 2538897, at *6 (W.D. Tex. June 7, 2013),† *aff'd*, 549 F. App'x 300 (5th Cir. 2013) (surreptitious removal of child); Furnes v. Reeves, 362 F.3d 702, 708 (11th Cir. 2004), *abrogated by Lozano III*, 572 U.S. 1 (obtained consent to remove child under false pretenses).

175. *See, e.g.*, Palencia v. Perez, 921 F.3d 1333, 1342–43 (11th Cir. 2019) (Father consented to mother taking child from Guatemala to Mexico to visit relatives, but mother secretly entered the United States with the child. Mother subsequently obtained father's assistance with securing passports, promising to return to Guatemala. Months later, after receiving the passports, mother informed father that she and the child were not returning to Guatemala. Mother applied for asylum in the United States without father's consent. The court rejected mother's claim that retention occurred when she first left Guatemala, planning not to return. The court held that wrongful retention began on the date father learned the true nature of the mother's plans.).

III.D.2.a

Commencement of Retention from Habitual Residence

The burden of proving wrongful retention is on the party seeking the return of the child, but it is not unusual for a court to look to the actions of the party retaining the child to fix the date of retention.[176] Generally, the date of an unlawful retention is either (1) the date when the child remains with the abducting parent despite the clearly communicated[177] desire of the left-behind parent to have the child returned,[178] or (2) when the acts of the abducting parent are so unambiguous that the left-behind parent knows, or should know, that the child will not be returned.[179] In *Barzilay v. Barzilay* (*Barzilay II*),[180] an Israeli family moved to the United States in 2001. A dissolution proceeding was filed in 2004. The parties subsequently entered into a custody agreement that awarded joint legal and physical custody of the children to both parents, and primary custody to the mother with specified visitation rights to the father. The agreement further provided that if either parent moved back to Israel, the other parent was to "forthwith" take steps to move back to Israel so that the family could live in the same country. When the father returned to Israel in September 2005, he requested the return of the mother and the children. The mother refused. A long and complicated litigation ensued in both the United States and Israel. The court found that unlawful retention took place in the spring of 2006, when repatriation of both the mother and the children was clearly at issue, and the father unequivocally communicated to the mother that he wanted her to repatriate to Israel with the children.[181]

176. Darín v. Olivero-Huffman, 746 F.3d 1 (1st Cir. 2014) (citing Zuker v. Andrews, 2 F. Supp. 2d 134, 140 (D. Mass. 1998), *aff'd*, 181 F.3d 81 (1st Cir. 1999)); *see also* Rehder v. Rehder, No. C14-1242RAJ, 2014 WL 6982530, at *8 (W.D. Wash. Dec. 9, 2014)† (continuing discussions between parents regarding the status of their relationship and plans to settle ended with mother's termination of negotiations and position that she would remain in the state of Washington).

177. The form of such communications can be through "words, actions, or some combination thereof." Blackledge v. Blackledge, 866 F.3d 169, 179 (3d Cir. 2017).

178. *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 (Ohio C.P. 1995) (determining that action taken in custody proceedings unequivocally asserted left-behind parent's rights to custody).

179. *See, e.g.*, Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010); *Zuker*, 2 F. Supp. 2d at 140; *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).

180. 609 F. Supp. 2d 867 (E.D. Mo. 2009), *aff'd*, 600 F.3d 912 (8th Cir. 2010).

181. *Id.* at 877–78.

Article 3 of the Convention makes a retention or removal wrongful only if the left-behind parent had custody rights at the time of such retention or removal. In *Redmond v. Redmond*,[182] the mother and father were an unmarried couple living in Ireland. Their child was born in 2007 while the parents were temporarily in the United States. They returned to Ireland when the child was less than two weeks old. At the time, Irish law provided that the biological father of an illegitimate child did not have parental rights. Seven months after the child's birth the couple separated, and the mother moved with the child from Ireland to Illinois. The father filed a guardianship petition in Ireland seeking to obtain custody rights. The mother returned to Ireland periodically to participate in the ongoing hearings. A decision in the Irish trial court against the father's petition was ultimately reversed on appeal, allowing the father to proceed with his custody claim. A final hearing took place in 2011. By this time the child had spent three of his four years in Illinois. The Irish court denied the mother's application to relocate to the United States, awarded shared equal custody to both parents, and ordered that the child return to live in Ireland. The court allowed the mother to travel to the United States to see to her affairs. Despite various promises that she made to the court to return with the child, the mother left for the United States and did not return to Ireland with the child. The Irish trial court issued an order for the mother to return to Ireland with the child, and the order stated that the mother's act of retaining the child in the United States was in violation of the Hague Convention. The mother then filed her own action in Illinois for custody of the child. The father appeared in the Illinois action and moved to dismiss the mother's custody case. The Illinois court deferred to the Irish court in accordance with the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), and declined to entertain the mother's custody claim. The father then filed a petition under the 1980 Convention for return of the child to Ireland, and the district court ordered the child returned to Ireland. The Seventh Circuit reversed.

> The Hague Convention targets international child abduction; it is not a jurisdiction-allocation or full-faith-and-credit treaty. It does not provide a remedy for the recognition and enforcement of foreign custody orders or procedures for vindicating a wronged parent's custody rights more generally. Those rules are provided in the Uniform Child-Custody Jurisdiction and Enforcement Act. Rather than applying to the Cook County Circuit Court for enforcement of the Irish custody order under the Uniform Act, Derek sought to enforce his newly declared custody rights via a Hague petition by treating Mary's refusal to comply with the Irish court's order as a wrongful "retention" of their son in the United States. But the concepts of removal and retention can be understood only by reference to the child's habitual residence; a legal adjustment of a

182. 724 F.3d 729 (7th Cir. 2013).

> parent's custody rights does not by itself give rise to an abduction claim. "The determination of a child's habitual residence is significant because wrongful removal can occur only if the child has been taken away from his or her habitual residence."[183]

The Seventh Circuit also drew from the reasoning of an Eighth Circuit decision in *Barzilay v. Barzilay* (*Barzilay III*)[184] that involved a similar set of facts. In *Barzilay III*, the Eighth Circuit observed,

> Having obtained a favorable judgment [in the Israeli court], [the father] then turned to the federal court seeking enforcement of his newly minted custody rights through [a Hague Convention] petition. This course of litigation not only betrays a fundamental misunderstanding of the Hague Convention, but [is] also precisely the sort of international forum shopping the Convention seeks to prevent.[185]

Wrongful retention must exist in connection with the child's habitual residence. For example, in *Pope ex rel. T.H.L-P v. Lunday*,[186] a father petitioned for his twins to be sent to Brazil, the country where they were conceived. The father acknowledged that the children were never physically present in Brazil and their entire lives were spent in the United States. But the father stated that he and the children's mother had previously shared an intent that the children would be raised in Brazil after their birth; he argued that the twins became habitually resident in Brazil at the time of their birth and thus were wrongfully retained in the United States. The court declined the father's interpretation of wrongful retention, noting, "[T]hat position cannot be squared with the text of the Convention, which explains that a child cannot be wrongfully 'retained' away from a place unless they were first a habitual resident of that place."[187] On appeal, the Tenth Circuit affirmed.[188] The court reiterated the principle that where the habitual residence question is at issue, the court need not determine *where* the child is habitually resident, but only *whether* the child is a habitual resident of the place that the petitioner claims.[189]

183. *Id.* at 741–42 (citing an earlier edition of this guide).

184. 600 F.3d 912, 921–22 (8th Cir. 2010); *accord* Martinez v. Cahue, 826 F.3d 983, 991–92 (7th Cir. 2016).

185. *Barzilay III*, 600 F.3d 912, 922 (8th Cir. 2010).

186. No. CIV-19-01122-PRW, 2019 WL 7116115, at *3 (W.D. Okla. Dec. 23, 2019).†

187. *Id*.

188. Pope *ex rel.* T.H.L-P v. Lunday, 835 F. App'x 968 (10th Cir. 2020).†

189. Citing its decision in Watts v. Watts, 935 F.3d 1138, 1147–48 (10th Cir. 2019): "The Convention does not require a district court to determine *where* a child habitually resides. Instead, the Convention requires a district court to determine *whether* the child habitually resides in the location that the petitioner claims. If the child habitually resides there, the Convention demands that the court determine whether the child's removal from that location was wrongful."

The Tenth Circuit noted that the district court's decision was made before *Monasky v. Taglieri*,[190] but held that it was consistent with the totality-of-circumstances test announced in *Monasky*. The district court considered a wide range of circumstances and facts surrounding the birth of the children, the mother's relocation to the United States, the lack of an actual controlling parental agreement, and the lack of the children's physical presence in Brazil. The appellate court noted language in *Monasky* addressing the conundrum whether newborns can have a habitual residence, which states that "if parents' actual agreement on where to raise their child were necessary to establish a habitual residence, that 'would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.'"[191]

III.D.2.b

Wrongful Retention Must Be Determined as a Fixed Date

If a child is removed by mutual agreement from that child's habitual residence for a fixed period, then keeping the child beyond that date establishes the date of unlawful retention. The *Pérez-Vera Report* notes that retention occurs as of the date "the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension . . . ."[192] If an extension of the time is agreed to, then the unlawful retention date begins at the end of the period of extension.[193] In cases where consent to removal of the child is granted but the terms of the child's return are vague or unspecified, courts will look to the point

190. 140 S. Ct. 719 (2020).

191. *Pope*, 835 F. App'x at 970–71 (10th Cir. 2020) (citing *Monasky*, 140 S. Ct. at 728 (internal quotation marks omitted)).

192. Pérez-Vera Report, *supra* note 18, at 458–59, ¶ 108. *See also* Sundberg v. Bailey, 293 F. Supp. 3d 548, 558 (W.D.N.C. 2017), *aff'd*, 765 F. App'x 910 (4th Cir. 2019) (wrongful retention occurred on the date the parties agreed upon the child's return); Mendoza v. Silva, 987 F. Supp. 2d 883, 904 (N.D. Iowa 2013).

193. Taveras v. Morales, 22 F. Supp. 3d 219, 231–33 (S.D.N.Y. 2014), *aff'd sub nom.* Taveras *ex rel.* L.A.H. v. Morales, 604 F. App'x 55 (2d Cir. 2015) ("archetypical" case involving refusal to return child at end of authorized visitation period); Paulus *ex rel.* P.F.V. v. Cordero, No. 3:12-cv-986, 2012 WL 2524772, at *3 (M.D. Pa. June 29, 2012).†

in time that the left-behind parent objects to the further retention of the child and unequivocally expresses an intent to reassert custody rights.[194]

A wrongful retention is a singular event, not an ongoing status. In *Marks ex rel. SM v. Hochhauser*,[195] the father petitioned for the return of his children from the United States to Thailand. The mother and children went to the United States for a three-week visit with relatives. Three days before their scheduled return, on October 7, 2015, the mother emailed the father, informing him that she was not returning with the children to Thailand. The father's petition for return was filed in September 2016. The 1980 Convention entered into force between the United States and Thailand on April 1, 2016. The mother's wrongful removal of the children on October 7, 2015, took place before the Convention entered into force between the two nations. The father argued that the mother's retention of the children was ongoing, and as such, the wrongful conduct was still occurring when the Convention entered into force between the two countries. The Second Circuit disagreed. It analyzed the text of the Convention, sister-state decisions, the opinion of the Department of State, and the *Pérez-Vera Report*, and concluded that an unlawful retention occurs on a fixed date and is not a continuing event.[196]

Similarly, the date of wrongful retention does not "relate back." To determine the date of wrongful retention, courts look to the "last date upon which it is undisputed that the child was present in the new country" with the permission of both parents.[197] That is the date that courts use to determine when the left-behind parent was on notice that the "abducting parent was not going to return the child."[198]

194. Babcock v. Babcock, 503 F. Supp. 3d 862 (S.D. Iowa 2020) (clear and unequivocal withdrawal of consent to child's stay was triggered by parent contacting law enforcement seeking child's return); Cunningham v. Cunningham, 237 F. Supp. 3d 1246, 1280 (M.D. Fla.), *aff'd*, 697 F. App'x 635 (11th Cir. 2017) (text message sent demanding child stay with father); Miller v. Miller, No. 1:18-CV-86, 2018 WL 4008779 (E.D. Tenn. Aug. 22, 2018);† Riley v. Gooch, No. 09-1019-PA, 2010 WL 373993, at *9 (D. Or. Jan. 29, 2010)† (service of petition for dissolution of marriage); Griffiths v. Weeks, No. 18-cv-60729-BLOOM/Valle, 2018 WL 7824477, at *5 (S.D. Fla. June 22, 2018)† (demand for child's return made and refused).

195. 876 F.3d 416 (2d Cir. 2017).

196. *Id.* at 420–22; *see also* Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. Int'l L. 137, 162 (1994).

197. McKie v. Jude, No. 10-103-DLB, 2011 WL 53058, at *5–6 (E.D. Ky. Jan. 7, 2011)† (citing Karkkainen v. Kovalchuk, 445 F.3d 280, 290 (3d Cir. 2006)) (Christmas visit turned into extended time to obtain medical treatment. Court rejected petitioner's argument that the wrongful removal date should "relate back" to the child's initial removal that was made with consent, thus incorporating the child's previous experiences into the question of his habitual residence.).

198. *McKie*, 2011 WL 53058, at *6 (citing Blanc v. Morgan, 721 F. Supp. 2d 749, 762 (W.D. Tenn. 2010)).

III.D.2.c

Efforts to Change Status Quo

While the facts surrounding a parent's retention of a child may be somewhat ambiguous, courts have consistently found that the date of wrongful retention will be fixed as of the date the abducting parent files an action to modify an existing custody arrangement[199] or the other parent commences an actual petition for the return of a child. In *Abou-Haidar v. Sanin Vazquez*,[200] the parents of a five-year-old daughter moved from France to Washington, D.C., so that the father could work as a banking consultant. The couple planned for the family to remain in the United States for eighteen months. After six months, the mother filed an action in District of Columbia courts for primary physical custody of their child. The father ultimately responded with a petition for return of the child to France. The district court found that an unlawful retention occurred when the mother served the father with her action for custody; the D.C. Circuit affirmed.[201]

III.D.2.d

Future Triggering Events

Agreements between parents that allow a child to remain in a location apart from their habitual residence are sometimes fixed with reference to a future occurrence. In *Stern v. Stern*,[202] the father consented to the mother remaining in the United States with the child "for as long as she is enrolled in her PhD studies at Iowa State . . . ."[203] The court therefore fixed the date of unlawful retention as the date the mother competed her doctoral studies.[204]

199. For example, in Mozes v. Mozes, the children's Israeli parents agreed to allow mother and the children to spend fifteen months in Los Angeles, with no understanding as to what would occur beyond that date. The Fifth Circuit found that the mother's action to establish custody of the children in California amounted to the date of wrongful retention. Mozes v. Mozes, 239 F.3d 1067, 1085 (9th Cir. 2001), *abrogated on other grounds by* Monasky v. Taglieri, 140 S. Ct. 719 (2020).

200. 419 F. Supp. 3d 1, 10–11 (D.D.C.), *aff'd*, 945 F.3d 1208 (D.C. Cir. 2019).

201. *Accord Karkkainen*, 445 F.3d 280 (mother filed petition for child's return after ongoing disagreement regarding child's continued presence in the United States; held: mother's action "unequivocally signaled her opposition to [the child's] presence in the United States.").

202. No. 4:08-CV-496, 2010 WL 11531399 (S.D. Iowa June 8, 2010), *aff'd*, 639 F.3d 449 (8th Cir. 2011).

203. *Id.* at *4.

204. *Id.*

III.D.2.e

Anticipatory Breach

One issue that arises in this context is whether an anticipatory breach of an agreement to return a child constitutes a wrongful retention. In *Toren v. Toren*,[205] 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, the mother filed an action in Massachusetts seeking to modify the Israeli decree and requested sole custody of the children. In 1998, the father filed a petition for return of the children under the Hague Convention, asserting that the mother's actions were in breach of their custody agreement and constituted an unlawful retention of the children. The First Circuit rejected the 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 retention. . . . Therefore, we do not see how a petitioner like the father, alleging only an anticipatory retention, can invoke the protections of the Hague Convention.[206]

Following *Toren*'s holding, the district court in *Falk v. Sinclair*[207] found that an unlawful retention did not begin until the date that an American father was to return the child to her mother in Germany. The question in *Falk* was whether the mother had filed her petition for return of the child within one year of the date of the unlawful retention. The father maintained that the 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. The mother alleged that the unlawful retention began on the date that the child was to be returned, approximately forty days after the father gave "clear notice" that he was not returning her. Citing *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 the father failed to return the child on the parties' agreed-on date.[208]

205. 191 F.3d 23 (1st Cir. 1999).

206. *Id*. at 28.

207. 692 F. Supp. 2d 147 (D. Me. 2010); *accord* Philippopoulos v. Philippopoulou, 461 F. Supp. 2d 1321, 1325 (N.D. Ga. 2006).

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

III.D.2.f

Retention by Ne Exeat Order

A ne exeat order is one that typically restrains one 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. In *Pielage v. McConnell*,[209] the 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, the mother was given temporary physical custody of the child, but the state court also entered a ne exeat order that forbade the mother from removing the child from Alabama's jurisdiction pending a full custody decision on the merits. Wishing to return to the Netherlands with the child, but unable to do so because she was restrained from removing the child from Alabama, the mother filed a Hague Convention petition for return in federal court, 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 the 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."[210]

III.E

Custody Rights

III.E.1

What Are Custody Rights?

The Convention does not give a static definition to the term *custody rights*, nor does it establish an international definition of custody rights. It does, however provide guidance that custody rights 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."[211] Custody rights are to be determined by the law of the child's habitual residence immediately before the child's removal or retention.[212] The interpretation

209. 516 F.3d 1282 (11th Cir. 2008).

210. *Id.* at 1289 (emphasis added).

211. Convention, art. 5.

212. *Id.*, art. 3(a).

of these rights is envisioned to be broad,[213] including rights that might exist under the law of the habitual residence and might differ from state to state.[214] The law of a child's habitual residence may include a bundle of rights within the meaning of custody rights. One court has indicated that the violation of a *single* right is sufficient to make a removal wrongful.[215] To be wrongful, the removal or retention of the child must be in violation of the left-behind parent's custody rights.[216]

The Convention distinguishes custody rights from access rights.[217] A person with only access rights may not maintain an action for return of a child.[218] In *White v. White*,[219] the Fourth Circuit found that a Swiss court order awarding custody of the child to the mother, and reserving the father only the right to visit the child, did not support a cause of action for return of the child, even though the father may have had some residual rights of parental authority (for care, education, religion, and legal representation) under Swiss law. The court relied on Swiss law for the custody-rights determination. Even though the father's residual rights might have supported a different interpretation under the law of other signatory nations—the court observed that the Swiss Supreme Court had "made it clear" that a parent with exclusive custody is entitled to relocate with the children, even internationally, without the authorization of the court or the other parent.[220]

213. As they relate to custody rights, "the law of the child's habitual residence is invoked in the widest possible sense." Pérez-Vera Report, *supra* note 18, at 446, ¶ 67. *See also* Palencia v. Perez, 921 F.3d 1333, 1339 (11th Cir.), *cert. denied sub nom.* Velasquez Perez v. Palencia, 140 S. Ct. 533 (2019) (The "intention of the Convention is to protect *all* the ways in which custody of children can be exercised, and the Convention favors a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." (citing Hanley v. Roy, 485 F.3d 641, 645 (11th Cir. 2007); emphasis in original)).

214. Ozaltin v. Ozaltin, 708 F.3d 355, 367–68 (2d Cir. 2013) ("[T]he Convention's broad definition of rights of custody is not constrained to traditional notions of physical custody" (citing Abbott v. Abbott, 560 U.S. 1, 12 (2010) (internal quotation marks omitted))); *Palencia*, 921 F.3d at 1339.

215. *Hanley*, 485 F.3d at 647 (emphasis in original). *See also* Furnes v. Reeves, 362 F.3d 702, 717 (11th Cir. 2004), *abrogated on other grounds by Lozano III*, 572 U.S. 1 (2014) (one parent with primary physical custody under Norwegian law does not preclude the other parent from maintaining enforceable rights of custody).

216. Convention, art. 3.

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

218. *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 (Mass. 1993)); Radu v. Toader, 463 F. App'x 29 (2d Cir. 2012) (Romanian divorce decree granted mother sole custody of child).

219. 718 F.3d 300, 304–05 (4th Cir. 2013).

220. *Id.* at 305, citing Tribunal fédéral [TF] [Federal Supreme Court] June 1, 2010, 136 ATF III 353 ¶ 3.3 (Switz.).

III.E.2

Holders of Custody Rights

Article 3(a) of the Convention provides that custody rights may be attributed to "a person, an institution[221] 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 . . . ."[222] 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.[223]

The vast majority of Hague Convention cases involve parents or relatives claiming custody rights, but administrative agencies or other bodies also may claim custody rights.[224] As noted in Article 3(a), the Convention also applies to custody rights belonging to institutions or other bodies.[225] In *Sanchez v. R.G.L.*[226] the Fifth Circuit ordered the joinder of the U.S. government (or appropriate agency thereof) in a Convention case. In *Sanchez*, three children habitually resident in Mexico were taken by their aunt to the U.S.–Mexico border at El Paso so that they could cross back into Mexico where their mother lived. The children balked at returning, and turned themselves into officials from the Department of Homeland Security at the border, refusing to return to Mexico for fear of their personal safety. Over the course of their stay in the United States, the children were placed in the custody of the Office of Refugee Resettlement (ORR) as temporary legal custodian. ORR later placed the children with Baptist Services, and while pending appeal, with Catholic Charities. The Fifth Circuit ruled that under

221. E. Sussex Child. Servs. v. Morris, 919 F. Supp. 2d 721 (N.D. W. Va. 2013) (English social services agency with jurisdiction over the child); Felder v. Wetzel, 696 F.3d 92, 96 (1st Cir. 2012) (Swiss Guardianship Authority, Boston Children's Hospital).

222. As the Supreme Court noted in *Abbott*, custody rights must be determined "by following the Convention's text and structure." Abbott v. Abbott, 560 U.S. 1, 10 (2010).

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

224. *See, e.g.*, *E. Sussex Child. Servs.*, 919 F. Supp. 2d at 734; *Felder*, 696 F.3d at 96; *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 Off. of Wiesbaden, 568 N.Y.S.2d 852 (N.Y. 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 (9th Cir. 1996) (unreported table decision) (alleging wrongful removal of child by child welfare agency); *cf. In re* Marriage of Witherspoon, 66 Cal. Rptr. 3d 586, 592 (Cal. Ct. App. 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).

225. Convention, art. 3(a).

226. 761 F.3d 495 (5th Cir. 2014).

Federal Rule of Civil Procedure Rule 19(a)(1)(B)(ii),[227] the government or the appropriate subdivision or agent should be joined as necessary parties.

Courts have also considered cases involving custody rights belonging to a godparent (later granted guardianship rights),[228] and a testimonial guardianship established under Irish law.[229]

III.E.3

Establishing Custody Rights

Petitioners may establish custody rights under the Convention by (1) operation of law, (2) judicial or administrative decision, or (3) agreement of the parties having legal effect under the laws of the habitual residence.[230] When analyzing the question whether a parent has custody rights under the law of the habitual residence, courts are frequently requested to interpret foreign-law questions. Proof of foreign law may be established under Rule 44.1 of the Federal Rules of Civil Procedure.[231] 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.[232]

227. Joinder required if "(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

228. Felder v. Wetzel, 696 F.3d 92, 93–94 (1st Cir. 2012).

229. Hanley v. Roy, 485 F.3d 641, 645–46 (11th Cir. 2007) (citing R.C. v. I.S. [2004] 2 I.L.R.M. 285, 294 (H. Ct.) (Ir.) (guardians under Irish law may not have custody of a child, but guardian is a person with custody rights under the Convention)).

230. Convention, art. 3.

231. 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.

232. *See* Pérez-Vera Report, *supra* note 18, at 456, ¶ 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).

III.E.3.a

Custody Rights by Operation of Law

Custody rights are subject to the local law of the signatory nations and, as such, will vary from country to country.[233] The marital status of parents may also arise as a question for courts called upon to determine whether only one parent or both have rights of custody.[234]

III.E.3.a.i

Custody Rights Generally

The burden of establishing custody rights in the prima facie case rests with the petitioner seeking return of the child.[235] A court must determine the contested issue of the existence of custody rights as a prerequisite for establishing wrongful removal.[236] Where the parents involved are married, the law of the habitual residence typically vests custody rights in both parents.[237] For example, in *Kufner v. Kufner*,[238] the court determined that when a child is born to married parents, "they have joint custody over the child until the operation of law (e.g., death of

233. Takeshi Ogawa v. Kyong Kang, 946 F.3d 1176, 1179 (10th Cir. 2020).

234. *See, e.g.*, Palencia v. Perez, 921 F.3d 1333, 1339 (11th Cir.), *cert. denied sub nom*. Velasquez Perez v. Palencia, 140 S. Ct. 533 (2019) ("When the father and the mother are neither married nor in a common-law marriage, the children shall be in the mother's custody unless she agrees to transfer them to the father's custody, or unless they are enrolled in a boarding school."); Garcia v. Pinelo, 808 F.3d 1158, 1166 (7th Cir. 2015) (unmarried, noncohabiting parents); Torres Garcia v. Guzman Galicia, No. 2:19-cv-00799-JAD-BNW, 2019 WL 4197611, at *5 (D. Nev. Aug. 15, 2019)† (custody rights existed); Mohácsi v. Rippa, 346 F. Supp. 3d 295, 310 (E.D.N.Y. 2018) (unmarried father has no custodial rights before paternity is established).

235. *In re* Adan, 437 F.3d 381, 394 (3d Cir. 2006) (case remanded to district court to determine law of Argentina, terms of parties' custody agreement, whether agreement was enforceable, and whether it was enforceable under Argentinian law).

236. *Id.*

237. Foster v. Foster, 429 F. Supp. 3d 589, 613 (W.D. Wis. 2019) (Guatemala); Cunningham v. Cunningham, 237 F. Supp. 3d 1246, 1272 (M.D. Fla.), *aff'd*, 697 F. App'x 635 (11th Cir. 2017) (Japan); *In re* A.L.C., 16 F. Supp. 3d 1075, 1089 (C.D. Cal. 2014) (under Swedish family law, married parents have joint custody of children absent some decree to the contrary), *vacated in part*, 783 F.3d 763 (9th Cir. 2015), *aff'd in part, vacated in part*, 607 F. App'x 658 (9th Cir. 2015); Culculoglu v. Culculoglu, No. 2:13-cv-00446-GMN-CWH, 2013 WL 1413231, at *4 (D. Nev. Apr. 4, 2013)† (under Canadian law, parents are joint guardians even if they are not married so long as they live together); Krefter v. Wills, 623 F. Supp. 2d 125 (D. Mass. 2009) (parents married at birth of child have joint custody in Germany); *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303, 1311 (S.D. Fla. 2004) (Argentina).

238. 519 F.3d 33 (1st Cir. 2008).

a parent) or a court order terminates joint custody."[239] Although a divorce proceeding was pending when the mother removed the children from Germany, the proceedings were not final, and the First Circuit determined that the father continued to possess enforceable custody rights.

For unmarried parents, however, very few generalizations concerning the custodial status of either parent hold true, and the results depend on the law particular to the nation involved. For example, in *Redmond v. Redmond*, the law of Ireland provided that absent a court-ordered guardianship, only the child's mother was entitled to custody rights over the child.[240] In *Crossan v. Clohessy*,[241] the court found that in order to obtain guardianship of a child in Ireland, an unmarried father must have cohabited with the mother for at least twelve consecutive months, including three that occurred after the child's birth.[242] In *Palencia v. Perez*,[243] the court found that Guatemalan law provided that when the parents are not married or in a common-law marriage, the mother has custody of the children unless she agrees to transfer custody to the father or the children are enrolled in a boarding school.[244] In *Mohácsi v. Rippa*,[245] the court found that under Hungarian law an unmarried father has no legal custodial rights before paternity is established, and no additional rights vest because the couple has become engaged to be married.[246] In *Zaragoza Gutierrez v. Juarez*,[247] the court applied the law of the Mexican state Guanajuato, finding that the unmarried parents of a child possess joint parental responsibility, and if they subsequently separate, custody rights will be determined by a judge.[248]

239. *Id.* at 39.

240. Redmond v. Redmond, 724 F.3d 729, 738 (7th Cir. 2013). *See also* Jacinto Fernandez v. Bailey, No. 1:10CV00084 SNLJ, 2010 WL 2773569, at *3 (E.D. Mo. July 4, 2010)† (Panamanian law provides that in the absence of a court order, an unmarried father has no custody rights).

241. 330 F. Supp. 3d 1098 (W.D. La. 2018).

242. *Id.* at 1102. In an unrelated case, the Supreme Court of Ireland found under Spanish law that the unmarried father had custody rights to a child removed from Spain. P. v. B. (Ir. S. Ct. Dec. 19, 1994).

243. 921 F.3d 1333 (11th Cir. 2019).

244. *Id.* at 1339. *Accord* Ovalle v. Perez, 681 F. App'x 777, 785 (11th Cir. 2017).

245. 346 F. Supp. 3d 295 (E.D.N.Y. 2018).

246. *Id.* at 310.

247. No. CV-17-02158-PHX-GMS, 2017 WL 3215659 (D. Ariz. July 28, 2017).†

248. *Id*. at *3.

III.E.3.a.ii

Custody Rights Established by Patria Potestas

Patria potestas is a comprehensive set of the rights and responsibilities of parents to exercise parental authority over the care of their children.[249] This "bundle"[250] of rights includes parental authority over the physical, mental, moral, and social protection of the child;[251] the discipline and education of the child;[252] asset management; and in some cases, permission to travel.[253] Almost all courts considering the impact of the patria potestas rights have found that they are custody rights within the meaning of the 1980 Convention.[254]

In general, patria potestas rights are retained by both parents.[255] When the parents disagree on how to exercise those rights, they may place the issue before a judge who will decide who shall prevail in the exercise of parental rights.[256] Where the parents are deceased or unavailable, the exercise of patria potestas devolves upon the grandparents, first to the paternal side, and then to the maternal

249. March v. Levine, 136 F. Supp. 2d 831, 842 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001); Garcia v. Varona, 806 F. Supp. 2d 1299, 1311 (N.D. Ga. 2011) (Spain); Luis Ischiu v. Gomez Garcia, 274 F. Supp. 3d 339, 346 (D. Md. 2017); Whallon v. Lynn, 230 F.3d 450, 456–57 (1st Cir. 2000). Patria potestas (sometimes referred to as patria potestad) is a Roman legal concept that is now found principally in civil law countries. Ancient Roman law provided for absolute authority for the father of his child, including the right of life and death. Garcia v. Pinelo, 125 F. Supp. 3d 794, 804 (N.D. Ill.), *aff'd*, 808 F.3d 1158 (7th Cir. 2015).

250. Gonzalez v. Preston, 107 F. Supp. 3d 1226, 1234 (M.D. Ala. 2015).

251. *Whallon*, 230 F.3d at 456–57.

252. *Id.* at 457.

253. *In re* R.V.B., 29 F. Supp. 3d 243, 253 (E.D.N.Y. 2014) (Colombia).

254. De La Riva v. Soto, 183 F. Supp. 3d 1182, 1195 (M.D. Fla. 2016) and cases cited therein. *Cf.* Gonzalez v. Gutierrez, 311 F.3d 942, 954 (9th Cir. 2002) (holding that patria potestas does not amount to rights of custody under the Convention where a Mexican court has ruled on the custody rights of each party), *abrogated by* Abbott v. Abbott, 560 U.S. 1 (2010).

255. *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303, 1311–12 (S.D. Fla. 2004) (Argentina).

256. Antoinette Sedillo López, *U.S./Mexico Cross-Border Issue: Child Abduction—The Need for Cooperation*, 29 N.M. L. Rev. 289, 297 (1999). *See also* Pacheco Mendoza v. Moreno Pascual, No. CV 615-40, 2016 WL 320951, at *5 (S.D. Ga. Jan. 26, 2016)† (Mexico, state of Oaxaca).

side.[257] Differences in the application of patria potestas may occur depending on the internal law of the particular nation or state involved.[258]

Patria potestas rights may arise as a matter of law even if the parents are unmarried and not living together.[259] Typically, even when parents separate or divorce, they continue to have rights of patria potestas.[260] This is because patria potestas and custody are two different concepts. Both parents may have patria potestas rights, while only one parent has actual custody of the child and the other possesses the equivalent of access or visitation rights.[261] Since patria potestas refers to a penumbra of rights,[262] upon the parties' separation or divorce, the term *custody* refers only to the physical custody of a child that has been granted to a parent.[263] The parent with only access rights still maintains patria potestas,

257. Sedillo López, *supra* note 256, at 297.

258. Article 31 recognizes that some signatory nations may have different territorial units with their own systems of law. A child's habitual residence is determined by the application of the law of the territorial unit within the nation. In such a case it is important to determine whether the federal law of the country is different from the law of the relevant political subdivision regarding the particulars of the law to be applied. For example, Mexico is comprised of thirty-one states and one federal district. The law of the particular state within Mexico is therefore the law of the child's habitual residence. *See, e.g.*, Martinez v. Cahue, 826 F.3d 983, 993 (7th Cir. 2016) (Aguascalientes); Garcia v. Pinelo, 808 F.3d 1158, 1164 (7th Cir. 2015) (Nuevo Leon); Whallon v. Lynn, 230 F.3d 450, 453 (1st Cir. 2000) (Baja California Sur); Tavarez v. Jarrett, 252 F. Supp. 3d 629, 638 (S.D. Tex. 2017) (Jalisco); Ambrioso v. Ledesma, 227 F. Supp. 3d 1174, 1187 (D. Nev. 2017) (Quintana Roo); Flores-Aldape v. Kamash, 202 F. Supp. 3d 793, 803 (N.D. Ohio 2016) (Querétaro); Saldivar v. Rodela, 879 F. Supp. 2d 610, 623–24 (W.D. Tex. 2012) (Chihuahua); Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 38932, at *3 (E.D. Mich. Jan. 3, 2020)† (Federal District of Mexico).

259. At least one opinion has noted that for the right to arise when mother and father are not cohabiting, the child must be registered with the appropriate authorities. Ambrioso v. Ledesma, 227 F. Supp. 3d 1174, 1187 (D. Nev. 2017) (Mexico, state of Quintana Roo).

260. Diaz Huete v. Sanchez, No. 18-cv-01485 (AJT/IDD), 2019 WL 4198658, at *5 (E.D. Va. Aug. 16, 2019),† *report and recommendation adopted*, Civil Action No. 1:18-cv-1485 (AJT/IDD), 2019 WL 4195336 (E.D. Va. Sept. 4, 2019)† (Honduras); Luis Ischiu v. Gomez Garcia, 274 F. Supp. 3d 346 (D. Md. 2017) (Guatemala); *Jimenéz Blancarte*, 2020 WL 38932, at *3.†

261. Altamiranda Vale v. Avila, 538 F.3d 581, 587 (7th Cir. 2008) (Venezuela; divorce decree gave mother physical custody of the children subject to father's right of patria potestas); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1123–24 (D. Colo. 2008) (Mexico); Vale v. Avila, No. 06-1246, 2008 WL 11363822, at *1 (C.D. Ill. May 6, 2008)† (Venezuela); *cf.* Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007) (Mexico), *distinguished in* Garcia v. Pinelo, 125 F. Supp. 3d 794, 805, 807–09 (N.D. Ill.), *aff'd*, 808 F.3d 1158 (7th Cir. 2015).

262. One case refers to patria potestas as "a divisible custody right." Lalo v. Malca, 318 F. Supp. 2d 1152, 1156 (S.D. Fla. 2004) (Panama).

263. Dulce Esperanza Mendez Gonzalez v. Batres, No. 14-00799 WJ/CG, 2015 WL 12831299, at *7 (D.N.M. Jan. 12, 2015)† (Mexico, state of Durango); Sedillo López, *supra* note 256, at 297–98.

a meaningful decision-making role that amounts to more than mere visitation rights.[264]

Other than the death of the parent or the child's marriage, emancipation, or reaching majority, rights of patria potestas are usually only terminable by a judicial decree.[265] For example, under the civil code of the Mexican state of Nuevo Leon, patria potestas rights may be terminated for events such as a parent's conviction of two or more serious crimes that endanger the child or the child's assets, conviction of an intentional offense against the child, mistreatment or abandonment of the child in a way that puts the child at risk, failure to visit the child in a public welfare institution, abandonment of the child for greater than 180 days, or leaving the child alone for more than 30 days without any information about the "child's origin."[266] A further provision of the civil code of Nuevo Leon provides that patria potestas is not waivable.[267]

III.E.3.b

Custody Rights Awarded by Judicial or Administrative Decision

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.[268] Examination of a custody order may support the grant of enforceable rights of custody or demonstrate a lack of the same.[269] A custody order may preserve a parent's parental authority over the child, but at the same time award the other parent the right to relocate with a child and determine the

264. Whallon v. Lynn, 230 F.3d 450, 458 (1st Cir. 2000); Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 38932, at *3 (E.D. Mich. Jan. 3, 2020)† (Federal District of Mexico).

265. Ambrioso v. Ledesma, 227 F. Supp. 3d 1174, 1187 (D. Nev. 2017) (Mexico, state of Quintana Roo); Garcia v. Pinelo, 808 F.3d 1158, 1166–67 (7th Cir. 2015).

266. *Garcia*, 808 F.3d at 1166–67. *Accord* Guerrero v. Oliveros, 119 F. Supp. 3d 894, 908 (N.D. Ill. 2015) (Mexico, state of Jalisco).

267. *Garcia*, 808 F.3d at 1166–67.

268. 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.").

269. Maxwell v. Maxwell, 588 F.3d 245, 249–50 (4th Cir. 2009) (Australian custody order did not grant petitioner custody rights); Pfeiffer v. Bachotet, 913 F.3d 1018 (11th Cir. 2019) (divorce judgment under Swiss law divested father of right to object to mother's relocation to the United States).

child's residence.[270] Conversely, where a divorce decree grants the parties shared parental care, but places the physical custody of the child with one parent, the law of the habitual residence may preclude removal of that child to another country absent a court order.[271]

A custody decree may be effective even if it is obtained ex parte.[272] Additionally, an interim or temporary order granting custody rights may support a petition for return even though the court has not made a final ruling on the merits of the custody case.[273] In *Kufner v. Kufner*,[274] a temporary court order awarding the mother primary care of the children and granting the father visitation rights did not terminate the 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. Despite the mother's temporary custody order, the father retained sufficient "rights of custody" to support his successful application for return of the children.[275]

In *Ozaltin v. Ozaltin*,[276] the 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 the mother to return from the United States and awarded the father visitation rights in Turkey and in the United States. The father petitioned for the return of the children to Turkey. The mother countered that the removal of the children from Turkey could not have been wrongful because subsequent orders from the Turkish court presumed that she could remain in the United States and granted the father visitation rights

270. Bandžius v. Šulcaite, No. 18-CV-3811, 2018 WL 5018459, at *7 (N.D. Ill. Oct. 15, 2018)† (Lithuanian divorce decree modified by interim amendment to allow mother to determine the place of the children's residence).

271. Kovačić v. Harris, 328 F. Supp. 3d 508, 517–18 (D. Md. 2018), *appeal dismissed*, No. 18-1976, 2018 WL 7364869 (4th Cir. Dec. 6, 2018) (Croatian law provided that shared parental care included right to determine child's permanent residence).

272. *See, e.g.*, Van De Sande v. Van De Sande, 431 F.3d 567, 569 (7th Cir. 2005); *cf.* Didon v. Castillo, 838 F.3d 313, 319 (3d Cir. 2016) (ex parte order issued six months after the alleged wrongful retention was invalid).

273. Custody orders that are superseded by newer versions are not valid for purposes of considering whether a parent has continuing rights of custody. Navani v. Shahani, 496 F.3d 1121, 1127–28 (10th Cir. 2007). *But see* Leslie v. Noble, 377 F. Supp. 2d 1232, 1240–45 (S.D. Fla. 2005) (where a custody determination in favor of father, made after the child had been removed to the United States, was determined by the Supreme Court of Belize to apply *nunc pro tunc*, resulting in confirmation of father's rights of custody that were initially pursued before the wrongful removal).

274. 519 F.3d 33 (1st Cir. 2008).

275. *Id.* at 39. *Accord* Wertz v. Wertz, No. 7:18cv00061, 2018 WL 1575830, at *11 (W.D. Va. Mar. 30, 2018)† (Canadian temporary custody order in effect at the time of the child's removal).

276. 708 F.3d 355 (2d Cir. 2013).

there. The Second Circuit held that the father retained custody rights to the children under Turkish law, and that while the interim orders allowed the mother to take the children to the United States, those orders did not alter the father's joint custody rights. The removal of the children constituted a breach of the father's rights to custody. Citing to the *Pérez-Vera Report*,[277] the court also noted that "a removal under the Hague Convention can still be 'wrongful' even if it is lawful."[278]

An order conferring custody rights can be issued by courts other than those of the child's habitual residence. In *Brooke v. Willis*[279] a California court order governed the custodial rights of the parties, granting the parents equal joint legal and physical custody of the child. After the parties' dissolution of their marriage, the father relocated to Great Britain, and the mother remained in California. The child lived alternately with each parent, pursuant to the California order. When the father attempted to exercise his parenting time with the child in 1990, the mother absconded with the child to Virginia. She later relocated with the child to New York, where the father filed his petition for the child's return. Although the district court found that the child's habitual residence was in Great Britain, that father's custody rights were established under 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. Furthermore, when custody rights are exercised in the place of

277. Pérez-Vera Report, *supra* note 18, at 447–48, ¶ 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.

278. *Ozaltin*, 708 F.3d at 369. *See also In re* Marriage of Witherspoon, 66 Cal. Rptr. 3d 586, 592 (Cal. Ct. App. 2007), quoting the Pérez-Vera Report, *supra* note 18, at 447–48, ¶ 71:

> 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.

279. 907 F. Supp. 57 (S.D.N.Y. 1995).

> habitual residence based on a foreign custody decree, it is not necessary for the state of habitual residence to formally recognize that decree.[280]

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 that

> [t]he 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*,[281] a mother and father divorced in Venezuela. The mother obtained the father's consent to travel with their children to Florida for five days on the pretense that she was going to a wedding. Instead, the mother and children flew to Illinois, where she settled and married a man she had met on the internet. The father petitioned for a return of the children. The parties settled the Hague case; a written agreement stipulated that the father's petition for the return of the children would be dismissed and the children would remain in the mother's custody, spending every summer and lengthy holidays with the father in Venezuela. The agreement further provided that if the mother failed to comply with the terms of the agreement, the father could refile his Hague Convention petition. The agreement also provided that the children's habitual residence was Illinois, and the mother obtained an uncontested state judgment incorporating the terms of the agreement. When the mother defaulted on her promise to allow the children to travel to visit with their father, the father moved to set aside the judgment dismissing his Hague application and reinstate his petition for the children's return. The mother raised the Illinois judgment as a defense, arguing that under the Illinois decree, the children's habitual residence was no longer Venezuela, and the Illinois decree was entitled to full faith and credit. She also contended that the reopening of the father's Hague case was barred by the *Rooker-Feldman* doctrine.[282] The Seventh Circuit rejected each of the 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.[283]

280. *Id*. at 62 (citations omitted).

281. 538 F.3d 581 (7th Cir. 2008).

282. 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 *infra* section VI.E.3.

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

III.E.3.c

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. Whether such agreements must be approved by a court to establish enforceable custody rights depends upon the law of the habitual residence. In *Shalit v. Coppe*,[284] the Ninth Circuit refused to endorse the father's reliance on an oral agreement with the mother that their child would live in Israel for three years. The court found that Israeli law specifically provided that an agreement between parents living separately "shall be subject to the approval of the Court." This oral agreement was not approved by a U.S. or Israeli court and could not establish the father's claimed custody rights.[285]

Absent local law to the contrary, agreements do not have to be reduced to a judgment or incorporated into custody orders in order to be binding.[286] For example, in *Carrascosa v. McGuire*,[287] the court found that the parties signed a valid, binding "Parenting Agreement" to resolve their custody issues without seeking "any court's imprimatur."[288] Also, in *Vela v. Ragnarsson*,[289] an agreement between a mother and father transferring custody of their child to the father was found to

284. Shalit v. Coppe, 182 F.3d 1124, 1131, *as amended on denial of reh'g and reh'g en banc* (9th Cir. 1999).

285. *Accord* Currier v. Currier, 845 F. Supp. 916, 921 (D.N.H. 1994) (written agreement between the parties that purportedly granted respondent sole custody of the children was without legal effect until approved by court order); Pignoloni v. Gallagher, No. 12-CV-3305 (KAM)(MDG), 2012 WL 5904440 (E.D.N.Y. Nov. 25, 2012),† *aff'd*, 555 F. App'x 112 (2d Cir. 2014) (Italian law requires ratification from a court in order for the separation agreement to attain legal effect).

286. 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.

Text & Legal Analysis, *supra* note 45, at 10,507 (citing the Pérez-Vera Report, *supra* note 18, at 447, ¶ 70).

287. 520 F.3d 249 (3d Cir. 2008).

288. *Id.* at 256.

289. 386 S.W.3d 72 (Ark. Ct. App. 2011).

be effective under Icelandic law once the agreement was approved by a district commissioner.[290]

However, a custody agreement must be sufficiently definite for a court to accord it legal significance. *In re Adan*[291] 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, [the 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 insufficient information to conclude whether the agreement had "legal effect under the law of [Argentina]," as required by Article 3 of the Convention.[292]

III.E.4

Article 15 – Request for Foreign Court Ruling

A court may request a legal determination from a foreign jurisdiction on orders or statutes that govern custody rights and habitual residence.[293] Such a determination may be dispositive, since the removal or retention of a child is not wrongful if the left-behind parent's custody rights were not violated or the child has not been taken from his or her habitual residence. Article 15 states, in part, that

> [t]he 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.

Courts should be cautioned that an Article 15 request typically proceeds back and forth through the diplomatic channels of the Central Authorities. This

290. *Id.* at 76.

291. 437 F.3d 381 (3d Cir. 2006).

292. *Id.* at 393.

293. *In re* Adan, 437 F.3d 381, 394 (3d Cir. 2006) (the district court might avail itself of the process under Article 15 to assist in determining whether the removal of the child was wrongful under Argentinian law).

may delay the proceedings.[294] If possible, Article 15 requests should be addressed early. "In countries where such a determination can be made only by a court, if judicial dockets are seriously backlogged, compliance with an Article 15 order could significantly prolong disposition of the return petition, which in turn would extend the time that the child is kept in a state of legal and emotional limbo."[295] In *Nunez Bardales v. Lamothe*,[296] the trial court denied a request for the Honduran judiciary to make an Article 15 determination regarding parental authority at the time the child was removed. The court concluded that this process would be so protracted that it would not be able to resolve the underlying case expeditiously.[297]

Despite the potential to cause delay in the proceedings, Article 15 has been considered and used in a number of cases.[298] For example, in *Silverman v. Silverman*,[299] an Israeli ruling regarding the habitual residence of two children was forwarded from the Israeli Central Authority for use in U.S. proceedings.[300] One court[301] emphasized that the process of obtaining the legal determination from the sister state was critical: either the courts or the Central Authority must initiate

294. Conclusions and Recommendations of the Sixth Special Commission on the Practical Operation of the 1980 and 1996 Conventions at 8, ¶ 63 (2011), https://assets.hcch.net/upload/wop/concl28sc6_e.pdf (acknowledging the reporting of problems and delays in connection with the use of Article 15).

295. Khalip v. Khalip, No. 10-13518, 2011 WL 1882514, at *1 (E.D. Mich. May 17, 2011),† quoting Text & Legal Analysis, *supra* note 45, at 10,509.

296. 423 F. Supp. 3d 459 (M.D. Tenn. 2019).

297. *Id.* at 473.

298. *See, e.g.*, Vite-Cruz v. Sanchez, 360 F. Supp. 3d 346, 351 (D.S.C. 2018) (Mexican Central Authority certified that child's removal from Mexico was wrongful); Soto Pena v. Serrano, No. 1:17-CV-903-RP, 2017 WL 6542758, at *8 (W.D. Tex. Dec. 21, 2017)† (letter from Central Authority indicating parents shared right to determine child's place of residence); Minette v. Minette, 162 F. Supp. 3d 643, 647 (S.D. Ohio 2016) (state-court magistrate directed parent to obtain advisory opinion on issue of wrongful removal); Garcia v. Pinelo, 125 F. Supp. 3d 794, 806 (N.D. Ill. 2015), *aff'd*, 808 F.3d 1158 (7th Cir. 2015) (document received per Article 15 failed to assist in determining issue of custody rights); 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. Mar. 19, 2008)† (father asserted that Australian Central Authority requested an Article 15 declaration). *See also* Tlustochowicz v. Tlustochowicz, No. 12 C 5468, 2012 WL 3779071 (N.D. Ill. Aug. 31, 2012)† (Polish court hearing case for return of child to United States requests Article 15 determination by U.S. authorities regarding habitual residence); Dawson v. McPherson, No. 1:14CV225, 2014 WL 4748512, at *6 (M.D.N.C. Sept. 23, 2014)† (An award of fees for obtaining an Article 15 declaration from the High Court in London was approved).

299. 338 F.3d 886 (8th Cir. 2003).

300. *Id.* at 891.

301. Pignoloni v. Gallagher, No. 12-CV-3305 (KAM)(MDG), 2012 WL 5904440 (E.D.N.Y. Nov. 25, 2012).†

the request for an Article 15 determination—not the parties. The district court disallowed a communication from the Central Authority of Italy on the grounds that neither the court nor the U.S. Central Authority requested the opinion.[302]

U.S. courts may find themselves on the receiving end of an Article 15 request when they are asked to clarify issues of custody or the child's habitual residence based upon U.S. law. In *Lakhera-Bonnefoy v. Lakhera-Bonnefoy*,[303] the mother was involved in a Hague proceeding pending in France. She filed a request with the New York state court to issue an Article 15 finding that the child's habitual residence was New York. Based on the evidence presented by the mother, the U.S. court entered an order finding that under U.S. law, the child's habitual residence was the state of New York.[304] In *Sorenson v. Sorenson*,[305] the father petitioned an Australian court for the return of his child to Minnesota. The Australian court requested the father to obtain a determination from a federal court in Minnesota that the child's habitual residence was Minnesota.[306] The father filed the claim under Article 15, and the U.S. court found that the child's habitual residence was in Australia.[307]

III.E.5

Chasing Orders

A *chasing order* is a legal order sought in response to the removal of the child that alters the custody status quo that existed before the child's removal. These orders are frowned upon and are largely ineffective.[308] The main concern with

302. *Id.* at *45 n.45. *See also* Felder v. Wetzel, 696 F.3d 92, 97 (1st Cir. 2012) (court denied mother's request for an Article 15 inquiry to Swiss Central Authority for determination of mother's custody rights—reversed and remanded with finding that mother possessed rights of custody).

303. 836 N.Y.S. 2d 486 (N.Y. Sup. Ct. 2006)† (unreported table decision).

304. *See, e.g.*, Vite-Cruz v. Sanchez, 360 F. Supp. 3d 346, 351 (D.S.C. 2018) (Mexican Central Authority certified that child's removal from Mexico was wrongful); Soto Pena v. Serrano, No. 1:17-CV-903-RP, 2017 WL 6542758, at *8 (W.D. Tex. Dec. 21, 2017)† (letter from the Mexican Central Authority sent to the United States Department of State in accordance with Article 15 of the Convention); Alcala v. Hernandez, No. 4:14-CV-4176-RBH, 2014 WL 5506739 (D.S.C. Oct. 30, 2014)† (Director of Family Law for the Mexican Central Authority attesting to father's patria potestas rights).

305. 559 F.3d 871, 872–73 (8th Cir. 2009).

306. *Id.* at 872.

307. *Id.* at 873 ("Upon receiving Eric's petition, the district court held a bench trial, and concluded that Australia was E.S.S.'s habitual residence.").

308. *See, e.g.*, Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) (father obtained chasing order from an Australian court ostensibly determining in his favor all issues that would be appropriate for the U.S. court to determine. The chasing order was ineffective, as 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 Cir. 2007) (finding that removal of children from grandparents who were testamentary guardians was a wrongful removal).

chasing orders is that they complicate the legal situation; "the Hague Convention . . . seeks to return the child to the status quo that existed before the wrongful removal, and that objective cannot be accomplished if the courts of the habitual residence have issued a custody order changing the status quo."[309]

In *White v. White*,[310] 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. The mother and father were granted a legal separation by Swiss courts that awarded the mother full custody subject to the father's right to visit. The 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 the father's rights. Two years after the mother and child left Switzerland, a Swiss court awarded custody of the child to the father. The Fourth Circuit held that a determination of wrongful removal must be made on the facts as they existed at the time of removal.[311] Citing to a number of sister-state decisions, the court ruled that a lawful removal of a child cannot be converted into wrongful retention by a subsequent chasing order in favor of the left-behind parent.[312]

In *Walker v. Walker*,[313] the parents disagreed on whether the children's habitual residence was in Australia or the United States. The mother filed an action for divorce in Chicago and obtained a decree for sole custody of the children. The father's petition for return was denied, and he appealed. On appeal, the mother argued that the case was moot because of the Illinois custody order. The Seventh Circuit disagreed, finding that the case was not moot. Article 17 of the Convention permits, but does not compel, recognition of a custody decree.[314] The issue

309. *In re* Roy, 432 F. Supp. 2d 1297, 1303 (S.D. Fla. 2006), *rev'd sub nom.* Hanley v. Roy, 485 F.3d 641 (11th Cir. 2007).

310. 718 F.3d 300 (4th Cir. 2013).

311. *Id.* at 306.

312. *Id.* at 306–07. *Accord* Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013); *see also* Madrigal v. Tellez, No. EP-15-CV-181-KC, 2015 WL 5174076, at *15 (W.D. Tex. Sept. 2, 2015)† (subsequent court order to justify mother's retention of the children in El Paso, Texas, of "no moment"); Slight v. Noonkester, No. CV 13-158-BLG-SPW, 2014 WL 282642, at *6 (D. Mont. Jan. 24, 2014)† ("When a party applies for custody after the other parent leaves the country, the subsequent order is referred to as a 'chasing order.' Courts typically do not give deference to chasing orders.").

313. 701 F.3d 1110 (7th Cir. 2012).

314. Article 17 provides,

> 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.

of habitual residence was still before the district court, and until that issue was decided, it could not be determined whether the United States or Australia was entitled to determine custody issues.[315]

Chasing orders typically alter the custody status quo that existed prior to the child's removal by granting sole or primary custody to the left-behind parent or stripping custody rights from the parent who removed the child. The Convention, however, presumes that the child's return to his or her habitual residence will result in the resumption of the status quo ante (the custody situation that existed before the child's removal). If a child is returned to the habitual residence and a chasing order remains in effect, the child may automatically be placed in the sole custody of the left-behind parent, subject to the terms of the chasing order, potentially including restrictions on the parental rights of the taking parent. Since most abductions are done by the primary-care parent or caretaker,[316] a return of the child into the custody of a parent who was not a primary caretaker can result in an inappropriate placement, especially if there is evidence of domestic violence, child abuse, neglect, or other negative circumstances. If a chasing order is still outstanding in the habitual residence, a court considering the return of a child may need to craft a return order that protects the child from physical or emotional harm. See *infra* section III.E.6.

III.E.6

Effect of Subsequent Custody Proceedings

A related but distinct issue arises when changes in the law or custody proceedings purport to retroactively affect custody rights that existed at the time of the removal of the child. A number of recent cases have examined whether the removal of a child that was not wrongful at the time may later be deemed wrongful based upon changes in the law or court orders that confer new custody rights to the left-behind parent. In *Redmond v. Redmond*,[317] discussed *supra* at section III.D.2.a, the mother removed the child to the United States at a time when the father had no legal custody rights. Subsequent changes in Irish law allowed the father to establish paternity years after the child's removal. Determining that the father's rights did not change the legality of the mother's removal of the child, the Seventh Circuit held that

> 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

315. *Walker*, 701 F.3d at 1116.

316. Lowe & Stephens, *supra* note 52, at ¶ 43.

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

> 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."[318]

The alleged wrongfulness of a child's retention must be assessed in the context of facts and parental rights existing at the time the petition is filed.

In *Mohácsi v. Rippa*,[319] a father filed a lawsuit in Hungarian courts to establish his paternity of a child born in September 2014. Under Hungarian law, an unmarried father has no legal custody rights until paternity is established by a court order. While the father's paternity action was pending, the mother took the child to New York in August 2015. The father obtained an order of paternity, effective September 2016 with no retroactive application. Even assuming that the child was habitually resident in Hungary at the time of his removal, the court determined that under Hungarian law, the father had no custody rights.[320]

The same issue arose in connection with an Article 12 defense in *Porretti v. Baez*.[321] The children were removed from Mexico in violation of the father's ne exeat rights. The father did not petition for the children's return until well after one year had passed. The mother invoked the delay defense, arguing that the children had become settled in their new environment in the United States. The father argued that the delay defense did not apply because he commenced his Hague Convention case within one year of a Mexican court order confirming his custody order and mandating that the children remain in Mexico. The district court rejected the father's argument, finding that the one-year period under Article 12 began to run when the children were removed from Mexico. An unlawful retention is a singular, not continuing, act and was not tolled while the father pursued his remedies in Mexican courts.[322]

318. *Id.* at 742 (citing *Barzilay III*, 600 F.3d 912, 916 (8th Cir. 2010)).

319. 346 F. Supp. 3d 295, 310 (E.D.N.Y. 2018), *aff'd. sub nom. In re* NIR, 797 F. App'x 23 (2d Cir. 2019).

320. "Accordingly, in August 2015—when Respondent left Hungary with [the child]—Petitioner did not have any custody rights under Hungarian law. Because Petitioner cannot show 'the removal . . . was in breach of [his] custody rights' under Hungarian law, Petitioner's claim of wrongful removal fails." *Mohácsi*, 346 F. Supp. 3d at 315.

321. No. 19 CV 1955 (RJD), 2019 WL 5587151 (E.D.N.Y. Oct. 30, 2019).

322. *Id.* at *6 (citing Marks *ex rel.* SM v. Hochhauser, 876 F.3d 416, 421–22 (2d Cir. 2017)).

III.E.7

Rights of Custody vs. Access

Rights of custody support a Hague petition for the return of a child; rights of access alone do not.[323] It is therefore important to determine the scope of the petitioning party's rights.[324] Article 5 of the Convention provides the following guidance:

> 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 *Takeshi Ogawa v. Kyong Kang*,[325] the parties' divorce agreement provided that the mother had full parental authority under Japanese law, with the right to all decision-making authority for the children; the father only had the right to "exercise some physical custody at undetermined future dates."[326] The father argued that the references to his "custody" rights should be interpreted by American concepts of custody. The court disagreed, concluding that Japanese law applied. The mother's "parental authority" under Japanese law included the right to change the child's residence, and her decision to remove the children did not violate the father's rights of custody.[327]

In *Jenkins v. Jenkins*,[328] the parties, both Israeli citizens, moved to the United States for the purpose of employment opportunities. They lived in Ohio for almost three years. When their marriage deteriorated, the mother wanted to return to

323. There is a split of authority on the question of whether a person may pursue a cause of action under the 1980 Convention for the purpose of establishing or enforcing access rights. *See* Neumann v. Neumann, 310 F. Supp. 3d 823, 843 (E.D. Mich. 2018) (recognizing the split). The Fourth Circuit, in *Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006), found that such a cause of action did not exist under the Convention, whereas the Second Circuit in *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013), disagreed with the *Cantor* holding and has ruled that such an action is specifically provided by ICARA. For a further discussion on this issue, see Petitions for Access Only, *infra* section VI.G.

324. Kufner v. Kufner, 519 F.3d 33, 39 (1st Cir. 2008) (citing Convention, art. 5: "Rights of custody are distinguished from 'rights of access,' with the Hague Convention defining the latter as 'the right to take a child for a limited period of time to a place other than the child's habitual residence.' . . . Having rights of custody is necessary to petition for return of a child, while having only rights of access does not entitle a party to petition for the return of a child to the place of habitual residence.").

325. 946 F.3d 1176 (10th Cir. 2020).

326. *Id.* at 1179.

327. *Id.* at 1180.

328. 569 F.3d 549 (6th Cir. 2009).

Israel with their child, but the father refused to allow the child to leave the United States. The mother, who still resided in the United States, commenced an action for return of the child to Israel. The Sixth Circuit denied mother's application, finding that both parents still had equal rights of custody. The court noted,

> In refusing to let [the mother] take [the child] to Israel, [the father] may arguably have committed a breach of [the mother's] "rights of access" to [the child] . . . 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."[329]

III.E.8

Ne Exeat Orders and Rights[330]

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 in *Abbott v. Abbott* resolved a circuit split on this issue.[331] The Court held that a ne exeat order confers a right of custody to a left-behind parent, entitling that parent to maintain an action under the Convention.[332]

The *Abbott* decision reversed a Fifth Circuit case[333] that followed the Second Circuit's ruling in *Croll v. Croll*.[334] *Croll* held that a parent with visitation rights and a ne exeat clause possessed only part of the "bundle of rights" that encompassed rights of custody. These limited rights were insufficient to compel a return remedy under the Convention. The Fourth and Ninth Circuits also adopted *Croll*'s reasoning.[335] In *Furnes v. Reeves*,[336] the Eleventh Circuit rejected *Croll* and held that a ne exeat provision conferred a right that would satisfy the Convention's definition of custody rights.

329. *Id.* at 555.

330. 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 border without the permission of the other parent or a court. This right is not absolute: 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.

331. Abbott v. Abbott, 560 U.S. 1 (2010).

332. *Id.* at 10.

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

334. 229 F.3d 133 (2d Cir. 2000), *abrogated by* Abbott v. Abbott, 560 U.S. 1 (2010).

335. *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 (N.Y. App. Div. 2005); Welsh v. Lewis, 740 N.Y.S.2d 355 (N.Y. App. Div. 2002).

336. 362 F.3d 702 (11th Cir. 2004), *abrogated on other grounds by Lozano III*, 572 U.S. 1 (2014).

In *Abbott*, the mother, father, and child had lived in Chile since the child was an infant. The Chilean court granted the mother the daily care and control of the child, and the father was granted "direct and regular" visitation. According to Chilean law, once a parent is granted visitation rights, a ne exeat right is conferred that requires the custodial parent's permission before the child may be removed from the country.[337] An additional ne exeat was ordered at the 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, the mother took the child to Texas in violation of the order of the Chilean court and Chilean law. The father commenced a Hague application in Texas.

The U.S. Supreme Court held that the 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.[338]

The mother argued that the ne exeat order imposed by the Chilean court at her request did not have a provision that granted the father a right to consent to the child's removal—hence the order did not grant the father any custodial rights. She argued that the provision was merely a provision that protected the Chilean court's continuing jurisdiction. The court declined to rule on the legal significance of the ne exeat clause. 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."[339]

Since *Abbott*, courts have ruled that ne exeat provisions and orders confer custody rights.[340] Clauses prohibiting travel with a child outside of the United States absent the consent of the other parent are now referred to as *ne exeat*

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

338. Abbott v. Abbott, 560 U.S. 1, 12 (2010). *See also* Sanchez v. Suasti, 140 So.3d 658, 661 (Fla. Dist. Ct. 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).

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

340. *See, e.g.*, Silva v. Vieira, No. 6:20-cv-1301-Orl-37GJK, 2020 WL 5652710 (M.D. Fla. Sept. 23, 2020)† (despite father's incarceration, he maintained a ne exeat right under Brazilian law, entitling him to seek the return of his children).

clauses.[341] The internal custody law of some countries provides that when parents have joint parental authority, each parent is vested with ne exeat rights.[342]

In *In re Custody of A.T.*,[343] the father secured "no-exit" orders from a Rabbinical Court in Israel, prohibiting the mother from leaving Israel with the children. When the orders expired, the mother relocated with the children to Washington state. The father filed a Hague petition for the return of the children to Israel. He argued that the no-exit orders were the equivalent of ne exeat orders conferring custody rights.[344] Rejecting this argument, the Washington state court ruled that the father failed to prove by a preponderance that he exercised rights of custody.

When a divorce order or settlement agreement does not include a ne exeat clause, a parent may fail to establish custody rights. In *Takeshi Ogawa v. Kyong Kang*,[345] the Tenth Circuit held that the parties' custody agreement granted the father visitation rights but did not empower him to prevent the mother from relocating with the children to another country—he did not possess rights of custody.

III.F

Habitual Residence[346]

III.F.1

Habitual Residence Generally

Essential to a Hague Convention case is the determination of a child's habitual residence. A child can only be wrongfully removed if removed or retained from the

341. O.G. v. A.B., 234 A.3d 766 (Pa. Super. Ct. 2020).

342. Both parents must consent to the child moving abroad, *e.g.*, Furnes v. Reeves, 362 F.3d 702, 707 (11th Cir. 2004), *abrogated on other grounds by Lozano III*, 572 U.S. 1 (2014) (Norway—parents with joint parental responsibility); Mendieta Chirinos v. Umanzor, No. 3:18-cv-02668-M, 2019 WL 2287975, at *5 (N.D. Tex. May 29, 2019)† (Honduras); Pfeiffer v. Bachotet, 913 F.3d 1018, 1025 (11th Cir. 2019) (Switzerland); Campomanes Flores v. Elias-Arata, No. 3:18-cv-160-J-34JBT, 2018 WL 3495865 (M.D. Fla. July 20, 2018)† (Peru); De La Riva v. Soto, 183 F. Supp. 3d 1182, 1196 (M.D. Fla. 2016) (Mexico, state of Guanajuato); Duran v. Beaumont, 622 F.3d 97, 98 (2d Cir. 2010) (Chile); Carvajal v. Chavarria, 986 F. Supp. 2d 138, 141 (D. Conn. 2013) (Costa Rica).

343. *In re* Custody of A.T., 451 P.3d 1132 (Wash. Ct. App. 2019).

344. *Id.* at 1141; *but see* Valles Rubio v. Veintimilla Castro, No. 19-CV-2524(KAM)(ST), 2019 WL 5189011, at *18 (E.D.N.Y. Oct. 15, 2019), *aff'd*, 813 F. App'x 619 (2d Cir. 2020) (where court found that petitioner exercised his custodial and ne exeat rights by maintaining visits with B.V., and by first declining to consent to B.V.'s travel and then by consenting to limited-duration travel in 2018).

345. 946 F.3d 1176, 1181.

346. Globally, the issue of a child's habitual residence as grounds for refusing return was raised in 25% of the cases in 2015. Lowe & Stephens, *supra* note 52, at ¶15.

child's habitual residence.[347] A habitual residence finding is also necessary when questions about the petitioning parent's custody rights are at issue, since those rights are determined according to the law of the child's habitual residence.[348] Courts must determine the country of the child's habitual residence "immediately before the removal or retention."[349] Habitual residence, which is not defined by the Convention,[350] applies to the country, not discrete locations within it.[351]

Before a substantial body of U.S. case law developed standards for defining a habitual residence in Hague Convention cases, U.S. courts[352] often referenced a case from the United Kingdom, *In re Bates*,[353] that helped define the concept:

> [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.[354]

In the past, the "settled purpose" language of *Bates* was often referenced when discussing the issue of parental intent.[355] The Supreme Court's 2020 decision in

347. 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, art. 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 45, at 10,504.

348. *See* discussion *supra* section III.E.

349. "[R]emoval or the retention of a child is to be considered wrongful where . . . 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. . . ." Convention, art. 3; *see* Barzilay v. Barzilay (*Barzilay II*), 609 F. Supp. 2d 867, 877–78 (E.D. Mo. 2009), *aff'd*, 600 F.3d 912 (8th Cir. 2010) (citing *Silverman II*, 338 F.3d 886 (8th Cir. 2003)); Holder v. Holder (*Holder II*), 392 F.3d 1009, 1014 (9th Cir. 2004).

350. Pérez-Vera Report, *supra* note 18, at 445, ¶ 66.

351. *See* Hollis v. O'Driscoll, 739 F.3d 108, 112 (2d Cir. 2014) (citing Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012)).

352. Mendez v. May, 778 F.3d 337, 345 (1st Cir. 2015); Blackledge v. Blackledge, 866 F.3d 169, 181 (3d Cir. 2017); *Friedrich I*, 983 F.2d 1396, 1401 (6th Cir. 1993); Robert v. Tesson, 507 F.3d 981, 989 (6th Cir. 2007); Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2011); Pfeiffer v. Bachotet, 913 F.3d 1018, 1024 (11th Cir. 2019).

353. [1989] EWHC (Fam) CA 122/89 (Eng.).

354. *Id.* at 10.

355. *See, e.g.*, Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1220 (D.C. Cir. 2019); Watts v. Watts, 935 F.3d 1138, 1143 (10th Cir. 2019); Carvajal Vasquez v. Gamba Acevedo, 931 F.3d 519, 526 (6th Cir. 2019); Ahmed v. Ahmed, 867 F.3d 682, 689 (6th Cir. 2017); Cartes v. Phillips, 865 F.3d 277, 282 (5th Cir. 2017).

Monasky v. Taglieri[356] directed courts to consider a broader range of factors to determine habitual residence.[357]

The concept of habitual residence must be distinguished from *domicile*.[358] The differences between the two are noted in the *Pérez-Vera Report* and case law.[359] Domicile embodies elements of future intent, citizenship, and nationality—concepts that the Convention does not consider determinative of a child's habitual residence.

Nationality and citizenship have no bearing on a determination of a child's habitual residence.[360] It is not unusual for a court to be presented with a situation where both parents and children share the same nationality and citizenship, yet the child's habitual residence is deemed to be another country.[361] In *Friedrich v. Friedrich* (*Friedrich I*),[362] the court rejected the respondent-mother's position that the child's habitual residence was the United States because of his citizenship, ad-

356. Monasky v. Taglieri, 140 S. Ct. 719 (2020).

357. The "settled purpose" language garnered some usage, particularly in 6th Circuit cases. *See* Gonzalez v. Pena, 194 F. Supp. 3d 897, 901 (D. Ariz. 2016) (quoting Simcox v. Simcox, 511 F.3d 594, 602 (6th Cir. 2007)); Ahmed v. Ahmed, 867 F.3d 682, 687 (6th Cir. 2017) (same); Carvajal Vasquez v. Gamba Acevedo, 931 F.3d 519 (6th Cir. 2019) (phrase used in connection with acclimatization). *See also* Miller v. Miller, No. 1:18-CV-86, 2018 WL 4008779, at *9 (E.D. Tenn. Aug. 22, 2018) (same); Rodriguez Palomo v. Howard, 426 F. Supp. 3d 160, 168 (M.D.N.C. 2019) (quoting Mozes v. Mozes, 239 F.3d 1067, 1085 (9th Cir. 2001), *abrogated on other grounds by* Monasky v. Taglieri, 140 S. Ct. 719 (2020)).

358. 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, 644 A.2d 1150 (N.J. Super. Ct. Ch. Div. 1993), *abrogated on other grounds*, Ivaldi v. Ivaldi, 685 A.2d 1319 (N.J. 1996).

359. Pérez-Vera Report, *supra* note 18, at 445, ¶ 66; *See also Monasky*, 140 S. Ct. at 727 ("The [Hague] Conference deliberately chose 'habitual residence' for its factual character, making it the foundation for the Convention's return remedy in lieu of formal legal concepts like domicile and nationality"); 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,' § 9001(b)(3)(B), 'habitual residence' should bear a uniform meaning, independent of any jurisdiction's notion of domicile."). *See also 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."); David B. v. Helen O., 625 N.Y.S.2d 436 (N.Y. Fam. Ct. 1995) ("Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home.").

360. *E.g.*, Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995). Although the term habitual residence may appear to be hybrid of the terms domicile and residence, and although all three concepts may, depending on context, have factual variables in common, the terms are capable of distinction.

361. *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).

362. 983 F.2d 1396 (6th Cir. 1993).

dress for purposes of his documentation, and the mother's intention to return to the United States after being discharged from the military. The court noted that the above factors might be relevant to the question of domicile, but they fell short of establishing habitual residence.[363]

The spirit of the Convention is to minimize the nationality or citizenship of the child or caregiver as a factor in determining whether a child should be returned to one country or remain in another.[364] The courts should therefore avoid allowing considerations of citizenship or nationality to affect determinations of habitual residence.[365] In *Rydder v. Rydder*,[366] the entire family was temporarily living in Poland for two years because of the father's employment there. The Eighth Circuit dismissed considerations of the children's status as registered residents of Sweden on the basis that their official resident status did not determine their habitual residence. The court held that it was entirely appropriate for the district court to treat the children's official Swedish residency as "a legal fiction of little consequence to the determination of their habitual residence."[367]

When a court is faced with a question regarding habitual residence, children's or parents' nationality or citizenship may be a fact worth noting, but usually the issue will not impact the court's ultimate determination.[368] There are two narrow exceptions to this general rule.

The first exception deals not with the existence of citizenship, but the lack thereof. The citizenship status of children or the parents caring for the children can have a significant impact on habitual residence. This is because the risk of deportation or removal of children or caregivers directly impacts the question

363. *Id*. at 1401.

364. Robert v. Tesson, 507 F.3d 981, 989 (6th Cir. 2007) ("a child's habitual residence is not determined by the nationality of the child's primary care-giver").

365. *See, e.g.*, Sacchi v. Dervishi, No. 19-cv-06638-SK, 2020 WL 3618957, at *8 (N.D. Cal. July 2, 2020)† (court finds children, both U.S. citizens, were habitual residents of Italy).

366. 49 F.3d 369 (8th Cir. 1995).

367. *Id.* at 373. *See also* Wesley v. Grigorievna, No. 16-1004, 2016 WL 4493691, at *4 (W.D. Pa. Aug. 26, 2016), *aff'd sub nom*. Blackledge v. Blackledge, 866 F.3d 169 (3d Cir. 2017) (district court determined United States was child's habitual residence "notwithstanding his American citizenship").

368. *But see* Schwartz v. Hinnendael, No. 20-C-1028, 2020 WL 6111634 (E.D. Wis. Oct. 16, 2020) (parents resided in Mexico for five years; two children, aged three years and three months, lived entire lives in Mexico except for some trips to U.S.; all parties U.S. citizens; court finds father failed to prove Mexico as habitual residence); Smith v. Smith, No. 19-11310, 2020 WL 5742023 (5th Cir. Sept. 25, 2020) (both parents and all four children, U.S. citizens, moved to Argentina; mother removed children to U.S. after two years; district court relied on fact that parents and children were all U.S. citizens; father failed to prove Argentina was habitual residence); Farr v. Kendrick, 824 F. App'x 480 (9th Cir. 2020) (parents and children all U.S. citizens; children and parents remained in Mexico for over two years; held: United States, not Mexico, was children's habitual residence).

whether children have settled or acclimatized to their new surroundings enough so as to establish habitual residence in a country.[369]

The second exception occurs when a child, or a parent on the child's behalf, has taken steps toward attaining U.S. citizenship or legal immigration status. The facts concerning attempts to obtain citizenship may be relevant to a party's intention to settle in the United States,[370] or bear on issues such as consent[371] or whether a child is "well settled" under the Article 12 delay defense.[372]

These two exceptions should not be interpreted broadly. Some cases[373] repeat a dictum found in a Fourth Circuit case, *Maxwell v. Maxwell*,[374] discussing evidence of parental intent related to habitual residence:

> Federal courts have considered the following factors as evidence of parental intent: parental employment in the new country of residence; the purchase of a home in the new country and the sale of a home in the former country; marital stability; the retention of close ties to the former country; the storage and shipment of family possessions; the citizenship status of the parents and children;[375] and the stability of the home environment in the new country of residence.[376]

369. *See* discussion regarding Immigration Status, *infra* section III.F.9.

370. Cohen v. Cohen, 858 F.3d 1150, 1154 (8th Cir. 2017) (parents applied for child to obtain U.S. citizenship); Koch v. Koch, 450 F.3d 703, 716–17 (7th Cir. 2006).

371. Stevens v. Stevens, 499 F. Supp. 2d 891, 897 (E.D. Mich. 2007) (both parents signed applications for child to become U.S. citizen).

372. Castillo v. Castillo, 597 F. Supp. 2d 432, 440 (D. Del. 2009).

373. Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1220 (D.C. Cir. 2019); Sundberg v. Bailey, 293 F. Supp. 3d 548, 555 (W.D.N.C. 2017); Velasquez v. Funes de Velasquez, 102 F. Supp. 3d 796, 801 (E.D. Va. 2015); Murphy v. Sloan, 982 F. Supp. 2d 1065, 1074 (N.D. Cal. 2013).

374. 588 F.3d 245 (4th Cir. 2009).

375. The authority supporting the reference to "the citizenship status of the parents and children" is cited in the footnotes as the Eleventh Circuit case Ruiz v. Tenorio, 392 F.3d 1247, 1255 (11th Cir. 2004). The habitual residence question in *Ruiz* was whether a family had abandoned their U.S. habitual residence and established a new one in Mexico. The court found that the move to Mexico was conditional, and as part of that determination pointed to the fact that there were no attempts to obtain permanent legal status in Mexico for the mother, or to pursue Mexican citizenship for the children. Thus, *Ruiz* dealt with the type of exception referred to above; that is, a lack of a certain citizenship status can bear on the issue whether habitual residence has been established within the country where the children are located.

376. *Maxwell*, 588 F.3d at 251 (footnotes and citations omitted).

III.F.2

Habitual Residence Before *Monasky*

Before the Supreme Court's 2020 *Monasky v. Taglieri*[377] decision, the lower courts used different approaches to determine habitual residence. The majority of circuits[378] followed the Ninth Circuit's *Mozes v. Mozes*[379] decision, which looked to whether: (1) parents demonstrated a shared intent to abandon the former habitual residence,[380] and (2) the child was in the new location long enough to acclimate to the new environment.[381]

Other circuits rejected *Mozes*'s emphasis on parental intent[382] in favor of the Sixth Circuit's approach in *Friedrich I*,[383] focusing on the "past experiences of the child, not the intentions of the parents."[384] This analysis looked first to facts surrounding the child's perceptions and degree of acclimatization, relegating parental intent to a subordinate role.[385]

III.F.3

Monasky's Holding: Standard for Determining Habitual Residence

The Supreme Court's *Monasky*[386] decision was clear: when determining a child's habitual residence, courts should look to a totality of the circumstances to find the place where, at the time of the removal or retention, the child is "at home." A

377. 140 S. Ct. 719 (2020).

378. Redmond v. Redmond, 724 F.3d 729, 745 (7th Cir. 2013).

379. 239 F.3d 1067 (9th Cir. 2001).

380. *Id.* at 1075.

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

382. 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).

383. 983 F.2d 1396 (6th Cir. 1993).

384. *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).

385. As noted previously (*supra* section III.D.2.a), Redmond v. Redmond, 724 F.3d 729, 744–47 (7th Cir. 2013), provides 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.

386. 140 S. Ct. 719 (2020)

first-instance habitual-residence determination is "subject to deferential appellate review for clear error."[387]

The court rejected using categorical tests for determining a habitual residence, including emphasis on parental intent or actual agreement. Rather, habitual residence is the child's home at the time of wrongful removal or retention. The court emphasized that the test depended upon a totality of factual circumstances of a specific case.[388]

III.F.3.a

Monasky Facts[389]

In *Monasky*, the parents were married in 2011 in the United States; in 2013, they relocated to Milan, Italy, without definite plans to return to the United States.[390] In 2014, the mother became pregnant. The father started a new job about three hours away from Milan and stayed in an apartment there during the workweek. The mother remained in Milan, where she had a fellowship at a local hospital. Their marriage deteriorated, marked by their separation, the mother's difficult pregnancy, and the father's physically abusive behavior. The mother began to make preparations for moving back to the United States, including applying for jobs and exploring divorce lawyers and healthcare options in the United States. At the same time, both parents made preparations in Italy for the upcoming birth of their child, including exploring childcare options, looking for a larger apartment, and making purchases for the child. The child was born in February 2015. Soon after the birth, the mother informed the father that she wanted a divorce and planned to return to the United States. But she agreed to join the father in Lugo,

387. *Id.* at 723. *See also* Harm v. Harm, No. 20-30488, 2021 WL 4900305 (5th Cir. Oct. 21, 2021)† (in case involving conflicting evidence, district court's finding of habitual residence affirmed based on adherence to "totality of the evidence" test and absence of clear error).

388. "The place where a child is at home, at the time of removal or retention, ranks as the child's habitual residence." *Monasky*, 140 S. Ct. at 726. "There are no categorical requirements for establishing a child's habitual residence—least of all an actual-agreement requirement for infants." *Id.* at 728. "[A] child's habitual residence depends on the totality of the circumstances specific to the case. An actual agreement between the parents is not necessary to establish an infant's habitual residence. We further hold that a first-instance habitual-residence determination is subject to deferential appellate review for clear error." *Id.* at 723.

389. Portions of the facts below were taken from the district court's decision, Taglieri v. Monasky, No. 1:15 CV 947, 2016 WL 10951269, at *10 (N.D. Ohio Sept. 14, 2016),† as well as the Sixth Circuit's original and en banc opinions, 876 F.3d 868, 871 (6th Cir. 2017), and 907 F.3d 404, 406 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 2691 (2019), *aff'd*, 140 S. Ct. 719 (2020).

390. *Taglieri*, 2016 WL 10951269, at *10† ("the parties were not in agreement that [the mother] would come only for a short, definite period of time and then return to the United States").

where he worked. In March 2015, after an argument with the father, the mother reported his abuse to the police and went with the child to a safe house. After two weeks in the shelter, the mother fled to the United States with the eight-week-old child and settled with her parents in Ohio.

The father initiated a custody action in Italian courts to determine his parental rights. In that action, with the mother absent from the proceedings, the Italian court terminated her parental rights. The father then initiated a petition for return in federal court in Ohio. The district court found that Italy was the child's habitual residence. The Sixth Circuit affirmed the district court en banc. In the Supreme Court, the mother argued that absent an agreement between the parents, Italy could not have become the child's habitual residence.

III.F.3.b

Text of the Convention

As in its previous Hague decision *Abbott v. Abbott*,[391] the Court looked to the text of the 1980 Convention. Because habitual residence is not defined in the treaty, the court looked to the plain meaning of the term *habitual*. Habitual describes a situation that is more than transitory, something that is "[c]ustomary, usual, of the nature of a habit."[392] Fully discerning the scope of something that is habitual, the court noted, warrants a fact-intensive inquiry.[393] Comments in the *Pérez-Vera Report* pointed to a fact-based understanding of habitual residence that referenced "family and social environment in which [the child's] life has developed"[394] and explained that habitual residence is "a question of pure fact, differing in that respect from domicile."[395]

The court concluded that the aim of the drafting history was "to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home."[396]

391. 560 U.S. 1, 12 (2010).

392. *Monasky*, 140 S. Ct. at 726 (citing Black's Law Dictionary 1176 (5th ed. 1979)).

393. *Monasky*, 140 S. Ct. at 726.

394. Pérez-Vera Report, *supra* note 18, at 428, ¶ 11.

395. *Id*. at 445, ¶ 66.

396. Monasky v. Taglieri, 140 S. Ct. 719 (2020).

III.F.3.c

Decisions of Sister-State Signatories

ICARA recognized "the need for uniform international interpretation of the Convention."[397] There is a "clear trend" among treaty partners "to treat the determination of habitual residence as a fact-driven inquiry into the particular circumstances of the case."[398] The Supreme Court referenced a number of foreign cases[399] supporting the fact-driven nature of the habitual residence question.[400] The Court discussed a 2018 decision by the Canadian Supreme Court, *Office of Children's Lawyer v. Balev*,[401] that rejected a formulaic analysis of habitual residence—such as one focusing on parental intent—in favor of a "hybrid" approach that incorporates relevant factors.[402]

The court reiterated its observation in *Abbott* that the Convention should be interpreted in such a way as to provide consistency among signatory states and a global jurisprudence.[403] Decisions of sister-state signatories aided treaty interpretation and are entitled to "considerable weight" and "special force."[404]

III.F.3.d

Scope of Factors

Monasky emphasized the broad scope of factors that influence a habitual residence determination.[405] Narrow focus on parental intent is unsupported by the text and purpose of the Convention. "There are no categorical requirements for

397. 22 U.S.C. § 9001(b)(3)(B).

398. *Monasky*, 140 S. Ct. at 728.

399. *Id.* at 726, 728, 730.

400. *See id.* at 728, referencing cases from the United Kingdom, European Union, Canada, Australia, New Zealand, and Hong Kong.

401. [2018] 1 S. C.R. 398, 421, para. 43 (Can.).

402. *Id. Balev* found that there is no rule that prevents a parent from unilaterally changing the habitual residence of a child.

403. *See* Monasky v. Taglieri, 140 S. Ct. 719 (2020) (citing Silberman, *supra* note 98, at 1054).

404. *Monasky*, 140 S. Ct. at 727–28 (citing Abbott v. Abbott, 560 U.S. 1, 16 (2010) (quoting El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999) (in turn quoting Air France v. Saks, 470 U.S. 392, 404 (1985)))).

405. In Douglas v. Douglas, No. 21-1335, 2021 WL 4286555 (6th Cir. Sept. 21, 2021), *cert. denied*, 142 S. Ct. 1443 (2022), the Sixth Circuit affirmed the district court's grant of summary judgment on the issue of habitual residence based on a review of the diverse facts, and finding that a totality of circumstances supported a finding that the child's residence was not Australia.

establishing a child's habitual residence—least of all an actual-agreement requirement for infants."[406]

Ascertaining a child's home is a fact-driven inquiry; courts must be "sensitive to the unique circumstances of the case and informed by common sense."[407] For example, for older children, there will be a greater array of "highly relevant" facts supporting acclimatization.[408] *Monasky* cited a number of factors that U.S. courts consider when analyzing habitual residence, including:[409]

- changes in geography combined with the passage of an appreciable period of time
- the age of the child
- social engagements, participation in sports programs, and excursions[410]
- meaningful connections with the people and places in the child's new country[411]
- language issues and proficiency[412]
- the circumstances of caregiving parents with infants or young children
- indefinite residence in only one place[413]
- young children who are entirely dependent on parents[414]
- the immigration status of the child and parent[415]
- academic activities and success in school[416]

406. *Monasky*, 140 S. Ct. at 728.

407. *Id*. at 727 (citing Redmond v. Redmond, 724 F.3d 729, 744 (7th Cir. 2013)).

408. *Monasky*, 140 S. Ct. at 727.

409. *Id*. at 727 n.3.

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

411. *See* In Interest of E.S.E., No. 06-18-00001-CV, 2018 WL 3040326, at *6 (Tex. App. June 20, 2018).†

412. *See, e.g.*, McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. Oct. 12, 2007).†

413. *See, e.g.*, *In re* R.C.G.J., No. 5:16cv69-RH/GRJ, 2016 WL 3198285, at *4 (N.D. Fla. June 8, 2016).†

414. Douglas v. Douglas, No. 21-1335, 2021 WL 4286555 (6th Cir. Sept. 21, 2021),† *cert. denied*, 142 S. Ct. 1443 (2022) (three-month-old child in mother's care from birth to time of child's removal); Ahmed v. Ahmed, No. 3:16-CV-142, 2016 WL 4691599, at *7 (E.D. Tenn. Sept. 7, 2016),† *aff'd*, 867 F.3d 682 (6th Cir. 2017) (citing *Holder II*, 392 F.3d 1009, 1020 (9th Cir. 2004)).

415. Kijowska v. Haines, 463 F.3d 583, 588 (7th Cir. 2006); *In re* B. del C.S.B., 559 F.3d 999, 1011 (9th Cir. 2009); Hernandez v. Garcia Peña, 820 F.3d 782, 788 (5th Cir. 2016) (one relevant factor in a multifactor test).

416. Martinez v. Cahue, 826 F.3d 983, 992 (7th Cir. 2016).

- the diplomatic status of a parent[417]
- the stability of parents' employment[418]
- meaningful connections with the people and places in the child's new country[419]
- the location of personal belongings or household, holiday, and sentimental possessions[420]
- the degree of the child's acclimatization to the new environment[421]
- participation in religious activities[422]
- parental intent[423]
- the period of time that the child was physically located in a particular place[424]
- personal issues, such as medical care and schooling[425]
- previous limited stays in other countries[426]

417. The nature of a diplomat's postings could arguably affect the acquisition of a habitual residence. Pliego v. Hayes, 86 F. Supp. 3d 678, 695–97 (W.D. Ky. 2015); *but see* Hogan v. Hogan, No. 1:16cv1538 (JCC/JFA), 2017 WL 106021, at *3 (E.D. Va. Jan. 10, 2017)† (court rejects respondent's position that previous diplomatic status created a "'bubble' around her family, such that they could not be considered to reside in Spain in a legal sense.").

418. De La Vera v. Holguin, No. 14-4372(MAS)(TJB), 2014 WL 4979854, at *10 (D.N.J. Oct. 3, 2014).†

419. *Id.*

420. Watts v. Watts, 935 F.3d 1138, 1145 (10th Cir. 2019); Panteleris v. Panteleris, 601 F. App'x 345, 349 (6th Cir. 2015).

421. *In re* Marriage of Milne, 109 N.E.3d 911, 917 (Ill. App. Ct. 2018).

422. Martinez v. Cahue, 826 F.3d 983, 992 (7th Cir. 2016).

423. Douglas v. Douglas, No. 21-1335, 2021 WL 4286555, at *5 (6th Cir. Sept. 21, 2021), *cert. denied*, 142 S. Ct. 1443 (2022) (facts concerning parental intent may be relevant to the determination whether a particular place is the child's "home").

424. *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).

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

426. Foster v. Foster, 429 F. Supp. 3d 589, 608 (W.D. Wis. 2019).

III.F.3.e

Standard for Appellate Review

A district court's factual findings on habitual residence should be accorded deferential review for clear error.[427] This approach has several benefits, including greater reliance on the trial court's exercise of discretion and easing the burden on appellate courts.

III.F.4

Concurrent Habitual Residences

The cases that have examined whether a child may have two concurrent habitual residences have rejected this possibility. Although this issue was not raised in *Friedrich v. Friedrich* (*Friedrich I*),[428] the court's discussion noted that "[a] person can have only one habitual residence."[429]

In *Mozes v. Mozes*,[430] the court observed that "the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind."[431] This is "consistent with the view held by many courts that a person can only have one habitual residence at a time under the Convention."[432] There is a rare exception to the rule of one residence: "where someone consistently splits time more or less evenly between two locations, so as to retain alternating habitual residences in each."[433]

Didon v. Castillo[434] involved a family living in Saint Martin, a thirty-four-square-mile island that comprises two separate countries, Dutch Sint Maarten and French Saint-Martin. French Saint-Martin is a signatory to the 1980 Convention; Dutch Sint Maarten is not. The mother and father had a biological son,

427. Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020). The court recognized that some courts had previously held that appellate review of habitual residence was one of law. *See, e.g.*, Robert v. Tesson, 507 F.3d 981, 987 (6th Cir. 2007).

428. 983 F.2d 1396, 1401 (6th Cir. 1993); *see also* Freier v. Freier, 969 F. Supp. 436, 440 (E.D. Mich. 1996) (where the statement was repeated); *In re* Morris, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (same).

429. *Friedrich I*, 983 F.2d at 1401; Blanc v. Morgan, 721 F. Supp. 2d 749, 760 (W.D. Tenn. 2010) (adhering to *Friedrich*, but acknowledging the *Mozes* dicta); Robert v. Tesson, 507 F.3d 981, 989 (6th Cir. 2007) (same).

430. 239 F.3d 1067 (9th Cir. 2001).

431. *Id.* at 1075.

432. *Id.* at 1075 n.17.

433. *See, e.g.*, Johnson v. Johnson, 493 S.E.2d 668, 669 (Va. Ct. App. 1997).

434. Didon v. Castillo, 838 F.3d 313 (3d Cir. 2016).

and the mother had a daughter from a prior relationship. The family residence was in Dutch Sint Maarten. Most other aspects of family life were in French Saint-Martin: the children's school, their doctors, the father's employment, and the administrative affairs of the family, such as insurance.

In August 2014, the mother took the children to the United States on the pretense of attending a wedding. She refused to return with the children, and they eventually moved to Pennsylvania. At the same time, the father filed a custody action in the French Saint-Martin Civil Court, requesting custody of both children.

In August 2015, the father filed a petition in Pennsylvania seeking the return of the children. The district court granted the father's petition for the return of parents' biological son, finding that the child had two concurrent habitual residences, French Saint-Martin and Dutch Sint Maarten.

> The parties' testimony reveals that the border [between Dutch Sint Maarten and French Saint Martin] is so permeable as to be evanescent, and is regularly and readily traversed by residents and travelers alike. . . . [F]or most purposes of its residents' daily life, the island is essentially undivided. . . . [T]he record facts, in addition to the nature of the island itself, support a finding that J.D. and A.D. were habitual residents of both Sint Maarten and Saint Martin.[435]

The Third Circuit reversed, holding that the children were habitual residents of Dutch Sint Maarten, a country that was not a signatory to the Hague Convention, and as such, the father's petition must be denied. The court rejected the possibility of having "concurrent" habitual residences, as was mentioned in the *Mozes* footnote.[436]

435. *Id.* at 318 (citations omitted).

436. *Id*. at 323 (quoting Mozes v. Mozes, 239 F.3d 1067, 1075 n.17 (9th Cir. 2001)). The *Didon* court was careful to delineate the meanings of words and phrases meant to signify different factual patterns that might arise when children spend substantial time in two different countries. It notes that

> [t]he authorities on this issue are inconsistent in their usage of terminology. The phrases "concurrent habitual residence," "alternating habitual residence," and "dual habitual residence" are sometimes used interchangeably. However, "concurrent habitual residence" refers to a situation where a child is habitually resident in two countries *at the same time*, whereas "alternating habitual residence" refers to a distinct situation where a child is moved in between two countries on a regular basis (known as "shuttle custody") such that her habitual residence alternates between those countries. "Dual habitual residence" can be used to refer to either or both situations. For the sake of clarity, we will refer to the phrases "concurrent habitual residence" and "alternating habitual residence" in the manner just described and will not use the term "dual habitual residence."

Didon, 838 F.3d at 316 n.6 (emphasis in original).

III.F.5

Shuttle Custody: Alternate Habitual Residences

"Shuttle custody" cases—cases where children regularly move between parents who live in different countries—are unusual[437] and present challenges for resolving habitual residence questions.[438]

There have been a handful of cases where a child spends nearly equal time in homes across international borders.[439] In *Brooke v. Willis*,[440] the parties agreed to an order of equal custody, half in California, and half in the United Kingdom. After one initial exchange, the mother refused to return the child to the father in England. The court found the United Kingdom to be the child's habitual residence, but in a footnote acknowledged the complexity of this determination: due to "the peculiar circumstances of this case, it is arguable that [the child] is also a habitual resident of the United States under the Convention."[441]

In the majority of cases, courts have concluded that a child can have only one habitual residence.[442] In *De Lucia v. Marina Castillo*,[443] an unmarried couple—both U.S. citizens living in Monza, Italy—had two children. The couple obtained permanent residency for the children so they could easily visit their grandparents in the United States. To maintain their green cards, the children had to spend some part of each year in the United States, and they spent substantial periods of time in Athens, Georgia, with their maternal grandparents. When the children were four and six, the mother ostensibly took the children from Italy for a visit with their grandparents in Georgia, but she did not return to Italy with the

437. Commenting on the issue of children spending equal parts of the year with each parent in different countries, Adair Dyer once noted that "the Hague Convention was not meant to cover this type of situation." Dyer, *supra* note 3.

438. *See* Johnson v. Johnson, 493 S.E.2d 668, 669 (Va. Ct. App. 1997). This case led to substantial litigation both in Sweden and in the United States, including a Hague Convention case that passed through four levels of Swedish courts. The result was that the child was placed in custody limbo, with conflicting custody orders issued by the courts of Sweden and Virginia.

439. *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).

440. 907 F. Supp. 57 (S.D.N.Y. 1995).

441. *Id*. at 61 n.2.

442. Sorenson v. Sorenson, 559 F.3d 871, 873 (8th Cir. 2009) (citing *Silverman II*, 338 F.3d 886, 898 (8th Cir. 2003)); *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, 30 F. Supp. 3d 674 (N.D. Ohio 2014), *aff'd*, 601 F. App'x 345 (6th Cir. 2015); 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).

443. No. 3:19-CV-7 (CDL), 2019 WL 1905158 (M.D. Ga. Apr. 29, 2019).†

children. The father claimed that Italy was the children's habitual residence, but the mother argued that the children had two habitual residences, Italy and the United States. The court granted the father's petition for return of the children to Italy, declining to find that the children had more than one habitual residence. "[M]ost (if not all) U.S. courts share the view that a person has only one habitual residence at a time."[444]

Many of the cases involving shuttle custody resolve the issue of habitual residence by focusing on parental intent. For example, in *Reyes v. Jeffcoat*,[445] 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 a Hague petition was 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 and noted that despite his constant travel, the child led a full and active life in both the United States and Venezuela and was comfortable in both countries.

In *Valenzuela v. Michel*,[446] the mother and father agreed that their twin girls should move from Nogales, Mexico, to Arizona 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 the mother in Mexico and the father in the United States. In March 2011, the father took the children but did not return them to their mother in Mexico. The Ninth Circuit reviewed both domestic and foreign authority, and concluded that the United States was the children's habitual residence for the following reasons: (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 the passage of an appreciable period of time.[447]

But in *Blackledge v. Blackledge*, another shuttle-custody case, the Third Circuit concluded that the intention of the parents was a "probative but not dispositive" consideration in determining the child's habitual residence.[448] The court rejected the argument that an agreement to alternating living arrangements automatically created dual habitual residences. Instead, the court adopted a flexible

444. *Id*. at *4.

445. 548 F. App'x 887 (4th Cir. 2013).

446. 736 F.3d 1173 (9th Cir. 2013).

447. *Id*. at 1179.

448. Blackledge v. Blackledge, 866 F.3d 169, 185–86 (3d Cir. 2017).

interpretation of the notion of habitual residence, one based upon "a fact-specific approach."[449]

III.F.6

No Habitual Residence

When parents have an acrimonious relationship, they often fail to reach reasonable agreements regarding their children. If evidence of parental agreement about a child's habitual residence is required, "the population most vulnerable to abduction [is] the least protected."[450] And in some cases there may be no clear facts establishing habitual residence, as is often the case with infants.[451]

In *Delvoye v. Lee*,[452] the father lived in Belgium and maintained a romantic relationship with the mother, a New York resident. The father maintained an apartment in New York. After the mother became pregnant, she traveled to Belgium on a three-month tourist visa to give birth to the child there, because medical care is free. The mother lived out of her two suitcases until the baby was born. The parties' relationship crumbled, and the mother's visa expired. She took the two-month-old child to New York. Reconciliation attempts failed, and the father filed a petition for the child to return to Belgium. The Third Circuit considered the issue of "whether and when a very young infant acquires a habitual residence."[453] In this case, the demise of the parents' relationship was "contemporaneous with the birth of the child." In such cases, no habitual residence may ever come into existence.[454] A similar situation may arise when a mother is temporarily in a country that is not her habitual residence and gives birth to

449. *Id.* at 186. "[W]e view a parental agreement that a child will split time between the parents' countries of residence as a significant consideration, but as one among others, informing the 'necessarily fact-intensive and circumstantially based' inquiry a court must undertake to determine whether a child's move was accompanied by a 'degree of settled purpose.' Approaching the inquiry in this way, we respect both our precedent and Congress's instruction that we pay heed to 'the need for uniform international interpretation of the Convention.'" *Id.* (citations omitted).

450. Taglieri v. Monasky, 907 F.3d 404, 410 (6th Cir. 2018).

451. *See, e.g.*, *In re* A.L.C., 607 F. App'x. 658, 662–63 (9th Cir. 2015) (Sweden could not have been child's habitual residence since the child never lived there. "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.'") (citing *Holder II*, 392 F.3d 1009, 1020 (9th Cir. 2004) (quoting Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 89, 112 (1999)).

452. 329 F.3d 330 (3d Cir. 2003).

453. *Id.* at 333.

454. *Id.*

the child there. The child will not acquire a habitual residence "until living in a country on a footing of some stability."[455]

The court affirmed the district court's ruling that the father failed to prove that Belgium was the child's habitual residence. But the court also did not determine that the child's habitual residence was the United States. The only question before the court was whether the father proved that Belgium was the child's habitual residence; it was not incumbent upon the court to make a finding that another country was the child's habitual residence.[456]

In *Nunez-Escudero v. Tice-Menley*,[457] an American mother and Mexican father lived in Mexico until their child was six weeks old. The mother separated from her husband and took the child to Minnesota. In response to the father's petition for return, the 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) that she had no intention of remaining permanently in Mexico herself; and (2) that 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 habitual residence.

III.F.7

Settled Versus Acclimatized

The terms *settled* or *acclimatized* are terms of art that are used in two different contexts. Article 12 of the Convention specifically uses the term *settled* as part of the delay defense.[458] *Settled* and *acclimatized* are also used by courts that

455. *Id*. at 334 (quoting E.M. Clive, *The Concept of Habitual Residence*, 1997 Jurid. Rev. 137, 146).

456. *Delvoye*, 329 F.3d. at 551. *But see* Aly v. Aden, No. 12-1960 (JRT/FLN), 2013 WL 593420 (D. Minn. Feb. 14, 2013)† (child lived in Canada for eight months before removal to the United States plus other facts indicated a settled intent to live in Canada).

457. 58 F.3d 374 (8th Cir. 1995).

458. "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, art. 12.

are analyzing a child's habitual residence.[459] The concepts seem to be nearly the same, for example, *a child has become settled in the child's new environment* versus *a child has acclimatized to the new environment*. However, the concepts are distinct, and they are not interchangeable in the lexicon of the 1980 Convention.

Two factors must be established under Article 12's delay defense: (1) that more than one year has elapsed from the time of the wrongful removal or retention; and (2) that the child has become settled in the child's new environment. Settlement 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 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 child's return.

Early cases invoked the issue of settlement in connection with habitual residence,[460] relying on language from *In re Bates*[461] that defined habitual residence as a move to a specific location with a "settled purpose." The "settled purpose" language has found its way into every circuit's consideration of habitual residence.[462] It is relied on particularly in the Third, Sixth, and Eighth Circuits,[463] which analyze the issue of settlement from the child's perspective. Although the

459. *E.g.*, Miller v. Miller, No. 1:18-CV-86, 2018 WL 4008779, at *12 (E.D. Tenn. Aug. 22, 2018)† ("various aspects of a child's life may be pertinent to reaching a decision as to whether a child has become acclimated to and settled in a particular country"); Guzzo v. Cristofano, 719 F.3d 100, 109 (2d Cir. 2013) ("if the evidence shows that a child is settled into (or, 'acclimated' to) the new environment"); McManus v. McManus, 354 F. Supp. 2d 62, 67 (D. Mass. 2005) (children had become settled and acclimated in Northern Ireland).

460. *Friedrich I*, 983 F.2d at 1403; Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995); Feder v. Evans-Feder, 63 F.3d 217, 223–24 (3d Cir. 1995).

461. [1989] EWHC (Fam) CA 122/89 (Eng.).

462. Sanchez-Londono v. Gonzalez, 752 F.3d 533 (1st Cir. 2014); Ermini v. Vittori, 758 F.3d 153 (2d Cir. 2014); Blackledge v. Blackledge, 866 F.3d 169, 172 (3d Cir. 2017); Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009); Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012); Ahmed v. Ahmed, 867 F.3d 682, 687 (6th Cir. 2017); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Cohen v. Cohen, 858 F.3d 1150, 1153 (8th Cir. 2017); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001); Watts v. Watts, 935 F.3d 1138, 1143 (10th Cir. 2019); Kanth v. Kanth, 232 F.3d 901 (10th Cir. 2000); Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004); Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1220 (D.C. Cir. 2019).

463. "[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) (quoting *Feder*, 63 F.3d at 224); "[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 III*, 600 F.3d 912, 918 (8th Cir. 2010).

various circuits have refined their own definition of habitual residence, *Bates* is still cited for its "settled purpose" language[464] and for the importance of maintaining a flexible definition for habitual residence.[465]

Acclimatization is significant to habitual-residence analysis. A child could acquire a new habitual residence, despite contrary mutual parental intent, by becoming so accustomed to the new environment that the residence becomes "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.[466]

However, acclimatization is not dependent on a particular period of time or a typical pattern of adjustment. The "degree" of acclimatization is a factor that might, or might not, override the issue of parental intent. For example, in *Mota v. Castillo*,[467] 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 [the child's] return to the family's intended residence."[468]

Stated in different terms, the court in *Mozes v. Mozes*,[469] observed that

> [t]he 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.[470]

Monasky rejected the argument that parental intent is dispositive to a determination of habitual residence. If a child has become so acclimatized to that child's environment that removal would seriously disrupt the child's life, the broad inquiry invited by *Monasky* counsels courts to assess all evidence that

464. Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2011); Sorenson v. Sorenson, 559 F.3d 871, 874 (8th Cir. 2009); *Tesson*, 507 F.3d at 989; *In re* Adan, 437 F.3d 381, 392 (3d Cir. 2006); *Ruiz*, 392 F.3d 1247; *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).

465. 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*, 239 F.3d at 1082.

466. *Sanchez-Londono*, 752 F.3d at 539 (internal citation omitted); *Accord Ruiz*, 392 F.3d 1247; Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005).

467. 692 F.3d 108 (2d Cir. 2012).

468. *Id.* at 116 (quoting *Gitter*, 396 F.3d at 134).

469. 239 F.3d 1067 (9th Cir. 2001).

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

the child has established a "home." However, when the case involves infants or very young children,[471] "acclimatization is rarely, if ever, a significant factor,"[472] *Monasky* observed, noting that very young children have a limited ability to relate to their surroundings.[473]

A habitual residence may be established even if a child is abducted to the new country. In *Moreno v. Zank*,[474] the mother abducted the parties' child from the United States to Ecuador in 2009, in violation of a Michigan custody order. Although the father began the administrative process for return of the child from Ecuador, he failed to follow through with filing a case in Ecuador for the child's return under the 1980 Convention. In 2016, the mother permitted the child to travel to the United States to visit her father for the summer. The father failed to return the child as previously agreed by the parties. In 2017, the mother petitioned for the return of the child to Ecuador. The district court acknowledged that the child lived in Ecuador between the ages of three and ten, and that she "had been acclimatized to Ecuador and was settled there." Nevertheless, the district court denied the mother's petition for return based upon the illegality of abducting the child to Ecuador in 2009. The court concluded that the child's habitual residence remained in the United States.

The Sixth Circuit reversed. The child's acclimatization to Ecuador, coupled with the father's failure to initiate or follow through with established procedures under the 1980 Convention required a finding that the child's habitual residence was Ecuador. The father's self-help actions foreclosed consideration of the Convention's safeguards for a child's welfare, including time limits under Article 12. Reabduction of a child involves the same threats to the child's well-being when the child has acclimatized to the abducted-to country.

471. The Third Circuit, in Whiting v. Krassner, 391 F.3d 540 (3d Cir. 2004), was of the opinion that a four-year-old child has the ability to "develop a certain routine and acquire a sense of environmental normalcy," whereas an eighteen-month-old child does not. *Id.* at 550. Tsai-Yi Yang v. Fu-Chiang Tsui (*Yang II*), 499 F.3d 259, 273 (3d Cir. 2007) (a five-year-old child is not a "very young child" for purposes of acclimatization); Jenkins v. Jenkins, 569 F.3d 549, 556 (6th Cir. 2009) (three-year-old child became acclimated); *Holder II*, 392 F.3d 1009, 1021 (9th Cir. 2004) (court focused on the total time the parents were in Germany with their two young children, and determined that six-year-old had insufficient time to acclimate in the new country, and "it is practically impossible for a newborn child . . . to acclimatize independent of the immediate home environment of the parents"); Neergaard-Colón v. Neergaard, 752 F.3d 526 (1st Cir. 2014) (children, aged one and two; cannot conclude that the children's habitual residence was in a particular place).

472. *Neergaard-Colón*, 752 F.3d at 533 (citing *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").

473. Monasky v. Taglieri, 140 S. Ct. 719, 724 (2020) ("An infant, however, is 'too young' to acclimate to her surroundings." (citation omitted)).

474. 895 F.3d 917 (6th Cir. 2018).

III.F.8

Coercion and Physical Abuse

Coercion of a child or caretaker to remain in a location will preclude a finding of habitual residence. Courts recognizing this have found serious intimate partner violence, concealment of the purpose of a visit, and restraint of the movement of the other parent by confiscation of passports.[475] Coercion cannot be deemed the "voluntary conduct" necessary to establish a new habitual residence.[476] The Supreme Court noted this principle in *Monasky*: "But suppose, for instance, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus."[477]

In re Ponath[478] is a frequently cited case. The district court found that a child's continued presence in Germany was the product of the father'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 the father's parents. Despite the mother's desire to return to the United States, she and the child were prevented from doing so by the 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.[479]

475. Loftis v. Loftis, 67 F. Supp. 3d 798, 808 (S.D. Tex. 2014) (citing Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009)); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1055–57 (E.D. Wash. 2001); *In re* Ponath, 829 F. Supp. 363, 368 (D. Utah 1993).

476. *See 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).

477. *Monasky*, 140 S. Ct. at 727.

478. 829 F. Supp. 363 (D. Utah 1993).

479. *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.

In *Koch v. Koch*,[480] the father did not deny a history of spousal abuse, but he argued that the issue was irrelevant to a determination of the habitual residence of the child. The Seventh Circuit disagreed, observing in dicta that physical attacks "have some relevance in some situations to determine habitual residence issues."[481]

In *Grano v. Martin*,[482] the father was a demeaning, domineering, overbearing, and emotionally abusive spouse. The couple lived in Spain, but the mother wanted their child to be born in New York. She gave birth in New York and returned to Spain in October 2017. The mother claimed that her return to Spain was on the condition that the father stop his abusive behavior. A year later, the mother brought the child to New York and did not return to Spain. She argued that she was a victim of coercive control and could not have shared an intent to make Spain the child's habitual residence, and that a coerced residence is not a habitual residence within the meaning of the Hague Convention. The parties produced "thousands of messages" focused on the mother's return to Spain in October 2017.[483] The Court found that at the time of the child's birth, the mother and father agreed that the mother would return with the child to Spain, and there was no evidence indicating that the plan was conditional.

Grano was decided after *Monasky*. The court found that this was not a case of a coerced residence after considering all of the circumstances bearing on the issue. Although the mother was the victim of coercive control, her decision to return to Spain was voluntary.[484]

Coercive conduct cannot retroactively nullify a previous change in a child's habitual residence that was otherwise established without coercion. In *Silverman v. Silverman*,[485] the Eighth Circuit ruled that coercive conduct that takes place after children are removed is not relevant when assessing the children's removal from a country where they earlier established habitual residence.[486]

480. 450 F.3d 703 (7th Cir. 2006).

481. *Id.* at 719. *See also* Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045 (E.D. Wash. 2001), where the court, citing *Ponath*, 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 to establish a new habitual residence.

482. 443 F. Supp. 3d 510 (S.D.N.Y.), *aff'd*, 821 F. App'x 26 (2d Cir. 2020).†

483. *Grano*, 443 F. Supp. 3d at 523.

484. *Id.* at 540. *See also In re* Marriage of Jimenez & Gomez, No. H044519, 2018 WL 6304211 (Cal. Ct. App. Dec. 3, 2018)† (no evidence that father attempted to coerce mother to stay or detain her).

485. 338 F.3d 886, 900 (8th Cir. 2003).

486. *Id.* at 900 (The mother's "subsequent, post-move desire to return to the United States, and the finding by the district court that she was subjected to coercion and abuse beginning two months after her arrival, does not change the legal conclusion that the habitual residence of the children changed from Minnesota to Israel.").

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*,[487] during the course of a bitter separation and divorce action in Greece, a court order prohibited the mother, a U.S. citizen, from removing the child from Greece. In violation of the order, the mother abducted the child to the United States, where the child and mother had visited frequently during previous years. The mother claimed that the child could not have acquired a habitual residence in Greece because she, the mother, was 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.

III.F.9

Immigration Status

The question of a child's immigration status can arise in two contexts: acclimatization for habitual residence and settlement as part of the delay defense under Article 12.

Courts have included immigration status as one of the factors that may bear on the acquisition of a habitual residence because it may impact acclimatization.[488] In general, courts have not treated a child's or a child and a parent's immigration status as a categorical disqualifier in habitual residence determinations. In *Mozes v. Mozes*,[489] for example, the court observed that "[w]hile 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."[490] Similarly, in *Seaman v. Peterson*[491] the Eleventh Circuit noted that "[d]etermining a child's habitual residence thus requires an assessment of the observable facts on the ground, not an inquiry into the child's or parents' legal status in a particular place."[492] At least one court has observed that no courts have relied exclusively upon immigration status to reject a country as a child's habitual residence.[493]

487. 6 S.W.3d 843 (Ky. Ct. App. 1999).

488. *Lozano I*, 697 F.3d 41, 57 (2d Cir. 2012), *aff'd by Lozano III*, 572 U.S. 1 (2014). *See* discussion *supra* section III.F.7 (concerning whether a child has become settled versus acclimatized); *see supra* section III.F.3.d (listing factors that might influence the acquisition of a habitual residence).

489. 239 F.3d 1067, 1082 (9th Cir. 2001) (citing E.M. Clive, *The Concept of Habitual Residence*, 1997 Jurid. Rev. 137, 147), *abrogated on other grounds by* Monasky v. Taglieri, 140 S. Ct. 719 (2020).

490. *Accord In re* B. del C.S.B., 559 F.3d 999, 1010–11 (9th Cir. 2009) (unlawful immigration status does not preclude a finding that a child is a "habitual resident" of a country within the meaning of Article 3).

491. Seaman v. Peterson, 766 F.3d 1252, 1260 (11th Cir. 2014).

492. *Id.* at 1260 (quoting Redmond v. Redmond, 724 F.3d 729, 743 (7th Cir. 2013)).

493. Thompson v. Gnirk, No. 12-cv-220-JL, 2012 WL 3598854, at *14 (D.N.H. Aug. 21, 2012).†

In a district court case in Arizona,[494] the father sought a pretrial ruling that the state of Arizona could not be the habitual residence of the children. He alleged that the mother entered the United States with the children with a student visa. The immigration forms that the mother signed indicated that she was in the United States temporarily. The court declined summary adjudication, noting that the mother's immigration status did not relieve the court of the responsibility to determine the habitual residence of the children—a matter of mixed fact and law that required an analysis of all of the facts in the case.[495]

Some courts, however, view immigration status in a more restrictive manner. In *In re Ahumada Cabrera*,[496] the court noted the child's frequent changes of residence and her immigration status. "[I]t is difficult to find that the child has any settled purpose whatsoever."[497] In *Alonzo v. Claudino*,[498] the court found that the mother and child's immigration status precluded the child's settlement and the degree of settled purpose that is required to establish a habitual residence.[499] In *Carrasco v. Carrillo-Castro*,[500] the court held that the father's immigration status affected the stability of a residence in the United States, even though the child himself was a U.S. citizen.[501] In *Miltiadous v. Tetervak*,[502] the court concluded, "Even when significant connections to the United States are proven, the child's connections are undermined if neither the abducting parent nor the child are legal residents of the United States."[503]

494. Kline v. Kline, No. CV 06-2844-PHX-SRB, 2009 WL 10673062 (D. Ariz. June 2, 2009).†

495. *Id.* at *3. *Accord* Tamman v. Tamman, No. 08-00155 DAE-LEK, 2008 WL 4527339, at *8 (D. Haw. Oct. 8, 2008)† ("Habitual residence should not be determined through the technical rules governing legal residence or common law domicile but, rather, by the facts and circumstances of each case." (citing *Friedrich I*, 983 F.2d 1396, 1401 (6th Cir. 1993))).

496. 323 F. Supp. 2d 1303 (S.D. Fla. 2004). *Accord* Alanis v. Reyes, 230 F. Supp. 3d 535 (N.D. Miss. 2017) (immigration status and "unsteady and temporary nature of the living arrangements in the United States").

497. *Id.* at 1311.

498. No. 1:06CV00800, 2007 WL 475340 (M.D.N.C. Feb. 9, 2007).†

499. *Id.* at *5 ("It is impossible to be settled when you are subject to arrest and deportation at any time.").

500. 862 F. Supp. 2d 1262 (D.N.M. 2012).

501. *Id.* at 1273–74.

502. 686 F. Supp. 2d 544, 552 (E.D. Pa. 2010).

503. *Id.* at 552 (citing *In re* Hague Child Abduction Application, No. 08-2030-CM, 2008 WL 913325, at *11 (D. Kan. Mar. 17, 2008)† and *In re* B. del C.S.B., 525 F. Supp. 2d 1182 (C.D. Cal. 2007)). Note, however, that the district court's holding in this regard was reversed by the Ninth Circuit in *In re* B. del C.S.B., 559 F.3d 999 (9th Cir. 2009).

III.F.10

Military Families

A family's military commitments may impact the status of a child's habitual residence, often due to the nature of changing orders, deployments, and transfers.[504] The military may become involved in the case through the office of the Judge Advocate General[505] or through the command structure.[506]

Some cases involve U.S. service members who have been posted abroad for significant periods of time. Courts must balance the specific duration of the military commitment against the period of time that might support a finding of acclimatization.

In *Friedrich v. Friedrich* (*Friedrich I*),[507] the Sixth Circuit found that the determination of habitual residence was a "simple case" given that the child lived exclusively in Germany until he was removed by his mother, a member of the U.S. military. Although the child was a U.S. citizen and the mother planned to return to the United States at the conclusion of her military service, the child's habitual residence was Germany.[508]

In *Coe v. Coe*,[509] the father deployed to Afghanistan as a military contractor. During his deployment, the mother moved with their child to her native country, Korea. The child was in Korea for three years without any objection from her father. The court determined that the child was physically present in Korea long enough to become acclimatized.[510]

504. "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 II*, 392 F.3d 1009, 1016 (9th Cir. 2004).

505. The U.S. Department of State's Bureau of Consular Affairs works with Judge Advocate General (JAG) offices in the military. JAG officers may be able to offer general guidance and information about custody, adoption, and international parental child abduction. *See* Baker v. Baker, No. 3:16-cv-1445, 2017 WL 314703 (M.D. Tenn. Jan. 23, 2017)† (JAG provided advice to service member).

506. Cunningham v. Cunningham, 237 F. Supp. 3d 1246, 1255 (M.D. Fla. 2017), *aff'd*, 697 F. App'x 635 (11th Cir. 2017).

507. 983 F.2d 1396 (6th Cir. 1993).

508. *Id.* at 1401. *See also In re* Marriage of Witherspoon, 66 Cal. Rptr. 3d 586, 592 (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 childcare provider while mother was deployed to Iraq).

509. 788 S.E.2d 261 (Va. Ct. App. 2016).

510. *Id.* at 270.

In *Harkness v. Harkness*,[511] the family lived in the United States for three years before moving to Germany for the father's deployment. The court found that Germany was the children's habitual residence, concluding that the parents had not solidified plans to leave Germany or settle in the United States.[512]

> 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* . . . 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."[513]

The very nature of military deployments contributes some uncertainty to the plans that military families might make. The circumstances and location of the service member's family may have a bearing on the question whether a habitual residence has changed. In some cases, children may live in a country close to a military base where they had no previous contacts. In other cases, the spouse and children of a military member may separately relocate to a place that is far from the service member's duty station. The Supreme Court's decision in *Monasky v. Taglieri*[514] will certainly control the approach to habitual residence determinations involving military families. *Monasky*'s "totality of circumstances" analysis, as opposed to ones that focus on parental intent or the past experiences of the child, [515] requires courts to explore a broad range of details of a family's situation—an inquiry especially appropriate in the case of military families, where the particulars of the residential arrangements can be both varied and fluid.

511. 577 N.W.2d 116 (Mich. Ct. App. 1998).

512. *Id.* at 123.

513. *Id.* (citations omitted).

514. 140 S. Ct. 719 (2020).

515. *See, e.g.*, *Holder II*, 392 F.3d 1009, 1011 (9th Cir. 2004) (father's four-year assignment to Germany was conditional for a specific period of time and as such was not evidence of an intent to alter the previous habitual residence in the United States); Chafin v. Chafin, 742 F.3d 934 (11th Cir. 2013), *on remand from* Chafin v. Chafin, 568 U.S. 165 (2013) (mother's temporary relocation with child to United States for limited period was insufficient to show she intended to alter the child's long-term residence in Scotland); Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012) (mother's residence in U.K. during father's deployment to Afghanistan did not demonstrate the parent's intent to abandon prior habitual residence in the United States); Yocom v. Yocom, No. 6:05CV590ORL28DAB, 2005 WL 1863422 (M.D. Fla. Aug. 5, 2005)† (facts surrounding family's relocation to Germany for father's three-year assignment showed parties' intent to establish Germany as new habitual residence); Daunis v. Daunis, 222 F. App'x 32 (2d Cir. 2007)† (relying on parental intent approach, Second Circuit found United States remained habitual residence despite fact that during father's assignment by the U.S. Navy the children principally lived in Italy for three years); Levesque v. Levesque, 816 F. Supp. 662 (D. Kan. 1993) (parents' mutual agreement to allow their child to relocate to Germany for an indefinite period was sufficient to establish habitual residence). *See* discussion of differing circuit views pre-*Monasky*, *supra* section III.F.2.

A challenging question of habitual residence arose in *Cunningham v. Cunningham*.[516] The mother, a native of Japan, met the father over the internet while he was stationed in Okinawa. They married, with neither partner fluent in the language of the other. The marriage was fraught with difficulties from the start. The mother became pregnant and, intending to live permanently in the United States, followed the father when he transferred to Maryland. While there, she experienced medical difficulties. With the assistance of the U.S. Army, she returned to Japan to deliver the child, with the understanding that she would not return to the United States.[517] The couple decided to attempt a reconciliation, and after the child's birth, the mother returned to the United States. The reconciliation was not successful. During a trip to see the father's family in Florida, an altercation arose between the father, the mother, and the paternal grandmother. The mother was jailed for domestic violence, and a state court ordered the child into the custody of the paternal grandmother. A later order gave the father full custody.

The mother's petition for return was granted on the basis that the child's habitual residence was Japan, and that the mother's return to the United States was conditioned upon a mutual understanding between the parents that if reconciliation failed, the mother would return to Japan with the child. Despite the passage of nearly a year since the child was detained by the grandmother in Florida, the court found that the child was not settled.[518]

In *Shealy v. Shealy*,[519] the mother was a soldier in the U.S. Army. When the parties' child was one year old, the mother was assigned to a three-year tour in Germany, and the family moved there. When the marriage deteriorated, the mother filed divorce proceedings in Germany, requesting sole custody of the child. The German court issued a decision granting temporary custody of the child to the mother, with a ne exeat provision that prohibited removal of the child from Germany except under one condition: that it "should become necessary for military reasons."[520] Seven months later, the mother requested a change in her assignment (admittedly for the purpose of avoiding further involvement from the German family court), and she was transferred to Fort Collins, Colorado. The German courts ultimately ruled that the mother's conduct did not violate the ne

516. 237 F. Supp. 3d 1246, 1253 (M.D. Fla.), *aff'd*, 697 F. App'x 635 (11th Cir. 2017).

517. While it may have been the parents' joint intent to raise the child in the United States, the problem was that by the time mother delivered the child, the relationship between mother and father was so damaged that the intent never came to be implemented. The role of the Army in paying for mother's return trip to Japan was based on the assumption that mother and unborn child would not be returning to the United States. *Cunningham*, 237 F. Supp. 3d. at 1266.

518. *Id*. at 1282.

519. 295 F.3d 1117 (10th Cir. 2002).

520. *Id*. at 1120.

exeat order. The father's petition to return the child to Germany was denied. The district court found that custody rights included the right to remove the child from Germany without the father's consent if her reassignment became "necessary for military reasons." Relying on testimony from an expert on military reassignments, the district court concluded that the mother's transfer from Germany to Fort Collins was a military necessity, so the removal of the child was in accordance with the orders of the German family court. This ruling was affirmed by the Tenth Circuit.[521]

III.G

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 during the pendency of the case, the Convention does not require the child to be returned.[522]

Both the *Pérez-Vera Report* and the *Text and Legal Analysis* interpret the age limit as jurisdictional.[523] In *Mohamud v. Guuleed*,[524] a mother petitioned for the return of her child to the United Kingdom. During the course of the court proceedings, the child turned sixteen. The mother argued that the return remedy would apply if the petition was filed while the child was still under the cutoff age. The court disagreed.

> I see no reasonable interpretation of the convention that would allow the court to continue to exercise jurisdiction now that the child has attained the age of sixteen years. Article 4 states unequivocally "[t]he convention shall cease to apply when the child attains the age of sixteen years." If the drafters intended that the child's age at the time the petition is filed were to control, the language could easily have so indicated. Here, notwithstanding that the petition was filed in mid-February, the child has now reached the age of sixteen and therefore the court lacks jurisdiction under the Convention to order her return.[525]

521. *Id*. at 1123.

522. Text & Legal Analysis, *supra* note 45, at 10,504.

523. "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 18, at 450, ¶ 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 45, at 10,504.

524. No. 09-C-146, 2009 WL 1229986 (E.D. Wis. May 4, 2009).†

525. *Id*. at *3.†

The court in *In re R.P.B.* held that the sixteen-year-old cutoff also applies to petitions to enforce access rights.[526] The father filed a petition for the enforcement of access rights he had been granted by a Brazilian court. The court ordered that the father could visit his son in the United States, but it denied the father's request to send the child to Brazil for visitation. The mother challenged the ruling, arguing that the court lacked jurisdiction to make such an order since the child had already turned sixteen. The court of appeals agreed: "When the juvenile court discovered that it no longer had jurisdiction over Father's petition when R.P.B. attained the age of 16, the juvenile court had no authority to take any further action on Father's petition other than to dismiss it."[527]

The Convention does not restrict the application of *other* laws that may provide remedies for children over the age of sixteen. Article 29 allows a court to consider a petition for return, or to enforce access rights, under the aegis of laws such as the UCCJEA[528] that apply to children over the age of sixteen.

The sixteen-year-old age limit in the Convention has not presented interpretive problems for courts.[529] However, this provision has posed some practical challenges where a return order applies to siblings under the age of sixteen, but not to another sibling who is over the age of sixteen.[530] 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.

526. *In re* R.P.B., 2010-Ohio-322 (Ohio Ct. App. Feb. 1, 2010).

527. *Id.* at ¶ 14.

528. *See, e.g.*, Ivaldi v. Ivaldi, 685 A.2d 1319, 1321 (N.J. 1996).

529. *See, e.g.*, Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008), *abrogated on other grounds by Lozano III*, 572 U.S. 1 (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 (9th Cir. 2009)† (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); *Guuleed*, 2009 WL 1229986† (denying return where petition filed before child reached sixteen, but was sixteen at the time the hearing occurred).

530. *But see* Velozny *ex rel.* R.V. v. Velozny, No. 21-1993-cv, 2021 WL 5567265, at *3 (2d Cir. Nov. 29, 2021) (three children: one not sufficiently mature to express an opinion, another preferred to remain in United States, the third child's opinion may have amounted to an objection to return to Israel. The district court ruled that even if the children were sufficiently mature to object to their return to Israel, it would nevertheless decline to sustain the mature child's exception to return so that all the children could be kept together. The Second Circuit approved the exercise of the district court's discretion whether to apply the mature child's objections to return. The appellate court noted that one child was too young to express a mature opinion, and the remaining two children disagreed on whether they objected to return to Israel. The refusal to apply the defense of a mature child's objection to return based upon the desire to keep all the children together was "well within the district court's discretion in Hague Convention Proceedings.").

III.H

Proof of Prima Facie Case and Burden Shifting

III.H.1

Mandatory Return

A child must be returned if a prima facie case is proven and the wrongful removal or retention took place within twelve months of the commencement of the proceedings. The duty to return is mandatory.[531] The first sentence of Article 12 provides that

> [w]here 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.

All relevant authorities, including case law, are in agreement that the obligation to return is mandatory unless it is excused by proof of an exception.[532] ICARA states, "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."[533] When discussing the obligation to return a child, the *Pérez-Vera Report* states that it is "compulsory,"[534] that courts are "obliged to order [the child's] return"[535] and "must order" it.[536]

531. Abbott v. Abbott, 560 U.S. 1, 9 (2010) (The Convention's central operating feature is the return remedy. When a child under the age of sixteen has been wrongfully removed or retained, the country where the child has been transported must "order the return of the child forthwith," unless certain exceptions apply.); Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995) (return is mandatory where child has been wrongfully retained); England v. England, 234 F.3d 268, 270 (5th Cir. 2000) (mandatory return); Navani v. Shahani, 496 F.3d 1121, 1124 (10th Cir. 2007) (mandatory return); *In re* Marriage of Condon, 73 Cal. Rptr. 2d 33 (Cal. Ct. App. 1998) (return under mandatory provisions of the Hague Convention).

532. Walsh v. Walsh, 221 F.3d 204, 221 (1st Cir. 2000) (return of the child is not mandatory if grave risk is shown); *Yang II*, 499 F.3d 259, 279 (3d Cir. 2007) (age and maturity exception).

533. 22 U.S.C. § 9001(a)(4).

534. Pérez-Vera Report, *supra* note 18, at 458, ¶ 106.

535. *Id*.

536. *Id*. at 459, ¶ 108.

Once a prima facie case is made out, the burden of proof shifts to the abductor to prove the existence of an exception.[537] The Convention only requires the abductor to prove a single exception to defeat the mandatory return.[538]

III.H.2

Shifting Burden of Proof

ICARA provides that "[c]hildren 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."[539] Once a party has satisfied the burden of proving a prima facie case for return of the child, the burden shifts to the responding party to establish an exception to the return.[540]

The failure to assert defenses, or unreasonable delay, may foreclose a respondent from presenting or prevailing on those defenses. In *Leon v. Ruiz*,[541] the respondent did not assert her affirmative defenses until opening statements at trial. The court ruled that the defenses failed because of the delay and prejudice to the petitioner.[542]

537. Berenguela-Alvarado v. Castanos, 950 F.3d 1352, 1360 (11th Cir. 2020) ("[O]nce a petitioning parent has established a prima facie case of wrongful retention/removal under the Hague Convention, the burden shifts to the retaining/removing parent to prove one or more affirmative defenses—without proof of one of those defenses, the child must be returned to the petitioning parent.").

538. An unfortunate phrasing of this principle in ICARA caused some ambiguity to surface as to whether a respondent must prove more than one defense. The issue arises over the language in 22 U.S.C. § 9003(e)(2) relating to "Burdens of proof":

> (2) In . . . 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. (emphasis added).

Despite this ambiguous wording, courts have rejected the argument that more than one defense is needed to establish a grave-risk defense. Monzon v. De La Roca, 910 F.3d 92, 102–03 (3d Cir. 2018). The court recognized that a plain reading of § 9003 seems to indicate that an Article 13(b) or Article 20 defense must be coupled with proof that either (1) the child is settled or (2) petitioner was not exercising custody rights at the time of retention or removal. Nevertheless, the court found the outcome of such an interpretation as a "patently absurd result."

539. 22 U.S.C. § 9001(a)(4).

540. *E.g.*, Pliego v. Hayes, 843 F.3d 226, 229 (6th Cir. 2016); Berenguela-Alvarado v. Castanos, 950 F.3d 1352, 1360 (11th Cir. 2020); West v. Dobrev, 735 F.3d 921, 930–31 (10th Cir. 2013).

541. No. MO:19-CV-00293-RCG, 2020 WL 1227312 (W.D. Tex. Mar. 13, 2020).†

542. *Id*. at *6.

However, a respondent does not bear the burden of disproving an element of a petitioner's case in chief if the petitioner has failed to adequately present it. In *Berenguela-Alvarado v. Castanos*,[543] a Chilean mother allowed her child to travel to the United States for a two-month stay with her father. The mother purchased a round-trip ticket for the child, with a scheduled return to Chile. The father pressured the mother to let their child remain with him permanently. She agreed to extend the child's visit for a few months, until July 2019, when the father and the child planned to come to Chile for a visit. Instead of returning the child to Chile, the father had a consent agreement drafted that would give him custody and allow the mother to see the child in Chile during the summers. The mother signed the agreement, believing it was the only way to ensure that the father would bring the child back to Chile. Instead, the father retained the child. The mother filed a petition for return.

At trial, the father alleged that the child faced a grave risk if returned to Chile because her mental and physical health would suffer, and she would have a better quality of life in the United States. The mother testified that she signed the consent agreement under duress because she was trying to stall for time to obtain the child's return. The district court denied the mother's petition for return, finding that the father's conduct did not amount to duress, and that the mother consented to the child remaining in the United States.

The Eleventh Circuit reversed, rejecting the district court's findings on duress. The district court acknowledged that if the mother had been threatened by the father as she claimed, "it would amount to duress."[544] However, the district court concluded that the mother "had not shown by a preponderance of the evidence that her consent was the product of duress."[545] The Eleventh Circuit ruled that this conclusion erroneously shifted the burden to the respondent-mother, requiring her to negate the father's consent defense.

> [T]he district court improperly—but expressly—shifted the burden *back* to Berenguela-Alvarado on the consent issue, erroneously treating her allegation that she signed the consent letter as a result of Castanos's threat as a formal allegation of "duress" that she had to prove by a preponderance of the evidence. The court's opinion leaves no mistake; it expressly found that "Berenguela-Alvarado ha[d] not shown by a preponderance of the evidence that her consent was the product of duress."[546]

The case was remanded back to the district court for further proceedings consistent with the Eleventh Circuit's opinion.

543. 950 F.3d 1352 (11th Cir. 2020).

544. *Id.* at 1359.

545. *Id.*

546. *Id.* at 1360.

IV
Exceptions to Return

IV.A
Exceptions Generally

The Convention lists six exceptions (defenses) that may be raised against a petition for the return of a child. Under the International Child Abduction Remedies Act (ICARA) different burdens of proof are required depending on the defense proffered.[547]

Preponderance of the evidence:

- *Delay.* More than one year has passed since the wrongful removal or retention occurred, and the child has become settled in the child's new environment.[548]
- *Consent or Acquiescence.* The person seeking return consented or acquiesced to the child's removal or retention.[549]
- *Nonexercise of Custody Rights.* The party seeking return was not exercising rights of custody at the time of the wrongful removal or retention.[550]
- *Objection of the Child.* The child objects to return, where the child has attained a sufficient degree of age and maturity that it is appropriate to take the child's views into account.[551]

547. 22 U.S.C. § 9000(e).

548. Convention, art. 12.

549. *Id.* art. 13(a).

550. *Id.*

551. Although this exception is not included in Article 12 or Article 13's subparagraphs (a) or (b) that set forth all other exceptions, it appears immediately thereafter in the Convention text as follows: "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." A court may find that the child's objection in and of itself is conclusive—it does not have to be coupled with another defense to be sustained. *Blondin IV*, 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022); *see, e.g.*, Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006) (listed as one of the Convention's affirmative defenses); *Danaipour I*, 286 F.3d 1, 14 (1st Cir. 2002) (one of three defenses invoked); England v. England, 234 F.3d 268 (5th Cir. 2000); Custodio v. Samillan, 842 F.3d 1084, 1089 (8th Cir. 2016) (one of several affirmative defenses); Haimdas v. Haimdas, 720 F. Supp. 2d 183, 204 (E.D.N.Y. 2010) (referred to as the "age and maturity defense" or "mature child exception"); *cf.* Sundberg v. Bailey, 293 F. Supp. 3d 548, 558 (W.D.N.C. 2017) (technically not a defense).

Clear and convincing evidence:

- *Grave Risk.* Return of the child would expose that child to a grave risk of harm or place the child in an intolerable situation.[552]
- *Human Rights.* 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.[553]

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. See discussion *infra* at section IV.H.

IV.A.1

Narrow Interpretation of Defenses

U.S. courts have uniformly acknowledged that defenses available under the Convention should be interpreted narrowly.[554] 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."[555] The report explains that the best way to deter illegal child abductions is to refuse to grant them recognition, and that the state that is best situated to decide custody issues is the child's habitual residence. To that end, "a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."[556]

The *Text and Legal Analysis* mirrors Pérez-Vera's interpretation of how to apply exceptions:

> In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had

552. Convention, art. 13(b).

553. *Id.*, art. 20.

554. *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 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 II*, 78 F.3d 1060 (6th Cir. 1996); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995).

555. Pérez-Vera Report, *supra* note 18, at 434–35, ¶ 34.

556. *Id.*

> 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.[557]

U.S. cases have embraced the familiar interpretative axiom that exceptions should not "swallow the rule."[558] But courts have also recognized that there are limits to the narrow-interpretation rule. While acknowledging the mandate of narrow interpretation, the Sixth Circuit in *Taglieri v. Monasky*[559] cautioned that "there is a danger of making the threshold so insurmountable that district courts will be unable to exercise any discretion in all but the most egregious cases of abuse" (this in the context of a grave-risk defense).[560] The Seventh Circuit in *Van De Sande v. Van De Sande*[561]also noted that "[c]oncern with comity among nations argues for a narrow interpretation of the 'grave risk of harm' defense; but the safety of children is paramount."[562]

IV.A.2

Article 18: Discretion to Order Return

Article 18 provides, "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."[563] If the return of a child would further the aims of the Convention, Article 18 confers discretion to return a child even though a defense to return has been proved. The *Text and*

557. Text & Legal Analysis, *supra* note 45; *accord Rydder*, 49 F.3d at 372.

558. Norinder v. Fuentes, 657 F.3d 526, 535 (7th Cir. 2011) ("The respondent must present clear and convincing evidence of this grave harm because any more lenient standard would create a situation where the exception would swallow the rule." (citing Simcox v. Simcox, 511 F.3d 594, 605 (6th Cir. 2007))); Soto v. Contreras, 880 F.3d 706 (5th Cir. 2018) (cautioning against broad interpretation of defenses: "Courts in Hague Convention cases 'must strive always to avoid a common tendency to prefer their own society and culture'; the Hague Convention 'deter[s] child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes.'" (citing Abbott v. Abbott, 560 U.S. 1 (2010)).

559. 876 F.3d 868, 878 (6th Cir. 2017), *aff'd*, 140 S. Ct. 719 (2020).

560. *Id.* at 878 (citing *Simcox*, 511 F.3d 594 at 608).

561. 431 F.3d 567, 572 (7th Cir. 2005).

562. *Id.* at 572. *See also Norinder*, 657 F.3d at 535 ("Because the court in this sort of case is responsible for determining which country's courts should adjudicate the domestic dispute and not resolving the dispute itself, we have stressed that the risk of harm must truly be grave. The respondent must present clear and convincing evidence of this grave harm because any more lenient standard would create a situation where the exception would swallow the rule." (citation omitted)).

563. Convention, art. 18.

Legal Analysis provides that if an Article 12 delay defense is proved, "the court is not obligated to return a child when return proceedings pursuant to the Convention are commenced a year or more after the alleged removal or retention . . . ." The defenses set forth in Articles 13 or 20 are treated the same—"The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies."[564] While the specific terms of Articles 12, 13, and 20 lend themselves to interpretations that return is discretionary, Article 18 of the Convention specifically gives courts discretion to order a child returned to the habitual residence.

The standard of review for assessing a lower court's exercise of discretion under Article 18 is clear error.[565]

Many early cases dealing with the Convention cited the discretion in Article 18[566] only to bolster the theme that defenses under the Convention were to be interpreted narrowly.[567] This discretionary authority was first reviewed by a U.S. court in 2009, in the case of *In re B. del C.S.B.*[568] The Ninth Circuit reversed a district court's finding that a child was not settled because she was in the country in violation of its immigration laws. The Ninth Circuit found that the child was

564. Text & Legal Analysis, *supra* note 45; *Friedrich II*, 78 F.3d 1060, 1067 (6th Cir. 1996) (citing Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995) (American courts have emphasized that "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."). *See also* Asvesta v. Petroutsas, 580 F.3d 1000 (9th Cir. 2009); Garcia v. Pinelo, 808 F.3d 1158, 1167 (7th Cir. 2015) ("This is consistent with the way other courts and the U.S. Department of State have understood the exceptions. They have said that a district court retains discretion not to apply an exception, and that its decision either way is reviewed only for abuse of discretion."); Baran v. Beaty, 526 F.3d 1340, 1345 (11th Cir. 2008) ("These affirmative defenses are to be narrowly construed to effectuate the purposes of the Convention and, even if proven, do not automatically preclude an order of return.").

565. Fernandez v. Bailey, 909 F.3d 353, 363 (11th Cir. 2018) ("Because we conclude that a court may exercise its discretion to order the return of a child notwithstanding finding that an exception to return is met, we review the determination by the district court to return or not to return a child for an abuse of discretion. The abuse of discretion standard is deferential, and 'allow[s] a range of choice for the district court, as long as that choice does not constitute a clear error of judgment.'" (citing United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989))).

566. Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995); *Friedrich II*, 78 F.3d 1060, 1067 (6th Cir. 1996); March v. Levine, 249 F.3d 462, 466 (6th Cir. 2001); *Yang II*, 499 F.3d 259, 278 (3d Cir. 2007) (citing de Silva v. Pitts, 481 F.3d 1279, 1285 (10th Cir. 2007)); Blanc v. Morgan, 721 F. Supp. 2d 749, 765 (W.D. Tenn. 2010).

567. *Feder*, 63 F.3d at 226 ("We note that the exceptions are narrowly drawn, lest their application undermines the express purposes of the Convention. Indeed, the courts retain the discretion to order return even if one of the exceptions is proven"); *Friedrich II*, 78 F.3d at 1067 (a court retains discretion to order return of a child despite the existence of a defense if return would "further the aims of the Convention").

568. 559 F.3d 999 (9th Cir. 2009).

settled within the meaning of Article 12, and her immigration status was not a bar to settlement unless there was an immediate, concrete threat of removal.[569] The court declined to remand the case back to the district court to determine whether the child should be returned to Mexico under Article 18. The child had been settled in the United States for many years, and the abducting mother did not seek to conceal the child from her father. Accordingly, there was "no reason justifying an exercise of discretion under Article 18 to order [the child's] return to Mexico."[570]

In *Friedrich v. Friedrich* (*Friedrich II*),[571] the Sixth Circuit noted that courts retain their discretion to order the return of a child despite the existence of a defense if return under Article 18 would "further the aims of the Convention."[572] Similarly, the court in *De La Riva v. Soto*[573] noted that even if the child had become settled in Florida, the court would have ordered the child returned to Mexico under the authority of Article 18 because the abducting parent did not intend to remain in the United States and was objecting to the child's return only to allow him time to obtain a Florida custody decree. "Respondent has admittedly done precisely what the Hague Convention strives to prevent—retained a child outside of his habitual residence in order to choose the forum for a custody proceeding."[574]

In *Lozano v. Montoya Alvarez* (*Lozano III*),[575] the Supreme Court ruled that the doctrine of equitable tolling did not extend Article 12's one-year limit for filing an application for a child's return. The majority opinion recognized that courts may have the discretion to order return despite the child's settlement, but the Court declined to rule on whether and under what circumstances a court might exercise that discretion.[576] The concurring opinion of Justice Alito, joined by Justices 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.[577] The concurrence also noted that Article 18's discretion was a "far better tool than

569. *Id.* at 1009–10.

570. *Id.* at 1016.

571. 78 F.3d 1060, 1067 (6th Cir. 1996).

572. *Id.* (citing Text & Legal Analysis, *supra* note 45).

573. 183 F. Supp. 3d 1182 (M.D. Fla. 2016).

574. *Id.* at 1201.

575. 572 U.S. 1 (2014).

576. *Id.* at 15 n.5. The majority opinion 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.

577. *Id.* at 18.

equitable tolling" for dealing with concealment cases; when applying their equitable discretion, courts could consider factors other than concealment, such as the strength of the child's contacts with old and new residences.[578] The concurring justices noted possible factors that might influence a court's decision to return a child under Article 18 when a delay defense has been established under Article 12:

> 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 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.[579]

Most cases considering the use of Article 18 discretion have focused on the issues of settlement under Article 12[580] and, to a lesser extent, on the "objections of the child" exception in Article 13.[581] In *Yaman v. Yaman*,[582] the First Circuit held that courts have discretion to order the return of a wrongfully removed child despite the fact that the child had become settled.[583] Similarly, in *Fernandez v. Bailey*,[584] the Eleventh Circuit noted that the language of Article 12 permits, but does not require, a court to order the return of a child, notwithstanding the child's

578. *Id.* at 22.

579. *Id.* at 20.

580. "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." Convention, art. 12, 1st paragraph.

581. "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." Convention, art. 13, 4th paragraph.

582. 730 F.3d 1 (1st Cir. 2013).

583. *Id*. at 20–21.

584. 909 F.3d 353 (11th Cir. 2018) (court, *id*. at 362, referenced the view held by some commentators that the use of the "broad equitable powers" to return conferred by Article 18 might render the Article 12 defense a "dead letter," with the associated problem of taking child custody issues into account in a Hague Convention proceeding). *See* Elizabeth A. Rossi & Brett Stark, *Playing Solomon: Federalism, Equitable Discretion, and the Hague Convention on the Civil Aspects of International Child Abduction*, 19 Roger Williams U. L. Rev. 106, 149 (2014).

settlement.[585] Other courts have considered granting or denying an Article 18 return request as an alternative to a determination that the child was well settled in the new environment.[586] Whether Article 18 is implemented in a given case appears to depend on the fact-specific analysis of the case. No circuit courts have yet adopted a contrary position.[587]

Courts have looked to various factors that may inform their exercise of discretion to order a child's return under Article 18:

- abducting parent's taking steps to sever child's relationship with left-behind parent; failure to disclose child's location; taunting other parent about possession of the child; left-behind parent's inability to visit child[588]
- unreasonable delay in pursuing petition even where child was concealed by abducting parent[589]
- repeated removals[590]
- ongoing legal proceedings in habitual residence, strong ties to habitual residence, reprehensibility of conduct by the abducting parent[591]

585. *Fernandez*, 909 F.3d at 362 ("the circuit courts which have addressed the issue have all held that this language, either standing alone or when read in conjunction with another provision (Article 12, for instance), grants courts the discretion to order the return of a child despite the existence of an exception to return" (citing Custodio v. Samillan, 842 F.3d 1084, 1091 (8th Cir. 2016); Alcala v. Hernandez, 826 F.3d 161, 175 (4th Cir. 2016); Garcia v. Pinelo, 808 F.3d 1158, 1167 (7th Cir. 2015); *Yaman*, 730 F.3d at 18–19; de Silva v. Pitts, 481 F.3d 1279, 1285 (10th Cir. 2007); *In re* B. Del C.S.B., 559 F.3d 999, 1015–16 & n.21 (9th Cir. 2009); March v. Levine, 249 F.3d 462, 474 (6th Cir. 2001); *Blondin IV*, 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022); Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995))). *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 (E.D. Mich. 1997) (suggesting that there may be equitable reasons to order a child returned despite being settled).

586. De La Riva v. Soto, 183 F. Supp. 3d 1182, 1201 (M.D. Fla. 2016); Guevara v. Soto, 180 F. Supp. 3d 517, 530 (E.D. Tenn. 2016); Vite-Cruz v. Sanchez, 360 F. Supp. 3d 346 (D.S.C. 2018).

587. *Cf.* Andres R. Cordova, Comment, *International Law: Honoring the Letter and Spirit of International Treaties*, 27 Fla. J. Int'l L. 441, 448 (2015) (case comment on *Lozano III*, 572 U.S. 1 (2014)).

588. *Vite-Cruz*, 360 F. Supp. 3d at 362.

589. Mohácsi v. Rippa, 346 F. Supp. 3d 295, 326 (E.D.N.Y. 2018).

590. Fernandez v. Bailey, 909 F.3d 353, 364 (11th Cir. 2018) (mother wrongfully removed children twice within five years, noting that multiple abductions are "exceedingly rare") (citing Pliego v. Hayes, No. 5:15-CV-00146, 2015 WL 4464173 (W.D. Ky. July 21, 2015), *aff'd*, 843 F.3d 226 (6th Cir. 2016) (ordering return of child twice abducted by mother) and Mendez-Lynch v. Pizzutello, No. 2:08-CV-0008-RWS, 2008 WL 416934 (N.D. Ga. Feb. 13, 2008)† (same)).

591. Flores Castro v. Renteria, 382 F. Supp. 3d 1123, 1130 (D. Nev. 2019).

- concealment of the child[592]
- child's interest in returning to original country of residence[593]
- child's need for contact with the nonabducting parent[594]
- nonabducting parent's interest in exercising legally entitled custody rights[595]
- the need to discourage inequitable conduct (such as concealment)[596]
- the need to deter international abductions generally[597]

Although courts may exercise their discretion to return a child under Article 18, they have an obligation under the Convention to consider all valid defenses. Otherwise, as the court noted in *Alcala v. Hernandez*,[598] the exceptions to return could be rendered meaningless if a wrongful removal itself was found to be sufficient grounds to invoke the discretion to order a child returned despite the existence of potentially valid defenses.[599] This view was echoed in *Fernandez*,[600] where the court referenced the view held by some commentators that the use of "broad equitable powers" conferred by Article 18 might render the Article 12 defense a "dead letter," with the associated problem of inserting child-custody issues into Hague Convention proceedings.[601]

Courts have rejected the request to invoke Article 18 for a number of reasons. In *Asumadu v. Baffoe*,[602] the Ninth Circuit found that the district court did not abuse its discretion in refusing an Article 18 return, based on a lack of equitable considerations supporting return. In *In re Marriage of Diaz & Villalobos*,[603] the court declined to apply Article 18, concluding that the record established that the children's "interest in settlement . . . was best served by their remaining in San

592. The concurring opinion in *Lozano III*, 572 U.S. 1, 24 (2014), notes that "concealment is a significant factor and should weigh heavily in a court's analysis . . . ."

593. *Lozano III*, 572 U.S. at 20.

594. *Id.*

595. *Id.*

596. *Id.*

597. *Id.*

598. 826 F.3d 161 (4th Cir. 2016).

599. *Id.* at 175.

600. Fernandez v. Bailey, 909 F.3d 353 (11th Cir. 2018).

601. *Id.* at 362 (citing Rossi & Stark, *supra* note 584).

602. 765 F. App'x 200 (9th Cir. 2019).

603. No. D070434, 2017 WL 2628438, at *7 (Cal. Ct. App. June 19, 2017)† (note that rule 8.1115 of the California Rules of Court restricts citation of unreported cases—"an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.").

Diego where their mother, school, activities, extended family, and friends, were located."[604] The court in *Silverman v. Silverman*[605] refused to order an Article 18 return for a child that had reached sixteen years of age. Even though a court may find that a child has become settled within the meaning of Article 12, after evaluating the child's settlement in the context of equitable considerations, the court may conclude that return under Article 18 is appropriate. In *Broca v. Giron*,[606] the mother petitioned for the return of her three children. By the time the matter was tried, the eldest turned sixteen years old and "aged out." The middle child, age fourteen, was determined to be settled by the court. The youngest child's settlement appeared to the court to be marginal, but the court found that the youngest child would suffer significant disruption if he were separated from his siblings, his mother, and the only life that he knew.[607]

Courts have also entertained requests for return under Article 18 in cases involving a child who objects to return. In *Bowen v. Bowen*,[608] the court invoked Article 18 and declined the petition to order the child returned to Ireland, finding that the child demonstrated a "marked degree of maturity" and the child's objections were "grounded in factors that exist independent of" his time in the United States and in the custody of his father. In *Haimdas v. Haimdas*,[609] the court acknowledged its "discretion to order repatriation notwithstanding the applicability of any Hague Convention exception if that would best fulfill the purposes of the Convention" and noted this discretion is particularly relevant in cases involving mature children "because of the potential for undue influence by the person who allegedly wrongfully retained the child."[610]

In *Von Meer v. Hoselton*,[611] the district court found that a child's objection to returning to Italy was the product of undue influence. "District courts may decline to apply a defense where doing so would reward a parent for wrongfully . . . retaining the child[ ] in violation of a Contracting State's custody orders."[612]

604. *Id*.†

605. No. 15-CV-2108-AJB-BLM, 2016 WL 10894424 (S.D. Cal. Jan. 14, 2016).†

606. No. 11 CV 5818(SJ)(JMA), 2013 WL 867276 (E.D.N.Y. Mar. 7, 2013), *aff'd*, 530 F. App'x 46 (2d Cir. 2013).

607. *Broca*, 2013 WL 867276, at *9. The court also cited Blondin v. Dubois (*Blondin III*), 78 F. Supp. 2d 283 (S.D.N.Y. 2000) ("children's relationships with their siblings are the sort of intimate human relationships that are afforded a substantial measure of sanctuary from unjustified interference by the State." (internal citation omitted)).

608. No. 2:13-cv-731, 2014 WL 2154905 (W.D. Pa. May 22, 2014).†

609. 720 F. Supp. 2d 183 (E.D.N.Y. 2010).

610. *Id*. at 204–05 (citing Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603 at 615 (E.D. Va. 2002)).

611. No. CV-18-00542-PHX-JJT, 2018 WL 1281949, at *5 (D. Ariz. Mar. 13, 2018).†

612. *Id*. (citing Custodio v. Samillan, 842 F.3d 1084 (8th Cir. 2016)).

In *Aranda v. Serna*,[613] a district court refused the request for an Article 18 return order, finding that the children, who were ten and eleven, were settled in the United States and objected to returning to Mexico. In addition, there was evidence that one of the children was sexually assaulted in Mexico.[614]

IV.B

Delay of More Than One Year

Article 12 contains two prongs that are necessary to sustain the defense of delay: (1) the party requesting return of the child must have delayed more than one year before "commencing" a proceeding for return, and (2) the child must have become settled in the new environment.

Article 12 provides,

> 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 filing period set forth in the first paragraph above begins to run from the date the wrongful removal or retention occurred. Fixing the date of a wrongful removal is usually a simple matter, since a parent with custody rights will have reasonably accurate knowledge of when those custody rights were violated, but the task of determining the date of a wrongful retention can be more complicated. See the discussion *supra* at section III.D.2.a.

613. 911 F. Supp. 2d 601 (M.D. Tenn. 2013).

614. *Id.* at 616.

IV.B.1

First Prong: Failure to Commence Proceedings Within One Year

U.S. courts have consistently interpreted the term "commencement of proceedings" in Article 12 to mean that an action must be filed in court.[615] An application made to the Central Authority will not suffice.[616] Proceedings for return must also be filed in the court that has jurisdiction where the child is located at the time of the filing.[617] Accordingly, requests made in the habitual residence for the return of the child do not satisfy the "commencement of proceedings" requirement under the Convention.[618]

In *Monzon v. De La Roca*,[619] the father followed accepted procedures for requesting the child's return by filing an application for the child's return with the

615. *Lozano III*, 572 U.S. 1 (2014) ("failure to file a petition for return within one year renders the return remedy unavailable"); 22 U.S.C. § 9003(f)(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."); 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 is uniformly held that the filing of the petition in court commences the judicial proceedings).

616. *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) (At first blush, the *A.V.P.G.* case may seem to be at odds with cases holding that an application to a Central Authority is insufficient to trigger the "commencement of proceedings" requirement. In *A.V.P.G.*, father filed an application with the Belgian Central Authority that was transmitted to the U.S. Central Authority within Article 12's one-year period, but father's petition for return was filed in a Texas court two weeks after the one-year period had run. Meanwhile, mother's parents filed a petition in a Texas county court requesting possession of the children. Before the one-year period ran out, Texas Protective Services (the agency that assumed temporary custody of the children) filed a notice with the Texas trial court giving notice of a pending application for return under the Hague Convention. The Texas Court of Appeals held that the combined action by father consisting of the immediate reporting of the abduction, securing a Belgian court order granting him custody, obtaining an international arrest warrant, commencing proceedings for return through the Central Authorities upon learning of children's location, along with the actions of Protective Services, satisfied the "commencement of proceedings" requirements of Article 12. The Court of Appeals granted father's petition and ordered the children returned to Belgium.).

617. Haimdas v. Haimdas, 720 F. Supp. 2d 183, 197 (E.D.N.Y. 2010); *see also* Stone v. U.S. Embassy Tokyo, No.19-3273 (RC), 2020 WL 4260711, at *3 (D.D.C. July 24, 2020)† (citing Yaman v. U.S. Dep't of State, 786 F. Supp. 2d 148, 154 (D.D.C. 2011)).

618. Matute-Castro v. Jimenez-Ortiz, 15-CV-04568 (DLI)(JO), 2016 WL 8711076, at *7 (E.D.N.Y. Aug. 26, 2016)† (citing *In re* R.V.B., 29 F. Supp. 3d 243, 255 (E.D.N.Y. 2014)).

619. 910 F.3d 92 (3d Cir. 2018).

Central Authority in Guatemala.[620] The application was forwarded to the U.S. Central Authority. Sixteen months later, the father discovered that he was required to file a lawsuit where the child was located. The Third Circuit recognized that the father was diligent in attempting to protect his rights. The court noted that language barriers, lack of legal representation, and uncertainty as to the child's location contributed to the late filing. Nevertheless, the court ruled that notice of intent to have the child returned, that is, an application for return filed with a Central Authority, was insufficient to constitute "commencement of proceedings" as required by the Convention.[621]

IV.B.2

Equitable Tolling Not Available

Equitable tolling is a common-law concept that prevents actions from being time-barred by a statute of limitations. Equitable tolling typically applies as a remedy so that offending persons may not profit by their own wrongful conduct that prevents would-be petitioners from promptly asserting their legal rights.[622] A number of U.S. courts in Convention cases have invoked equitable tolling to deny Article 12 delay defenses.[623] In these cases, tolling was applied because the delay in petitioning for the return of a child was in whole or in part because the abducting parent concealed the child. Other courts, however, have reasoned that because Article 12 is not a true statute of limitations, equitable tolling is not available to extend the one-year period.[624]

The Supreme Court granted certiorari in *Lozano v. Montoya Alvarez* (*Lozano III*)[625] to resolve this circuit split. In its unanimous 2014 decision affirming the Second Circuit,[626] the Court held that equitable tolling is not available even when the one-year period in Article 12 expires because of an abductor's successful concealment of the child from the left-behind parent. The court viewed the application of equitable tolling in Hague cases as "fundamentally a question

620. *Id.* at 96. *See* explanation of process for commencing an administrative return, *supra* section I.B.3.

621. *Monzon*, 910 F.3d at 96.

622. *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).

623. 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).

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

625. 572 U.S. 1 (2014), *cert. granted by* Lozano v. Alvarez (*Lozano II*), 570 U.S. 916 (2013).

626. *Lozano I*, 697 F.3d 41.

of statutory intent."[627] The concept of equitable tolling was not part of the legal background of the original signatory nations to the Hague Convention and was not a concept that the signatory nations intended to be incorporated within the structure of the treaty.

The Court acknowledged that in absence of equitable tolling, abducting parents might be rewarded by successfully concealing children. But the Convention's goal to deter abductions does not apply "at any cost," given that the child's interest in remaining in a settled environment may outweigh the benefits of ordering a return. The Court also observed that abducting parents would not necessarily gain an advantage by concealing a child and "running out the clock" on the one-year period. American and sister-state courts have found that concealment of the child is a consideration in determining whether the child is settled.[628]

IV.B.3

Second Prong: Child Settled in New Environment

The second prong of the delay defense is that the child must be settled in the new environment.[629] "When the petition for return has been filed one year or more after the wrongful removal, . . . a court may decline to order return if the child is now settled in the new country."[630]

627. *Lozano III*, 572 U.S. at 10.

628. *Id.* at 17.

629. Guimaraes v. Brann, 562 S.W.3d 521 (Tex. App. 2018),† *reh'g denied*, *reconsideration en banc denied*, 583 S.W.3d 652 (Tex. App. 2018), *review denied* (Tex. App. Jan. 17, 2020) ("[T]he 'well-settled' exception found in the second paragraph of article 12 does not apply when the petitioner files his Hague Convention petition seeking to have the child returned *within* one year of the child's removal." (emphasis in original)). Note, however, that even if an Article 12 defense is not applicable because the petition for return was filed within one year of removal or retention, the fact that a child is settled in his or her new environment may be one—but not the sole—factor taken into account when determining a grave-risk defense. *Blondin IV*, 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022). "The District Court explicitly 'rejected the argument [that it should consider whether they had become deeply rooted in the United States] to the extent that respondent was attempting to invoke the "well-settled" exception set forth in Article 12 of the Convention,' agreeing to consider it only 'within the context of Article 13b.' Its discussion makes clear that the evidence that the children are well-settled in the United States was not, by itself, the dispositive factor in this case. Accordingly, we conclude that the Court did not err in considering this evidence as one factor in its Article 13(b) analysis." *Blondin IV*, 238 F.3d at 165 (quoting *Blondin III*, 78 F. Supp. 2d 283, 287 (S.D.N.Y. 2000)). For extended discussion, see *Blondin IV*, 238 F.3d at 163–65.

630. da Silva v. de Aredes, 953 F.3d 67, 75 (1st Cir. 2020).

Neither the Convention nor ICARA define the term *settled* used in Article 12.[631] The *Text and Legal Analysis* comment on this section provides, "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."[632] The Second Circuit defined the term *settled* in an Article 12 defense as meaning 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."[633]

The question whether a child is settled is fact-intensive.[634] Courts are advised to consider a number of factors,[635] which are practically identical to those the courts use to determine habitual residence questions.[636] In the Second Circuit decision *Lozano v. Alvarez* (*Lozano I*), the court listed seven factors[637] that should be considered in determining the issue of a child's settlement within the context of Article 12:

631. The Second Circuit points to a potential conflict between the "acclimatization" 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 n.5 (citing Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005)).

632. Text & Legal Analysis, *supra* note 45, at 10,509.

633. *Lozano I*, 697 F.3d 41, 56 (2d Cir. 2012) (citing Duarte v. Bardales, 526 F.3d 563, 569–70 (9th Cir. 2008)); *accord* Alcala v. Hernandez, 826 F.3d 161, 170 (4th Cir. 2016).

634. *See, e.g.*, Yaman v. Yaman, 730 F.3d 1, 21–22 (1st Cir. 2013) (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 11–12, *Lozano II*, 570 U.S. 916 (2013) (No. 12-820), 2013 WL 2280948).

635. *See, e.g.*, Wojcik v. Wojick, 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 v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010) (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); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); Lutman v. Lutman, No. 1:10-CV-1504, 2010 WL 3398985 (M.D. Pa. Aug. 26, 2010)† (looking to child's academic progress).

636. *See* habitual residence factors, *supra* section III.F.3.d.

637. 697 F.3d 41, 56 (2d Cir. 2012).

1. The child's age
2. The stability and duration of the child's residence in the new environment
3. Whether the child attends school or day care consistently
4. The child's participation in church, community, or extracurricular activities
5. The respondent's employment and financial stability[638]
6. Whether the child has friends and relatives in the new area
7. The immigration status of the respondent and child[639]

In 2018, the Third Circuit added the following factors to the *Lozano I* list:[640]

1. To what extent the child has maintained ties to the country of habitual residence
2. The level of parental involvement in the child's life
3. Active measures to conceal the child's whereabouts[641] (and the possibility of criminal prosecution as a result)

A clear majority of courts follow the *Lozano I* factors noted above, including courts in the Third,[642] Fourth,[643] Fifth,[644] Ninth,[645] and Eleventh[646] Circuits. However, this list is not exhaustive, and there is no single formula for applying these factors.

638. A more "comfortable material existence" does not mean that the child is well settled. Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998).

639. *See also, e.g.*, *In re* B. del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009) (child and mother's immigration status did not mandate finding that child was not settled); Hernandez v. Garcia Pena, 820 F.3d 782, 789 (5th Cir. 2016) (finding of settlement error without considering effect of immigration status); da Silva v. de Aredes, 953 F.3d 67, 75 (1st Cir. 2020) (factors showing child settled; including immigration status showed that child was not settled); Seaman v. Peterson, 766 F.3d 1252, 1260 (11th Cir. 2014) (immigration status is a factor to be considered, but is not controlling in determining the child's habitual residence).

640. Monzon v. De La Roca, 910 F.3d 92, 106 (3d Cir. 2018).

641. Cunningham v. Cunningham, 237 F. Supp. 3d 1246, 1281–82 (M.D. Fla.), *aff'd*, 697 F. App'x 635 (11th Cir. 2017); *In re* Koc, 181 F. Supp. 2d 136, 153 (E.D.N.Y. 2001).

642. *Monzon*, 910 F.3d at 106.

643. Alcala v. Hernandez, 826 F.3d 161, 171–73 (4th Cir. 2016).

644. Hernandez v. Garcia Pena, 820 F.3d 782, 787–88 (5th Cir. 2016).

645. *In re* B. del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009).

646. Fuentes-Rangel v. Woodman, 617 F. App'x 920, 922 (11th Cir. 2015).

> [I]n a particular case some of these considerations may not apply and additional considerations may be relevant. Additionally, there is no formulaic way to tabulate or weigh any particular factor or circumstance. Thus, while we agree that the use of such factors may be helpful in guiding factual development and analysis, their use should not obscure the ultimate purpose of the court's inquiry. This inquiry is, as explained above, a holistic determination of whether a child has significant connections demonstrating a secure, stable, and permanent life in his or her new environment.[647]

The range of facts that might bear on the issue of a child's settlement will vary from case to case.[648] In *Yaman v. Yaman*[649] the father was granted sole custody of his two children by a Turkish court. Shortly after the order was confirmed by Turkish appellate courts, the mother abducted the children to Andorra—then a non-Hague country. The mother eventually relocated to New Hampshire. The father located the mother and children and filed a petition for return more than two years after the children's disappearance. The district court refused to order the children returned, reasoning that it lacked authority to order "settled" children returned. The First Circuit reversed this ruling.

> 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."[650]

IV.B.3.a

Concealment

Concealment of the child militates against the conclusion that the child has become settled. In *Wigley v. Hares*,[651] a Florida court found that despite the fact

647. *Alcala*, 826 F.3d at 171.

648. *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004) (viewing child's fluency in English as a settlement factor); Roche v. Hartz, 783 F. Supp. 2d 995, 1002 (N.D. Ohio 2011) (time spent in new environment before wrongful removal or retention); Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828, 848 (S.D. Tex. 2006) (percentage of time that was spent in new environment); Bernal v. Gonzalez, 923 F. Supp. 2d 907, 927 (W.D. Tex. 2012) (absence of relatives in the new country); Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998) (factors that are relevant to the child's living arrangement).

649. Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013).

650. *Id.* at 20–21. *See* Justice Alito's concurring opinion in *Lozano III*, 572 U.S. 1 (2014), *supra* section IV.A.2.

651. 82 So.3d 932 (Fla. Dist. Ct. App. 2011).

that the child had been present in that state for four years, the child could not be found to be settled. The mother kept the child actively concealed, not permitting the child to attend school and come to the attention of school authorities. The 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."[652]

IV.B.3.b

Settlement and Immigration Status

Immigration status is relevant to determining whether a child is settled. The fact that a child is undocumented does not prevent the child from becoming settled under the Convention. Though many cases deem undocumented status as undermining settlement, others find the opposite.[653] A court's review of the immigration status of a child is consistent with courts viewing all of the circumstances that bear on the Convention's focus on the child's overall well-being.[654] While most cases focus on immigration status as a potential negative factor, it can also be viewed as a positive factor.[655]

As noted earlier, all courts agree that immigration status is a factor to be considered when deciding whether a child has become settled, but no court has held such status to be a categorical bar, or single disqualifying factor to becoming settled.[656] In *Alcala v. Hernandez*[657] the Fourth Circuit advised,

652. *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).

653. *See* Lukic v. Elezovic, No. 20-CV-3110 (ARR) (LB), 2021 WL 466029 (E.D.N.Y. Feb. 9, 2021)† (both unemployed parent and six-year-old child overstayed visas; immigration status was a factor leading to conclusion that child was not well-settled; neither the children nor respondent were under immediate threat of removal); Alvarez Romero v. Bahamonde, No. 1:20-CV-104 (LAG), 2020 WL 8459278 (M.D. Ga. Nov. 19, 2020) (children deemed settled despite parent and children lacking legal status but were not under immediate threat of deportation); da Silva v. Vieira, No. 6:20-cv-1301-Orl-37GJK, 2020 WL 5652710, at *5 (M.D. Fla. Sept. 23, 2020)† (children's uncertain immigration status weighed heavily against finding of settlement).

654. *Lozano I*, 697 F.3d 41, 56 (2d Cir. 2012) ("[I]mmigration status should only be one of many factors courts take into account when deciding if a child is settled within the meaning of Article 12.").

655. Matute-Castro v. Jimenez-Ortiz, No. 15-CV-04568 (DLI)(JO), 2016 WL 8711076, at *11–12 (E.D.N.Y. Aug. 26, 2016)† (both respondent and child held F-1 status; court notes their legal residence was a positive factor in the settlement analysis).

656. *Lozano I*, 697 F.3d at 57.

657. 826 F.3d 161 (4th Cir. 2016).

> Neither the Hague Convention nor ICARA makes a lack of immigration status a bar to finding that a child is settled. Indeed, it runs counter to the purpose of the exception to read such a categorical bar into the treaty. If a child is functionally settled, such that ordering his or her return would be harmfully disruptive, it would be odd to nevertheless order that disruption based on a formal categorization.[658]

The proposition that undocumented status would render an otherwise settled child to be unsettled has been rejected by many courts.[659] While some courts have recognized that an uncertain or unstable immigration status might be destabilizing, other factors can compensate.[660] The weight to be given to the immigration factor will vary according to the facts of each case.[661] The undocumented status of a parent or child may be considered in a negative light by judges assessing whether a child is settled. In *Lopez v. Alcala*[662] the court found that a child was not settled based on an imbalance of factors caused by the mother's immigration status, lack of a work permit, and the possibility that she could be subject to deportation at any time. Similarly, in the case of *In re Ahumada Cabrera*,[663] the court noted that despite the child's regular school attendance, there were frequent changes in residences and schools. The court concluded that despite some indications of the child's stability, those indications were "significantly undermined by the Respondent's uncertain immigration status."[664] In one case,

658. *Id.* at 173–74.

659. Demaj v. Sakaj, No. 3:09 CV 255(JGM), 2012 WL 476168, at *4 (D. Conn. Feb. 14, 2012);† *accord In re* B. del C.S.B., 559 F.3d 999, 1010 (9th Cir. 2009) ("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.").

660. *In re* B. del C.S.B., 559 F.3d at 1010 ("Brianna's current immigration status—a status similar to that of many millions of undocumented immigrants—cannot undermine all of the other considerations which uniformly support a finding that she is 'settled' in the United States."). *See also In re* D.T.J., 956 F. Supp. 2d 523, 537–39 (S.D.N.Y. 2013) ("The Court joins the various courts in this Circuit that, applying this multi-factor test, have held that a child without lawful status was nevertheless 'well-settled.'").

661. *Lozano I*, 697 F.3d 41, 56 (2d Cir. 2012).

662. 547 F. Supp. 2d 1255 (M.D. Fla. 2008).

663. 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004).

664. *Id. See also* Alonzo v. Claudino, No. 1:06CV00800, 2007 WL 475340, at *5–6 (M.D.N.C. Feb. 9, 2007)† (no steps taken to acquire legal status in the United States, no family ties to the United States; court concludes child "cannot be considered 'settled' . . . considering her illegal status and the illegal status of her mother."); Jimenez v. Lozano, No. C05-5736FDB, 2007 WL 527499, at *3 (W.D. Wash. Feb. 14, 2007)† ("[Child] is not 'settled' in Shelton, Washington. While [child] may attend school and has the benefit of being with his mother and close relatives, this perceived stability is undermined by the fact that neither Mrs. Lozano nor [child] have the proper documentation to reside in the United States.").

the undocumented status of the respondent's boyfriend, who was the sole support of the respondent and the child, was one of the factors that the court relied upon in rejecting the mother's defense that the child was settled.[665]

In the case of *In re Koc*,[666] the court's primary concern was that the respondent and the child had overstayed their visas. The court observed that although deportation proceedings had not been initiated, this "does not, in any way, guarantee that that position will not change in the future." Other factors also suggested the absence of settlement. Finally, the court noted that respondent's immigration status made it "virtually impossible" for the child's father to visit because he had been repeatedly denied a visa to enter the United States.[667]

Most courts consistently describe immigration status as one of several factors to consider in determining a child's settlement status.[668] In *Hernandez v. Garcia Peña*[669] the Fifth Circuit wrote that immigration status should not be considered by courts in the abstract—as automatically defeating a settlement defense. Rather, the appropriate approach is to engage in an "individualized, fact-specific inquiry" in each case.[670] The Fifth Circuit noted that the likelihood of deportation was small because of the number of undocumented persons and the government's priority on deporting those with criminal records. Nevertheless, after conducting a de novo review of the removal proceedings against the respondent and child, the court concluded that the evidence did not support a defense of settlement.[671]

In *Alcala v. Hernandez*[672] the Fourth Circuit upheld a district court's finding that the child was settled despite his undocumented status. The respondent's mother and her two children previously came to the United States undocumented. Respondent's two siblings settled in Florence, South Carolina, and completed high school. The children's maternal aunts owned small businesses in the area and were participants in the DACA[673] program. The court found that the

665. Vite-Cruz v. Sanchez, 360 F. Supp. 3d 346, 359 (D.S.C. 2018).

666. *In re* Koc, 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

667. *Id.* at 154.

668. Garza-Castillo v. Guajardo-Ochoa, No. 2:10-cv-00359-LDG (VGF), 2012 WL 523696, at *6 (D. Nev. Feb. 15, 2012).†

669. 820 F.3d 782, 788–90 (5th Cir. 2016).

670. *Id.*

671. *Id.*

672. 826 F.3d 161 (4th Cir. 2016).

673. Department of Homeland Security's Deferred Action for Childhood Arrivals (DACA) program, https://www.ice.gov/daca.

mother was able to provide for her children and they were well cared for, with a strong support network of family and friends.[674]

Affirming the district court, the Fourth Circuit concluded, "The record facts as a whole establish that [the child] has developed significant connections to his new environment such that his life is stable, secure, and permanent; if his immigration status is destabilizing, something else is apparently compensating."[675]

The *Alcala* court rejected the father's proffer of evidence concerning the future detriments that the children would encounter in the United States because of their immigration status.

The Ninth Circuit has taken a different approach to the issue of settlement in cases involving undocumented children. In *In re B. del C.S.B.*,[676] the record included significant evidence that the child was settled. Nevertheless, the district found the child to be "not settled" because she and her mother were not legal residents. Reversing the district court, the Ninth Circuit held,

> [The child's] current immigration status—a status similar to that of many millions of undocumented immigrants—cannot undermine all of the other considerations which uniformly support a finding that she is "settled" in the United States. Indeed, only in a case in which there is an immediate, concrete threat of removal can immigration status constitute a significant factor with respect to the question whether a child is "settled."[677]

The requirement of an "immediate, concrete threat of removal" has been followed primarily by district courts within the Ninth Circuit.[678]

674. *Alcala*, 826 F.3d at 173.

675. *Id.* at 174.

676. 559 F.3d 999 (9th Cir. 2009).

677. *Id.* at 1010.

678. Garza-Castillo v. Guajardo-Ochoa, No. 2:10-cv-00359-LDG (VGF), 2012 WL 523696, at *6 (D. Nev. Feb. 15, 2012);† Etienne v. Zuniga, No. C10-5061BHS, 2010 WL 4918791, at *3 (W.D. Wash. Nov. 24, 2010);† Slight v. Noonkester, No. CV 13-158-BLG-SPW, 2014 WL 282642, at *9 (D. Mont. Jan. 24, 2014).† *But see* Habrzyk v. Habrzyk, 775 F. Supp. 2d 1054, 1066 (N.D. Ill. 2011); Aranda v. Serna, 911 F. Supp. 2d 601, 614 (M.D. Tenn. 2013);† Demaj v. Sakaj, No. 3:09 CV 255(JGM), 2012 WL 476168, at *4 (D. Conn. Feb. 14, 2012);† Roque-Gomez v. Tellez-Martinez, No. 2:14-cv-398-FtM-29DNF, 2014 WL 7014547, at *11 (M.D. Fla. Dec. 11, 2014);† Bejarno v. Jimenez, No. 19-17524, 2020 WL 4188212, at *5 (D.N.J. July 21, 2020).†

IV.C

Consent and Acquiescence

IV.C.1

Consent and Acquiescence Generally

Article 13(a) 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.[679]

Although the Convention combines the consent and acquiescence defenses in the same sentence, the grounds are set forth in the disjunctive (or), creating two distinct defenses.[680] The term *consent* refers to permission given before the child is removed, whereas *acquiescence* refers to conduct that occurs after the child's removal.[681]

The cases usually center on the parents' conduct at the end of their domestic relationship, and courts generally look at the overall conduct of the parties rather than focus upon isolated words or conduct. The words or actions of a party should not be "scrutinized for a possible waiver of custody rights."[682] Consent or acquiescence must be established on the basis of clear and unambiguous conduct.[683]

Both consent and acquiescence inquiries focus on the petitioner's subjective intent and must be established by a preponderance of the evidence.[684] As with all other defenses, they are subject to narrow interpretation.[685] Consent or acquiescence may be proved by the parties' statements, conduct, or writings. The

679. Convention, art. 13(a).

680. Baxter v. Baxter, 423 F.3d 363, 371 (3d Cir. 2005); Walker v. Walker, 701 F.3d 1110, 1122 (7th Cir. 2012).

681. *See, e.g.*, *Baxter*, 423 F.3d at 371.

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

683. *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).

684. *See* burdens of proof, *supra* section IV.A.

685. *Baxter*, 423 F.3d at 371; Cunningham v. Cunningham, 237 F. Supp. 3d 1246, 1277 (M.D. Fla. 2017).

inquiries concerning conduct tend to be fact-intensive, especially when issues arise regarding the parties' subjective intent.[686]

One notable distinction: courts have held that proof of acquiescence requires "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."[687] In contrast, consent need not be expressed with as much formality as acquiescence. 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.

IV.C.2

Consent

Consent involves conduct that takes place before removal of the child, and suggests a mutual agreement between parents regarding where the child should live and who should care for the child.[688] Consent can be established by either statements[689] 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.[690] It is more than mere discussions about moving or relocating.[691]

In *Sacchi v. Dervishi*,[692] the parents discussed a potential move of the mother and the children from Italy to California, but this discussion took place at a time earlier than the mother's actual move with the children. The father consented to have the mother and the children take a one-month vacation from June to

686. Moura v. Cunha, 67 F. Supp. 3d 493, 505 (D. Mass. 2014) ("[T]he First Circuit has observed that consent is a fact-intensive inquiry 'that focuses on [the petitioner]'s intent prior to the child's retention,' and which 'may be evinced by the petitioner's statements or conduct, which can be rather informal.'") (quoting Nicolson v. Pappalardo, 605 F.3d 100, 105 (1st Cir. 2010)).

687. *Friedrich II*, 78 F.3d at 1070 (footnotes omitted).

688. Nicolson v. Pappalardo, No. 09-cv-541-P-S, 2009 WL 5227666, at *6 (D. Me. May 27, 2009).

689. *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).

690. *See, e.g.*, Gonzalez-Caballero v. Mena, 251 F.3d 789, 793–94 (9th Cir. 2001); Baxter v. Baxter, 423 F.3d 363 (3d Cir. 2005).

691. *Baxter*, 423 F.3d at 371–72.

692. No. 19-cv-06638-SK, 2020 WL 3618957 (N.D. Cal. July 2, 2020).†

July 2019, but he did not consent to a permanent removal. At the time, the mother had the subjective intent that she and the children would relocate eventually, and she would not have left Italy if she believed the children could not join her. The father did not intend to allow the children to relocate permanently to California. His accusations of kidnapping and illegal detention, as well as filing an application for return of the children within days of their not returning to Italy made this clear. The *Sacchi* court found that the "key inquiry is whether [the father] consented to [the mother's] removal and retention of the children *at the time of removal.*"[693]

IV.C.2.a

Common Situations

Whether by design or happenstance, many abductions start out in the context of a vacation or holiday abroad[694] that involve agreements to allow a parent and children to relocate for a limited stay[695] and agreements in writing.[696]

In *Garcia v. Pinelo*,[697] the parents of a teenage boy met in Monterrey, Mexico, to discuss whether their son could spend one year in Chicago. They agreed that after one school year in Chicago, the son could decide whether to remain in Chicago with his mother or return to Monterrey. The father believed that his son

693. *Id*. at *9† (emphasis in original). *See also* Clarke v. Clarke, No. 08-690, 2008 WL 2217608, at *3 (E.D. Pa. May 27, 2008)† ("Consent does need to be expressed with the same degree of formality as acquiescence because it is often the case that the petitioner grants some measure of consent, such as permission to travel, in an informal manner before the retention becomes wrongful.") (citing *Baxter*, 423 F.3d at 372); *see also* Cartes v. Phillips, 240 F. Supp. 3d 669 (S.D. Tex.), *aff'd*, 865 F.3d 277 (5th Cir. 2017) (consent not established where after abduction, father pursued mother, and took action to obtain return through law enforcement and under the Convention).

694. *See, e.g.*, Warren v. Ryan, No. 15-cv-00667-MSK-MJW, 2015 WL 3542681, at *2–4 (D. Colo. June 5, 2015)† (family vacation); *Sacchi*, 2020 WL 3618957, at *9 (one-month vacation); Avendano v. Balza, 442 F. Supp. 3d 417, 422 (D. Mass. 2020) (annual summer visit); Berenguela-Alvarado v. Castanos, No. 20-11618, 2020 WL 3791569, at *1 (11th Cir. July 7, 2020)† (short-term visit); Gil-Leyva v. Leslie, 780 F. App'x 580, 585 (10th Cir. 2019) (visit of week and a half to visit ailing mother).

695. Darín v. Olivero-Huffman, 746 F.3d 1 (1st Cir. 2014) (one-month vacation extended by parent seeking business venture); Fabri v. Pritikin-Fabri, 221 F. Supp. 2d 859, 862 (N.D. Ill. 2001) (trip to attend to relative who was recuperating from heart surgery); Cocom v. Timofeev, No. 2:18-cv-002247, 2019 WL 76773, at *12 (D.S.C. Jan. 2, 2019)† (two-week visit to family); Guerrero v. Oliveros, 119 F. Supp. 3d 894, 909–10 (N.D. Ill. 2015) (two-month visit with father); Mauvais v. Herisse, No. 13-13032, 2014 WL 1454452 (D. Mass. Apr. 15, 2014),† *aff'd*, 772 F.3d 6 (1st Cir. 2014) (consent given for child to travel in United States for a month to visit relative).

696. Diagne v. Demartino, No. 2:18-cv-11793, 2018 WL 4385659, at *9 (E.D. Mich. Sept. 14, 2018)† (interim separation agreement did not amount to acquiescence).

697. 125 F. Supp. 3d 794 (N.D. Ill.), *aff'd*, 808 F.3d 1158 (7th Cir. 2015).

would opt to return to Mexico and did not intend to permanently relinquish his right to have the child in Mexico. After the son concluded his year in Chicago, he decided to return to Mexico. The mother retained the child in Chicago, and the father initiated proceedings for the boy's return. The court held that the father's approval for the son to remain in the United States was conditioned on one year only, unless the son elected to stay. Because the condition for the son's remaining in the United States did not occur, the father did not consent to the retention.

IV.C.2.b

Postremoval Conduct

Consent must exist contemporaneously with the child's removal, but subsequent conduct by the parents may be relevant to the parents' subjective intent at the time of removal. For example, in *Padilla v. Troxell*,[698] the mother's statements made in text messages after the child's removal were relevant as expressions of her belief that the child would be better off with the father in the United States.[699] In *Asumadu v. Baffoe*,[700] the mother removed the parties' children from Canada to the United States. She did so while the father was away at work, without telling him that she was leaving or disclosing the children's location. After removal, the mother refused to respond to the father's attempts to make phone calls to her. The father's actions also were not consistent with his giving consent: he tried to reach the mother by phone and contacted Canadian police for assistance.[701]

IV.C.2.c

Documentation

Parents frequently prepare written documents to reflect their intentions regarding travel with their children. In *Moreno v. Basilio Pena*[702] the court found that the mother consented to the removal of her child from the Dominican Republic to New York. Before the removal, the parties signed a travel authorization giving the father the right to take the child to New York. The mother argued that the authorization was conditioned upon a fifteen-day stay, but the written document

698. 850 F.3d 168 (4th Cir. 2017).

699. *Id.* at 176–77.

700. No. CV-18-01418-PHX-DLR, 2018 WL 3957696, at *4–5 (D. Ariz. Aug. 17, 2018),† *aff'd*, 765 F. App'x 200 (9th Cir. 2019).

701. *Id.* at *4–5.

702. No. 15-CV-2372 (JPO), 2015 WL 4992005 (S.D.N.Y. Aug. 19, 2015).†

did not include such restriction. Additionally, the mother assisted with efforts to secure a green card for the child.[703]

In *Culculoglu v. Culculoglu*[704] the court found that during the course of a divorce proceeding, the father provided an agreement specifically allowing his children to relocate to Nevada from Canada. The agreement provided, "Michelle, kids left with you on September 15, 2012, with my consent and will be staying with you in Nevada with my consent until we come to and [sic] agreement by March 14th (time Nevada will have jurisdiction for kids) and file for divorce and custody jointly without lawyers."

In addition to this agreement, the father sent the mother and children on a one-way ticket, deposited support funds monthly, participated in arranging for housing and schooling, and transported personal property and the mother's car to Nevada. The court found that "this clear, unambiguous, written statement of consent" was clear evidence that the children were not wrongfully removed.[705]

Writings, however, may not always accurately reflect a party's subjective intentions. For example, in *Berenguela-Alvarado v. Castanos*[706] mother signed an agreement prepared by the father allowing the child to remain in the United States with the father and spend summers with the mother. The mother argued that the agreement was signed under duress; she feared that failure to agree to the father's terms would result in the child not returning to Chile. The district court found that the mother had consented and denied her petition for return. On appeal, the Eleventh Circuit reversed, finding that the mother signed the consent form under duress.

In *Currier v. Currier*[707] the mother signed an agreement prepared by the father's attorney granting him sole custody of the parties' two children during any future separation or divorce. The mother signed the agreement under duress; the mother's friend—who was present during the signing—refused to sign the document as a witness. The next day, the father attempted to have the agreement notarized. The mother called the father's attorney to revoke her consent. The mother

703. *See also* Grau v. Grau, 780 F. App'x 787, 796 (11th Cir. 2019) (father's written consent for children to leave Germany bore no return date or condition).

704. No. 2:13-cv-00446-GMN-CWH, 2013 WL 4045905, at *5, *10 (D. Nev. Aug. 8, 2013).†

705. *Id.* at *10. *See also* Chechel v. Brignol, No. 5:10-cv-164-Oc-10GRJ, 2010 WL 2510391 (M.D. Fla. June 21, 2010)† (despite provisions in Marital Settlement Agreement granting father primary custody, he waived those rights by giving written consent to travel and purchase of one-way tickets, and acquiescing to child's presence in the United States for an indefinite period of time).

706. 950 F.3d 1352 (11th Cir. 2020). For a more in-depth discussion of the facts of this case, see *supra* section III.H.2.

707. 845 F. Supp. 916 (D.N.H. 1994).

also obtained an ex parte order from German family court ordering the father to return the children to the mother. By then, however, the father had absconded with the children. The court ruled against the father's claim that the mother consented to the children's removal.[708]

In *Nissim v. Kirsh*,[709] an Israeli couple executed an agreement before the birth of their child providing that upon any future separation, the mother would have custody of the child that she was pregnant with, as well as any other child thereafter born to the couple, in addition to the right to relocate abroad at her discretion. The agreement included the father's promise not to undertake any proceedings—such as under the Hague Convention—to prevent the mother's departure. Nine years later, the father received a promotion requiring him to temporarily relocate from Israel to California. The mother and child made arrangements to accompany the father, but after remaining in California for less than a week, the mother left with the child and relocated to New York. The court found that the 2009 agreement did not establish the father's consent to the removal of the child to New York. There was no evidence that the agreement remained in effect before the move to California or that it had been modified either orally or in writing during the following nine years. The court further found that the parties intended to move to California as an intact family. The court also found that the surreptitious manner in which the mother carried out the child's move to New York belied her position that the father consented to the child's relocation; her actions were inconsistent with the belief that her conduct was protected by the 2009 agreement. The court granted the father's petition to return the child to his custody so that he could repatriate with the child to Israel.

IV.C.2.d

Stranded Parents and Conditional Consent

Consent for a child to be removed from his or her habitual residence may be conditional.[710] The "nature and scope" of a petitioner's consent and any conditions or limitations are relevant.[711] When examining alleged consent by a parent, courts should examine "what the petitioner contemplated, agreed to, the nature and scope of the petitioner's consent, and any conditions or limitations placed on

708. *Id.* at 922.

709. 394 F. Supp. 3d 386 (S.D.N.Y. 2019).

710. Abbott v. Abbott, 560 U.S. 1, 13, 17 (2010) (parent can exercise the ne exeat right by declining consent to the exit or placing conditions to ensure the move will be in the child's best interests).

711. Baxter v. Baxter, 423 F.3d 363, 371 (3d Cir. 2005). *Accord Berenguela-Alvarado*, 950 F.3d at 1359.

the consent. A parent's consent to his or [sic] child's travel does not necessarily constitute consent to retention under the Convention."[712]

A parent may consent to a change in the child's habitual residence as part of a planned family relocation, but subsequent events prevent the parent from joining the child and spouse. The original consent may be viewed as conditional. In *Mota v. Castillo*,[713] the father left the family in Mexico and entered the United States without proper documentation. He settled in New York and began sending financial support for his wife and daughter. Three years later, the mother and father agreed that the mother and the child should join the father in New York. The child was successfully smuggled across the border and into the father's custody in New York. The mother made several unsuccessful attempts to cross the border, ultimately abandoning her efforts for fear of greater punishment at the hands of U.S. authorities. The father refused the mother's requests for the return of the child to Mexico. The Second Circuit affirmed the district court's ruling granting the mother's petition for return. The court found that the mother and father mutually intended for the child to enter and live in the United States as part of their plans to live together as a family. The mother's agreement allowing the child to enter the United States was conditioned upon her ability to join the family.

In *Hofmann v. Sender*,[714] the mother and father were physicians living in Canada. They explored the possibility of moving to New York, and they agreed that the mother should take their two sons to New York for a prolonged period so that the maternal grandparents could help care for the children. The father claimed that the trip was intended to be temporary, but the mother said that the move was the first step in the family's permanent relocation. While in New York, the parties made changes to the grandparents' house to accommodate their family, opened a joint bank account, and the older son began attending school. While in New York, however, the mother became disillusioned with the marriage and began to consult with attorneys. She ultimately sued for divorce, and the father filed a Hague petition for the return of the children. The district court found that the father's consent to the removal of the two children to the United States was conditioned on his living with them as a family. The Second Circuit affirmed.

> Just as in *Mota*, "if the parents [here] did not agree that [the children] would live indefinitely in . . . [the United States] regardless of [their father's] presence, it cannot be said that the parents 'shared an intent'"

712. Guerra v. Rodas, No. CIV-20-96-SLP, 2020 WL 2858534, at *4 (W.D. Okla. June 2, 2020).†

713. 629 F.3d 108 (2d Cir. 2012).

714. 716 F.3d 282 (2d Cir. 2013).

> that New York would be the children's "state of habitual residence." There is evidence in the record, including testimony from both parties, that they intended to relocate to New York as a family to enable the "rebirth" of their marriage. They therefore had a shared intent to relocate to New York, but the extent to which that intent was shared was limited by Hofmann's conditional agreement that the relocation was to be accomplished as a family.[715]

Stranded parents have not prevailed in all cases. In *Sanchez-Londono v. Gonzalez*,[716] the mother moved with the child from the United States to Colombia with the father's consent, 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, the mother was not able to obtain a visa. After living in Colombia with the child for two-and-a-half years, the mother consented to the child's return to the United States. The return of the child was based on the mother's hope that the child's presence in the United States would provide renewed grounds for the mother's legal entry. Almost two years later, still unable to secure legal entry into the United States, the 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 the mother's reentry into the United States did not change that fact.

In *Bowen v. Bowen*,[717] the parents and their three children lived primarily in Northern Ireland but mutually agreed to relocate to the United States with all three children. The mother purchased five one-way tickets to the United States. When the mother encountered visa problems, she agreed that the father would relocate to the United States with the eldest child, and the mother and the other two children would join them later. The mother learned that she was subject to a ten-year ban on reentry into the United States and decided to remain in Northern Ireland. When the father refused to return the eldest child to Northern Ireland, the mother petitioned for the child's return. Although the trial court found that Northern Ireland was the child's habitual residence, it sustained the father's defense that the mother consented and acquiesced in the child's removal and denied the mother's petition for return of the child.[718]

715. *Id.* at 293 (citations omitted). *Accord Baxter*, 423 F.3d at 372 (father consented to mother's visit to Delaware for a limited period of time, under certain circumstances and conditions. Held: consent to removal not established); *see also* Calixto v. Lesmes, 909 F.3d 1079, 1091 (11th Cir. 2018) (father's written travel consent sufficient to show conditional consent to child's change in habitual residence).

716. 752 F.3d 533 (1st Cir. 2014).

717. No. 2:13-cv-731, 2014 WL 2154905 (W.D. Pa. May 22, 2014).†

718. *Id.* at *8–10. It does not appear that the issue regarding conditional consent was argued to the court.

IV.C.2.e

Consent by Participation in Custody Proceedings

A party that voluntarily allows a particular court to make final custody orders is deemed to have consented to the terms of that court's order. One of the fundamental principles of the Hague Convention is that issues relating to child custody ought to be heard in the courts of the habitual residence; when a parent voluntarily participates in child-custody proceedings in one country, it is likely that the court will deem that participation as consent to that country's adjudication of custody issues.

In *Larbie v. Larbie*,[719] the mother moved with the child to the United Kingdom during the pendency of divorce proceedings. Upon the father's completion of military service, the parties litigated their divorce case to a final judgment in Texas. The father was given primary custody of the child. The mother initiated a petition for return of the child in district court, and the court granted the petition and ordered the child returned to the United Kingdom. The Fifth Circuit set aside the district court's order, ruling that the mother's consent to the resolution of the custody issue in Texas state court amounted to consent to the result obtained in the Texas state court. The court noted, "Crucially, consent for a particular tribunal to make a final custody determination—which may be established by entry of a temporary custody order—suffices to establish an affirmative defense under the Convention."[720]

In contrast, when a parent refuses to participate in custody proceedings brought in another country and instead commences Hague proceedings for the return of the child, courts are likely to deny the respondent's argument that the left-behind parent acquiesced to the results of the proceeding by their refusal to participate.[721]

IV.C.3

Acquiescence

Acquiescence, unlike consent, is based upon conduct that occurs after the child's removal. It may be proven by formalized conduct, such as a parent agreeing to

719. Larbie v. Larbie, 690 F.3d 295, 309 (5th Cir. 2012).

720. *Id.*, citing Nicolson v. Pappalardo, 605 F.3d 100, 105 (1st Cir. 2010); *cf.* Willard v. Willard, No. 17-cv-11645, 2017 WL 3278745 (E.D. Mich. Aug. 2, 2017)† (district court refused to find waiver of Convention rights by filing action in Texas, where no hearing was held on the issue of custody).

721. Sundberg v. Bailey, 293 F. Supp. 3d 548, 559 (W.D.N.C. 2017), *aff'd*, 765 F. App'x 910 (4th Cir. 2019).

a formal consent order in court or by a formal renunciation of rights. Where the facts showing acquiescence are ambiguous, courts tend to focus on the subjective intent of the parent who has allegedly acquiesced.

These cases center on the parents' overall conduct at the end of their relationship rather than isolated words or events. Words or actions, including isolated statements to third parties, should not be "scrutinized for a possible waiver of custody rights."[722] Consent or acquiescence should be based on clear and unambiguous conduct.[723] This defense is fact-intensive.[724]

The First Circuit explored the issues of consent and acquiescence in *Darín v. Olivero-Huffman*.[725] While in the United States, the mother informed the father that she was unwilling to return to Argentina, the child's habitual residence. The father, whose visa was about to expire, signed an affidavit drafted by the mother authorizing her "to take any steps necessary to provide for the education, health care, and overall well-being of the child."[726] Also included in the document was an authorization for either parent to travel with the child, and a statement that the 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, seeing no evidence that the father consented to the child's retention in the United States. He was unaware that the mother intended to remain in the United States until she announced her intention to do so.[727] The court also concluded that the father's affidavit was not evidence of acquiescence to the child remaining permanently in the United States, even though the affidavit set no date for its termination.[728] Both parents testified that the purpose of the affidavit was to allow the mother to care for the child in the father's absence. The father's five-month delay in filing a petition for return was not evidence of acquiescence.[729]

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

723. *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).

724. *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).

725. 746 F.3d 1 (1st Cir. 2014).

726. *Id.* at 6.

727. *Id.* at 15–16.

728. *Id.* at 16.

729. *Id.* at 18–19.

In *Leonard v. Lentz*,[730] the court observed that the issue of acquiescence "turns on the subjective intent of the party who allegedly acquiesced."[731] The father objected to the mother's retention of the children in the United States, but he acknowledged that he understood the mother's relocation to be permanent. The father also asked for updates regarding the welfare of the children without further objecting to their continued retention. The court rejected the mother's position that the father's acknowledgment that the marriage was beyond repair was the equivalent of acquiescence to the children's removal. The court found no evidence that the father consented to the removal of his children either before or after they were removed, nor was there evidence of a written renunciation of his custodial rights.

IV.D

Failure to Exercise Rights of Custody

Under Article 3(b), a party petitioning for return must make a preliminary showing that the petitioner was exercising custody rights before the removal of the child.[732] Article 13(a) provides that a defense to wrongful removal or retention is established 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." This affirmative defense must be established by a preponderance of the evidence.

The exercise of custody rights is clear if the family unit was intact prior to the wrongful removal or retention, or when one parent has sole custody of the child.[733] 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.[734]

730. 297 F. Supp. 3d 874 (N.D. Iowa 2017).

731. *Id*. at 891.

732. *See* discussion of exercise of custody rights as part of the case in chief, *supra* section III.C.

733. *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). *See also, e.g.*, *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); Morrison v. Dietz, No. 07-1398, 2008 WL 4280030 (W.D. La. Sept. 17, 2008)† (children taken from mother who was their primary custodian by virtue of Mexican divorce decree).

734. *See, e.g.*, Text & Legal Analysis, *supra* note 45; *see also* Sampson v. Sampson, 975 P.2d 1211 (Kan. 1999) (finding the exercise of custody rights where father placed children with his parents, supported children, and visited them on weekends).

Friedrich II outlined the requirements for this defense:

> 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 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.[735]

Both state and federal courts have uniformly accepted *Friedrich II*'s analysis of this issue. In *Bader v. Kramer*,[736] the Fourth Circuit explored the meaning of "exercising" custody rights. The court ultimately adopted what it characterized as the nearly universal approach of other courts.

> [W]e will "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." . . . a person [who] has valid custody rights to a child under the law of the country of the child's habitual residence . . . cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.[737]

The court also relied on language from *Friedrich II* to establish boundaries for the extent of the "exercise" inquiry. "Once it determines 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."[738]

The court proceeded to analyze the facts in *Bader* and found that the father exercised his right to joint custody of the child. In the three months before the child's removal, he had actual physical custody of the child three times—a two-day visit, a ski vacation, and an overnight stay. Additionally, the father paid child support.[739] These facts showed that the father did not clearly and unequivocally abandon the child. The court rejected the mother's contention that the

735. *Friedrich II*, 78 F.3d 1060, 1065–66 (6th Cir. 1996) (footnote omitted).

736. 484 F.3d 666 (4th Cir. 2007).

737. *Id.* at 671 (citing *Friedrich II*, 78 F.3d at 1065).

738. *Id.* at 672.

739. *See In re* ICJ, 13 F.4th 753, 763 (9th Cir. 2021), and cases discussed therein discussing the impact on failure to provide financial support for short periods of time on the concept of exercise of custody rights.

father had to show that he had exercised his custody rights in a particular place, such as a home or particular dwelling unit, noting that such a concept would require the court to engage in the precise analysis of whether the father acted sufficiently like a "custodial parent."[740]

In *Sealed Appellant v. Sealed Appellee*,[741] the Fifth Circuit found evidence that the father exercised his custody rights, noting his visits about five times a year and continued payment of child support.[742]

In *Lopez v. Bamaca*,[743] the court was faced with the question whether the test for "exercise" of rights of custody was the same for questions involving the elements of a prima facie case under Article 3 and the defense of nonexercise set forth in Article 13. The *Lopez* court determined that the tests for exercise of custody rights under Article 3 and 13 are the same: "nothing short of clear and unequivocal abandonment" will establish failure to exercise rights of custody.[744] The court noted that this test has been adopted in virtually every other circuit following the test set forth in *Friedrich II*.[745] The court also found that the abandonment test applied to both Articles 3 and 13 based on the similarity of language between the articles and Third Circuit precedent.[746]

740. *Bader*, 484 F.3d at 672.

741. 394 F.3d 338 (5th Cir. 2004).

742. *Id*. at 345.

743. 455 F. Supp. 3d 76 (D. Del. 2020).

744. *Id*. at 82 (quoting *Yang II*, 499 F.3d 259, 277 (3d Cir. 2007)). Mother also argued that the law of the habitual residence governs whether a parent has exercised custody rights. The court disagreed, citing *Baxter*: "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." Baxter v. Baxter, 423 F.3d 363, 370 (3d Cir. 2005).

745. The court noted the following cases: *Yang II*, 499 F.3d 259, 277 (3d Cir. 2007); Bader v. Kramer, 484 F.3d 666, 671 (4th Cir. 2007); Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 344–45 (5th Cir. 2004); Walker v. Walker, 701 F.3d 1110, 1121–22 (7th Cir. 2012); Asvesta v. Petroutsas, 580 F.3d 1000, 1018 (9th Cir. 2009); Navani v. Shahani, 496 F.3d 1121, 1130 (10th Cir. 2007); Seaman v. Peterson, 762 F. Supp. 2d 1363, 1379–80 (M.D. Ga. 2011), *aff'd*, 766 F.3d 1252, 1259 (11th Cir. 2014); Krefter v. Wills, 623 F. Supp. 2d 125, 133–35 (D. Mass. 2009); Eidem v. Eidem, 382 F. Supp. 3d 285, 291–92 (S.D.N.Y. 2019); Kofler v. Kofler, No. 07-5040, 2007 WL 2081712, at *2–3 (W.D. Ark. July 18, 2007).† *See also* De Aguiar Dias v. De Souza, 212 F. Supp. 3d 259, 269 (D. Mass. 2016) (no evidence that petitioner clearly and unequivocally abandoned her child); *In re* D.T.J., 956 F. Supp. 2d 523, 532–33 (S.D.N.Y. 2013) ("The standards applied to evaluating whether a petitioner is exercising custody at the time of removal are instead lenient: They have been held to require fairly minimal activity on the part of a petitioner.").

746. Saltos v. Severino, No. 18-8704 (JLL), 2018 WL 3586274 (D.N.J. July 25, 2018).†

IV.E

Grave Risk of Harm: Intolerable Situation

Article 13(b) provides that a child need not be returned 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."

Grave risk is an affirmative defense that must be proved by clear and convincing evidence,[747] although the underlying facts may be proved by a preponderance of the evidence.[748] Grave-risk issues involve mixed questions of fact and law, and the standard of review on appeal is de novo review.[749] As with the defenses set forth in Article 12—delay and failure to exercise custody rights—even if the grave-risk defense is established, the court is not required to deny the petition and may issue an order of return.[750] The court may condition such an order with appropriately crafted undertakings or conditions.[751] See the discussion on undertakings *infra*, beginning at section V.B.

IV.E.1

General Rules of Interpretation

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 in a

747. da Silva v. de Aredes, 953 F.3d 67, 73 (1st Cir. 2020) ("an abiding conviction that the truth of its factual contentions are 'highly probable.'" (citing Colorado v. New Mexico, 467 U.S. 310, 316 (1984))).

748. Grano v. Martin, 821 F. App'x 26, 28 (2d Cir. 2020).†

749. Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013) (citing *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 (6th Cir. 2007); *Blondin IV*, 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000); *In re* Marriage of Eaddy, 52 Cal. Rptr. 3d 172, 178–79 (Cal. Ct. App. 2006), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022).

750. "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." 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), https://assets.hcch.net/docs/432981e4-238b-4ed4-a41e-bb239d5acdac.pdf.

751. The Pérez-Vera Report explains at paragraph 113: "In general, it is appropriate to emphasize that the exceptions in these two articles (Articles 12 and 13) 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." *Supra* note 18, at 460. *See also* Text & Legal Analysis, *supra* note 45, 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.").

custody case.[752] The Article 13(b) defense is to be interpreted narrowly[753] so that issues that predominantly relate to what parent is better suited to custody of the child do not subsume the purposes of the Hague proceeding. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned.[754] "Concern with comity among nations argues for a narrow interpretation of the 'grave risk of harm' defense; but the safety of children is paramount."[755] In deciding whether grave risk exists, courts should consider "both the magnitude of the potential harm and the probability that the harm will materialize."[756]

> [A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.[757]

IV.E.1.a

What Is a Grave Risk?

The term *grave* means "more than a serious risk."[758] Grave risk arises in situations where the child faces a real risk of being physically or psychologically hurt as a result of repatriation.[759] The potential for harm to the child must be "severe," and the "level of risk and danger . . . very high."[760] It is a situation where the child would suffer "serious abuse" if returned to the habitual residence.[761] Grave risk is normally raised where the abducting parent asserts that the conduct of the other

752. "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 18, at 461, ¶ 116.

753. *Souratgar I*, 720 F.3d 96, 103 (2d Cir. 2013).

754. *Friedrich II*, 78 F.3d 1060, 1067 (6th Cir. 1996); Simcox v. Simcox, 511 F.3d 594, 604 (6th Cir. 2007).

755. Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005); *Danaipour I*, 286 F.3d 1, 25–26 (1st Cir. 2002). *See also* Colchester v. Lazaro, 16 F.4th 712 (9th Cir. 2021) (district court order refusing appointment of forensic psychologist reversed for abuse of discretion).

756. Colon v. Mejia Montufar, No. 2:20-cv-14035-KMM, 2020 WL 3634021, at *7 (S.D. Fla. July 2, 2020)† (citing *Souratgar I*, 720 F.3d 96, 103 (2d Cir. 2013)).

757. *Blondin IV*, 238 F.3d 153, 162 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022).

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

759. Asvesta v. Petroutsas, 580 F.3d 1000, 1020 (9th Cir. 2009) (citing *Blondin IV*, 238 F.3d at 162).

760. West v. Dobrev, 735 F.3d 921, 931 (10th Cir. 2013) (citing *Souratgar I*, 720 F.3d at 103).

761. *Blondin IV*, 238 F.3d at 163 n.11.

parent has caused or contributed to the grave risk. Some cases, however, have attributed the existence of grave risk to outside factors and actors.[762]

The Sixth Circuit was the first to interpret the provisions of Article 13(b) in *Friedrich v. Friedrich* (*Friedrich II*).[763] In dicta, the court characterized the types of harm broadly as falling into two categories: (1) where there is a grave risk of harm if the child is subjected to imminent danger before the resolution of the custody dispute, for example, returning the child to a zone of war, famine, or disease; and (2) a grave risk of harm in cases of "serious abuse or neglect, or extraordinary emotional dependence, when the court in the habitual residence is incapable or unwilling to give the child adequate protection."[764] *Friedrich II*'s limited but widely cited explanation of grave risk is not without criticism.[765]

IV.E.1.b

What Is Not a Grave Risk?

Findings of grave risk are rare.[766] The defense "does not encompass the normal problems and disruptions that a child might encounter if returned to his country

762. Velasquez v. Funes de Velasquez, 102 F. Supp. 3d 796, 812 (E.D. Va. 2015) (combination of factors including that country is one of the most violent in the world, actual threats of violence to family members, and credible threats of kidnapping carried out). *Cf*. Guerra v. Rodas, No. CIV-20-96-SLP, 2020 WL 2858534, at *6 (W.D. Okla. June 2, 2020)† (concerns about general gang violence is insufficient); *see also* Salguero v. Argueta, 256 F. Supp. 3d 630, 640 (E.D.N.C. 2017) (where despite previous threats, no evidence that the child had received gang threats recently).

763. 78 F.3d 1060 (6th Cir. 1996).

764. *Id*.

765. *See* Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005):

> [*Friedrich*'s] dictum has been repeated and it influenced the district court in this case, but we do not think it correct. There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations. Because of the privacy of the family and parental control of children, most abuse of children by a parent goes undetected. To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise. The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody.

(citations omitted); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008) (disagreed with the dicta of *Friedrich II* that courts have a duty to assess the ability of the habitual residence to protect a child from harm, noting 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. *Id*. at 1349.

766. *See* Delgado v. Osuna, No. 4:15-CV-00360-CAN, 2015 WL 5095231, at *13 (E.D. Tex. Aug. 28, 2015),† *aff'd*, 837 F.3d 571 (5th Cir. 2016).

of habitual residence."[767] The "harm must be 'something greater than would normally be expected on taking a child away from one parent and passing [the child] to another.'"[768]

Grave risk does not apply to "value judgment" evidence demonstrating that the standard of living in the habitual residence is lower. This includes economic conditions, educational opportunities, and disparate parenting styles.[769] "[T]he exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest,"[770] nor is the defense "a vehicle to litigate (or relitigate) the child's best interests."[771] In *Cuellar v. Joyce* (*Cuellar I*),[772] the father failed to persuade the court that living in a home without running water or indoor plumbing constituted a grave risk. The court noted that

> [b]illions of people live in circumstances similar to those described by [the 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."[773]

IV.E.1.c

Intolerable Situation

The term *intolerable situation* is not defined in the Convention. Some courts have concluded that if a situation qualifies as a grave risk under Article 13(b), it also

767. Colon v. Mejia Montufar, No. 2:20-cv-14035-KMM, 2020 WL 3634021, at *7 (S.D. Fla. July 2, 2020).†

768. Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (citing *In re A. (A Minor)*, [1988] 1 F.L.R. 365, 372 (Eng.C.A.)).

769. *Cuellar I*, 596 F.3d 505, 509 (9th Cir. 2010); *see also* Text & Legal Analysis, *supra* note 45, at 10,510 (intolerable situation "was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State.").

770. *Friedrich II*, 78 F.3d 1060, 1068 (6th Cir. 1996).

771. *Danaipour I*, 286 F.3d 1, 14 (1st Cir. 2002) (quoting Text & Legal Analysis, *supra* note 45, at 10,510); da Silva v. de Aredes, 953 F.3d 67, 73 (1st Cir. 2020).

772. 596 F.3d 505, 509 (9th Cir. 2010).

773. *Id.* (citing 51 Fed. Reg. 10,494, 10,510 (1986)).

amounts to an intolerable situation,[774] but this interpretation has been rejected by other courts.[775]

Attempts to raise a defense based upon the "zone of war" criteria have largely failed. In *Salguero v. Argueta*,[776] the mother contested the father's petition for return of the child to El Salvador because of the danger posed by threats made to her second husband, the child's stepfather. The stepfather was employed as a judicial liaison responsible for criminal interrogations at the ministry of justice. He was assigned a case involving a member of La Mara Salvatrucha, commonly known as MS-13. Because of his involvement with the MS-13 case, the mother and stepfather were harassed, threatened, and attacked. The stepfather was attacked by a suspected gang associate; later the same day, the mother was attacked, threatened, and raped. Despite moving, the threats continued: the stepfather was threatened harm to him and his family and received demands for money. While vacationing in the United States with the mother and child, the stepfather learned that his house was broken into. The stepfather decided that he would not return to El Salvador. The district court granted the biological father's petition for return of the child, finding that there was only one threat concerning the child, and this was insufficient to support a grave-risk defense. The court also rejected the "zone of war" defense because there was no evidence that the child was in any specific danger.[777]

There are a few cases finding "intolerable situation" based upon exposure to potential harm. In *Nunez-Escudero v. Tice-Menley*,[778] the district court held that return of the child to Mexico posed a grave risk because of the mother's assertion that the six-month-old child could be institutionalized during the pendency of their Mexican divorce proceedings. The possibility of having the child institutionalized pending custody hearings in Mexico "almost goes completely beyond the subject of being an intolerable situation." The Eighth Circuit remanded the

774. Thomson v. Thomson, [1994] 3 S.C.R. 551 (Can.).

775. Walsh v. Walsh, 221 F.3d 204, 217–19 (1st Cir. 2000) ("There is disagreement as to whether . . . 'the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation.' The Supreme Court of Canada has said that it does. . . . . We are doubtful about this.") (citation omitted). *See, e.g.*, *In re* D.D., 440 F. Supp. 2d 1283, 1299 (M.D. Fla. 2006) (characterizing an intolerable situation as an "evaluation of the people and circumstances awaiting that child in the country of her habitual residence, including the environment where the child resides."); *see also* Lauren Cleary, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations,* 88 Fordham L. Rev. 2619 (2020); Kevin Wayne Puckett, Comment, *Hague Convention on International Child Abduction: Can Domestic Violence Establish the Grave Risk Defense Under Article 13*, 30 J. Am. Acad. Matrim. Law. 259, 270–71 (2017).

776. 256 F. Supp. 3d 630, 638 (E.D.N.C. 2017).

777. *Id*. at 641.

778. 58 F.3d 374 (8th Cir. 1995).

case for a specific factual finding as to "whether the child will face immediate and substantial risk of an intolerable situation if he is returned to Mexico pending final determination of his parents' custody dispute."[779]

In *Reyes Olguin v. Cruz Santana*,[780] the court found that domestic violence perpetrated against the mother by the father was severe and continuing. Expert testimony disclosed that the eldest son had symptoms of PTSD and threatened to kill himself if he was returned to Mexico. Denying the father's petition for return of the children, the court held that "[w]hile repatriating such children is one goal of the Convention, it cannot trump '"the primary interest of the children not to be exposed to physical or psychological danger" or the "intolerable situation" that would surely exist' if these boys are returned to Mexico."[781]

The inability of a judicial system in the child's habitual residence to adjudicate custody issues may constitute an intolerable situation.[782] In *Pliego v. Hayes*,[783] the father petitioned for the return of a child to Turkey. Opposing the father's petition, the mother argued that an intolerable situation existed: the child had been physically abused by the father, Turkish courts could not intervene to protect the child because the father was entitled to diplomatic immunity, and the father was able to exert "undue influence" on the courts. The Sixth Circuit examined the ordinary meaning of Article 13(b). "[W]hatever an 'intolerable situation' means within the context of the Hague Abduction Convention, it must mean something serious: either it cannot be borne or endured, or it fails some minimum standard of acceptability."[784]

The Sixth Circuit acknowledged that the inability of a country's courts to adjudicate custody cases may constitute an "intolerable situation." However, in this case, the mother failed to prove that the alleged abuse occurred and that the Turkish courts could not resolve the custody issues.

In *Neumann v. Neumann*,[785] after living in Mexico as an intact family for three years, the mother left Mexico with the parties' three children and returned to their previous home in Michigan. The district court granted the father's petition to have the children returned to Mexico, where he remained employed by Ford Motor Company. At oral argument on appeal, it was discovered that the

779. *Id.* at 377.

780. No. 03 CV 6299 JG, 2005 WL 67094 (E.D.N.Y. Jan. 13, 2005).†

781. *Id*. at *12 (citing Blondin v. Dubois (*Blondin I*), 19 F. Supp. 2d 123, 129 (S.D.N.Y. 1998)).

782. Pliego v. Hayes, 843 F.3d 226, 231–36 (6th Cir. 2016).

783. *Id.*

784. *Id.* at 233 (citations omitted).

785. 684 F. App'x 471, 482 (6th Cir. 2017).

father's employer, Ford Motor Company, transferred the father from Mexico back to Michigan, leaving all parties—the parents and children—in the state. The court recognized that the absence of all parties to the custody case may impact the ability of the Mexican court to adjudicate custody issues, and that this could lead to an intolerable situation.[786] The court of appeal remanded the case back to the district court to determine whether Mexican courts could practically or legally adjudicate custody issues.

IV.E.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.[787] Sexual abuse in particular qualifies as a grave risk and intolerable situation.[788] "If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition."[789] As noted in *Noergaard v. Noergaard*, a speedy return "'is not the goal in cases where there is evidence that the status quo was abusive.'"[790]

In *Danaipour v. McLarey* (*Danaipour I*),[791] the mother alleged that the children had been subjected to sexual abuse by their father in Sweden. The district court deferred the issue of whether the abuse actually occurred to the courts of Sweden 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.

786. *Id.* at 482.

787. Text & Legal Analysis, *supra* note 45, at 10,510; Pérez-Vera Report, *supra* note 18, at 426, ¶ 2; Baran v. Beaty, 526 F.3d 1340, 1352 (11th Cir. 2008); *Danaipour I*, 286 F.3d at 15.

788. Ortiz v. Martinez, 789 F.3d 722, 728 (7th Cir. 2015) ("Sexual abuse most certainly constitutes a 'grave risk' of physical or psychological harm. Similarly, sexual abuse, particularly by a custodial parent, is a well-recognized example of an 'intolerable situation' within the meaning of this exception."); Diaz-Alarcon v. Flandez-Marcel, 944 F.3d 303, 306 (1st Cir. 2019) (policy viewing sexual abuse is an intolerable situation).

789. Text & Legal Analysis, *supra* note 45, at 10,510.

790. 197 Cal. Rptr. 3d 546, 551 (Cal. Ct. App. 2015) (citing Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005)).

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

> 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 substantial allegation that, if true, would justify application of the Article 13(b) exception, the court should make the necessary predicate findings.[792]

IV.E.3

Domestic Violence

Pursuant to Article 13(b), domestic violence has been recognized as a defense that may justify a refusal to return children.[793] *Domestic violence* is an all-inclusive term that embraces physical, emotional, and psychological abuse.[794] Domestic violence is found in a wide range of cases, some involving minor and isolated events and others with high degrees of lethality. Domestic violence may establish clear and convincing evidence that return would place the child at grave risk of harm or in an intolerable situation; but evidence of domestic violence has not been held to amount per se to a grave risk under Article 13(b).[795]

792. *Id.* at 18.

793. *See, e.g.*, *Walsh*, 221 F.3d 204 (1st Cir. 2000); Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000); *Blondin II*, 189 F.3d 240 (2d Cir. 1999); *In re* Adan, 437 F.3d 381 (3d Cir. 2006); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); *Van De Sande*, 431 F.3d 567; Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).

794. As used herein, the term *domestic violence* is intended to include the types of conduct that may be referred to as "intimate partner violence," "spousal abuse," or "family violence."

795. *See* Jeffrey L. Edelson, Taryn Lindhorst, National Institute of Justice, Final Report, Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases 306 (2010), https://www.ojp.gov/pdffiles1/nij/grants/232624.pdf:

> The Hague Convention was not conceived of as a remedy to issues of domestic violence. In fact, it was drafted three decades ago at the beginning of the modern movement to end violence against women and the accumulation of research that reveals the potentially damaging effects of domestic violence exposure for children. The Convention is focused on the potential harm to children caused by parental abduction, without consideration for the reasons that "abduction" might be occurring. Although the treaty was not envisioned as a policy response to the issue of serious domestic violence and child abuse within families, those who drafted the Convention were aware that there would be circumstances under which children would face a grave risk of harm, an intolerable situation or a violation of their human rights if they should be returned to the country of habitual residence. These concerns led the drafters to include exceptions to return such as Articles 13(b) (grave risk) and 20 (human rights violations) to allow for judicial discretion when addressing unforeseen dangers that would result from the return of children to their habitual residence.

In *Simcox v. Simcox*,[796] the Sixth Circuit outlined the different levels of domestic violence, noting that a court's responsibility under Article 13(b) largely depends upon the evidence presented in each case:

> First, there are cases in which the abuse is relatively minor. In such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a "grave risk" or otherwise place the child in an "intolerable situation" under Article 13b. In these cases, undertakings designed to protect the child are largely irrelevant; since the Article 13b threshold has not been met, the court has no discretion to refuse to order return, with or without undertakings. Second, at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect. In these cases, undertakings will likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner will not be deterred by a foreign court's orders. 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," 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.[797]

Walsh v. Walsh[798] is often cited for its guidance on when evidence of domestic violence constitutes grave risk. When the Walsh family lived in Massachusetts the father severely beat the child's mother on numerous occasions. The father was also charged with attempted breaking and entering and threatening to kill his next-door neighbor. After his arraignment, the father absconded to Ireland, and a warrant was issued for his arrest. The mother and their child followed a few months later. In Ireland, the father continued to beat the mother, even after she became pregnant with the couple's second child. During one attack, the father was stopped from beating the mother by his fourteen-year-old daughter from a previous marriage. A later beating resulted in injuries to the mother's face, chest, knees, and arms, and a broken tooth. She sought refuge in the home of the father's

796. 511 F.3d at 594.

797. *Id.* at 607–08 (footnotes and citations omitted). The *Simcox* method of analysis was recognized and followed in Maurizio R. v. L.C., 135 Cal. Rptr. 3d 93 (Cal. Ct. App. 2011).

798. 221 F.3d 204 (1st Cir. 2000).

son, Michael. A few months later, the father and Michael got into a fight witnessed by the couple's eight-year-old child and culminating in a violent assault on the mother. After another beating the next day, the mother sought a protective order. The father violated the protective order by again assaulting the mother. He twice broke into and ransacked the house where she was living. The mother finally left Ireland with the two children and returned to the United States. The eldest child was subsequently diagnosed with PTSD, and the therapist's report stated that if the child was returned to Ireland, she would relapse.

The district court ordered the children returned to Ireland, finding that there was no "*immediate*, serious threat"[799] to the safety of the children that could not be dealt with by Irish authorities. A friend of the mother sought intervention on behalf of the children and filed motions to dismiss or vacate the district court's judgment. Intervention was allowed, but based only on the theory of fugitive disentitlement.[800] The motion to vacate was denied, but execution of the return order was stayed pending appeal.

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 the father's persistent disobedience of authority—absconding from criminal charges in the United States and disobeying court orders[801]—it was unlikely that he would adhere to any undertakings that a court might impose as a condition of return of the children. The appellate panel outlined the district court's errors:

> [I]t inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse; it failed to credit John's more generalized pattern of violence, including violence directed at his own children; and it gave insufficient weight to John's chronic disobedience of court orders. The quantum here of risked harm, both physical and psychological, is high. . . . There is a clear and long history of spousal abuse, and of fights with and threats against persons other than his wife.[802]

The court listed its reasons for reversing the district court's ruling, including the father's uncontrollable, recurring violent temper and assaults, some of which were witnessed by or directed at his children, and credible social science literature establishing that serial abusers are also likely to be child abusers.[803] The court also found that undertakings likely would not restrain the father's future

799. *In re* Walsh, 31 F. Supp. 2d 200, 206 (D. Mass. 1998) (emphasis added).

800. *See* discussion of fugitive disentitlement, *infra* section IV.H.3.

801. A barring order is one that prohibits the restrained person from inhabiting or entering a home.

802. *Walsh*, 221 F.3d 204.

803. *Id.* at 220.

conduct, given that he had already violated orders from Massachusetts and Ireland. "There is every reason to believe that he will violate the undertakings he made to the district court in this case as well as orders from the Irish courts."[804] The court remanded the case with instructions to dismiss the father's petition.[805]

The outcome of grave-risk defenses based upon domestic violence tend to be decided upon the gravity and frequency of the violence coupled with whether the child or children involved have been direct victims of that violence. Courts frequently fail to find grave risk if there is no clear evidence that the children themselves are at risk of serious abuse.

In the frequently cited case *Whallon v. Lynn*,[806] a child was born to an unmarried couple in Mexico. The mother accused the father of subjecting her and their child to significant verbal abuse and a single incident of physical violence against the mother. There was no evidence of violence directed toward the child. When the child was four years old, the mother planned to travel with the child to Texas to visit her parents. The father's attorney attempted to block the mother's departure, resulting in an incident where the mother, child, and the mother's half-sister were held at gunpoint in the airport until a Mexican official intervened. The mother and child were eventually able to leave for the United States. The father denied instructing his attorney to use force to prevent the mother from leaving and claimed he did not know that a gunman had been hired. The district court found that the allegations of violence were insufficient to establish grave risk. The First Circuit agreed, comparing the case to its decision in *Walsh*. The *Whallon* court noted the absence of a "clear and long history of spousal abuse," no evidence of abuse directed toward the child, and no indication that the father would disregard a court order. Any psychological harm to the child as a result of separation from her mother was "not per se the type of psychological harm contemplated by the narrow exception under article 13(b)."[807]

In *Sourtgar v. Lee*,[808] the court found that spousal abuse is only relevant to a grave-risk defense if it seriously endangers the child,[809] citing to the First Circuit's opinion in *Charalambous v. Charalambous*.[810] In *Charalambous*, the children's mother was subjected to verbal and emotional abuse, and the single act of physical abuse (pushing against a wall and holding hand to face) was not witnessed

804. *Id.* at 221.
805. *Id.* at 222.
806. 230 F.3d 450 (1st Cir. 2000).
807. *Id.* at 460.
808. 720 F.3d 96 (2d Cir. 2013).
809. *Id.* at 104.
810. 627 F.3d 462 (1st Cir. 2010) (per curiam).

by the children. The court observed that the issue of grave risk was not directed to future harm that the mother might be subject to—the relevant question was whether the children were at risk of future violence.[811]

Recent cases have echoed the position that grave risk cannot be established if the child has not been directly victimized or included in threats of violence.[812] In *Monroy v. de Mendoza*,[813] the father petitioned for the return of a three-year-old child to El Salvador. The mother argued that the father's history of domestic violence precluded the child from safely returning to El Salvador. The mother produced a document from the Salvadoran Family Court stating that the mother had suffered family violence and mental abuse from the father. After the Salvadoran Family Court issued a protective order against the father, the petitioner's father threatened to kill the mother and her family.[814] The mother asserted that she was repeatedly subjected to physical abuse, including a black eye and being locked in the family home without a phone. The mother also offered evidence that the Salvadoran authorities refused to act unless there was "proof" of the incidents of violence. The mother described incidents where the father would bite the child as a form of punishment. The district court compared the case to *Walsh*, finding that the father's violence was not so severe as to amount to a "serious endangerment" of the child and that it was not established that the child would be seriously endangered if returned to El Salvador.[815]

In *da Silva v. de Aredes*,[816] the district court found that the father "on occasion . . . engaged in some degree of physical assault or abuse" against the mother, but not the child.[817] A suggestion of potential future abuse and the fact that the child witnessed conflict between its parents was not enough to support a finding

811. *Id.* at 468–69. *Accord* Aly v. Aden, No. 12-1960 (JRT/FLN), 2013 WL 593420, at *17 (D. Minn. Feb. 14, 2013).†

812. *But see In re* M.V.U., 178 N.E.3d 754 (Ill. App. Ct. 2020) (domestic violence toward a partner causes grave harm to the child or places the child in an intolerable situation).

813. No. 3:19-cv-1656-B, 2019 WL 7630631, at *10–11 (N.D. Tex. Sept. 20, 2019).†

814. These threats also formed the basis for an asylum application made by mother. *Id*. at *5.

815. *Id.* at *11.

816. 953 F.3d 67 (1st Cir. 2020).

817. *Id.* at 74.

of grave risk. Relying on *Walsh*, the First Circuit determined that the facts in *da Silva* did not "come close to the witnessed abuse in *Walsh* . . . ."[818]

Domestic violence has been found to justify findings of grave risk in cases notable for the seriousness of the violent conduct and potential for harmful impact on the children—regardless of whether the children have been direct victims of the violence.[819]

Blondin v. Dubois (*Blondin IV*)[820] is often cited for imposing an obligation on courts to go one step further after a finding of grave risk; it directs courts to examine whether measures are available to return the child and simultaneously reduce the grave risk to a tolerable level. "It is important that a court considering an exception under Article 13(b) take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation."[821]

The facts of the *Blondin IV* case merit summary.[822] The mother and father were an unmarried couple living in France. Their first child, Marie-Eline, was born in Paris, where the family lived with Blondin's son from a former relationship. Blondin was abusive, often hitting or beating Dubois, sometimes when she was holding their daughter. As the child later confirmed, she sometimes received the father's blows, and he also sometimes hit her with a belt. When still an infant, the father took an electrical cord and twisted it around the child's neck, threatening to kill her and her mother. After that incident, Dubois took the child and moved to a battered women's shelter. After approximately two weeks, Blondin

818. *Id.* at 73–74. Similar results are reflected in Sarabia v. Perez, 225 F. Supp. 3d 1181, 1191–92 (D. Or. 2016) (child exposed to domestic violence, and child disciplined with a branch or switch); Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 38932, at *6 (E.D. Mich. Jan. 3, 2020)† (children did not directly witness abuse of mother or stepbrother); Grano v. Martin, 443 F. Supp. 3d 510, 542–43 (S.D.N.Y.), *aff'd*, 821 F. App'x 26 (2d Cir. 2020) (child observed mother as victim of "coercive control," screaming, but did not establish a sustained pattern of physical abuse) (citing Porretti v. Baez, No. 19 CV 1955 (RJD), 2019 WL 5587151, at *9 (E.D.N.Y. Oct. 30, 2019)† ("Evidence of sporadic or isolated incidents of abuse . . . have not been found sufficient to support application of the grave risk exception.")).

819. *See* Neumann v. Neumann, 684 F. App'x 471, 490 (6th Cir. 2017) (noting a number of cases that recognized that damage to a child may result from domestic violence, even if the child is not a target of that violence; citing Gomez v. Fuenmayor, 812 F.3d 1005, 1007 (11th Cir. 2016)); Khan v. Fatima, 680 F.3d 781, 787 (7th Cir. 2012) (existence of repeated physical and psychological abuse of a child's mother in the presence of the child was likely to create a risk of psychological harm to the child); Hernandez v. Carsoso, 844 F.3d 692 (7th Cir. 2016) (same).

820. 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022).

821. *Id*. at 156.

822. Unless otherwise noted, the facts are taken from *Blondin I*, 19 F. Supp. 2d 123 (S.D.N.Y. 1998).

fetched the mother and child, and they returned home. The next year, the mother and child spent eight or nine months in different shelters.

In 1993, Blondin began an action in French courts to gain custody of their child, but the parties reconciled. The court awarded them joint custody: the child's principal residence was with the father, and the mother was awarded visitation rights. The couple had a second child in 1995. During the mother's pregnancy, medical visits confirmed injuries, including a facial cut, hematomas on her arms and breasts, swelling of the jaw, and headaches. After the birth of their son, the father continued to beat the mother in front of the children, threatened to "kill everyone," "and on one occasion threatened to throw their son out of a window. When the children were approximately two years and six years old, the mother and children left France for the United States. The father filed a petition for the return of the children on June 19, 1998.[823]

The parties' daughter related to the district court judge that she did not like living in France because her father screamed and hit her at lot, and that she did not want to return to France because she did not want her father to hit her. The district court found that the return of the children to France would expose them to a grave risk of physical or psychological harm, or place them in an intolerable situation. The court reflected on the abuse suffered by both the mother and the children. The mother, the two younger children, and the father's older child from a prior relationship all were compelled to relocate. The court found that the children had settled well into the United States, and that returning the children to France would be "extremely disruptive." The court also took note of the daughter's reasons for not wanting to return to France, not for the purpose of establishing the Article 13 exception of the objection of a mature child, but instead for purposes of determining grave risk ("I don't want my daddy to hit me.").[824] The father appealed.

The Second Circuit vacated the district court's order and remanded for further proceedings. The circuit court recognized that the evidence in the record supported the district court's finding regarding the existence of a grave risk, but it also found that the degree of settlement of the child and potential psychological harm from uprooting her could not be a consideration for determining grave risk. The court placed weight on one of the Convention's founding principles: custody determinations are best made by the authorities in the child's habitual residence. To this end the court concluded that "it is important that a court considering an

823. Undoubtedly aware of the Convention's exhortation for prompt proceedings, the court issued an order to show cause on June 24, appointed counsel to represent mother, and conducted a hearing on June 29. The court's decision was filed forty-eight days later.

824. *Blondin I*, 19 F. Supp. 2d at 129.

exception under Article 13(b) take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation." [825]

> In the exercise of comity that is at the heart of the Convention (an international agreement, we recall, that is an integral part of the "supreme Law of the Land," U.S. Const., art. VI), 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. [826]

The Second Circuit advised that if the district court was unable to find a reasonable means of returning the children without placing them in the immediate custody of the father, it should deny the father's petition. The Second Circuit vacated the district court's decision and remanded for further proceedings consistent with its opinion.

On the second remand, the district court accepted additional evidence, including procedures available in France for modification of the existing custody order and a forensic evaluation of the children and mother. Other processes that might allow repatriation of the children were considered by the court, including the assistance of public agencies for the children and mother, and the possibility that the French government might seek to extradite the mother for criminal proceedings relating to her taking the children. A forensic psychiatrist testified that the parties' daughter suffered from an acute, severe traumatic disorder caused by the father's physical and verbal abuse. [827] The children's conditions improved while in the United States, but they were not fully recovered. The doctor stated that regardless of how carefully the arrangements for return were made, returning the children to France would "almost certainly" trigger a posttraumatic stress disorder and "impair their physical, emotional, intellectual, and social development," leading to "long-term or even permanent harm to their physical and psychological development." [828]

The district court again denied the father's petition for return, citing: (1) removal of the children from the United States would interfere with their state of recovery; (2) return to France, coupled with the uncertainties of legal proceedings, would cause them psychological harm; and (3) daughter's objections to return to France.

825. *Blondin IV*, 238 F.3d at 156.

826. *Blondin II*, 189 F.3d 240, 248–49 (2d Cir. 1999) (citing *Friedrich II*, 78 F.3d 1060, 1068 (6th Cir. 1996)).

827. *Blondin III*, 78 F. Supp. 2d 283, 290 (S.D.N.Y. 2000).

828. *Id*. at 292.

The district court noted that

> in directing me to consider whether other alternatives were available that would allow the return of the children to France while protecting them from harm, the Second Circuit implied that my findings that Blondin had seriously abused the children were insufficient to establish a "grave risk of harm" under Article 13b without an additional finding that no other options existed by which the children could be safely returned to France.
>
> These interpretations of Article 13b are, in my view, unduly narrow. This case is directly analogous to a factual situation identified by United States Department of State as falling within the "grave risk/intolerable situation" exception . . . .
>
> . . . .
>
> Under the State Department's interpretation of Article 13b, findings of serious sexual abuse (or physical abuse, by analogy) of the abducted children by a petitioner parent, standing alone, amount to an "intolerable situation" that justifies the invoking of the "grave risk" exception. The gloss placed on Article 13b by the Sixth Circuit—and seemingly adopted by the Second Circuit—is unwarranted and narrows the "grave risk" exception to the point where it is virtually written out of the Convention.[829]

The Second Circuit denied the father's appeal. The district court's finding that no arrangements would ameliorate the grave risk of harm to the children was based upon uncontested expert testimony that the children would suffer from PTSD upon return to France.[830] The Second Circuit concurred that the child's objections to return were relevant evidence of the grave-risk defense under Article 13(b).

829. *Id*. at 298 (citations omitted). The Second Circuit's response is found in note 11 of *Blondin IV*:

> The District Court seems to have misunderstood our statement in *Blondin II*. In order to avoid further confusion, we make two observations: First, the requirement to which the District Court refers was stated clearly, not merely "implied," in *Blondin II*. We reiterate this requirement here: In cases of serious abuse, before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the full range of options that might make possible the safe return of a child to the home country. Second, we do not read *Friedrich* as narrowly as the District Court seems inclined to do. As we have explained, in the instant case we confront a situation involving allegations of serious abuse and in which the authorities, through no fault of their own, may not be able to give the children adequate protection. Although the wording in *Friedrich* might seem somewhat narrow, we believe the facts in the case at bar fall within the second standard set forth in that opinion.

Blondin IV, 238 F.3d 153, 163 n.11 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022) (citations omitted).

830. *Blondin IV*, 238 F.3d at 157.

In *Van De Sande v. Van De Sande*,[831] the father sought the return of his children from the United States to Belgium and filed a summary judgment motion. The mother's brief in opposition included affidavits detailing a history of profound physical abuse. The court granted summary judgment finding that there was no indication that the children could not be protected by the Belgian legal system. The only condition ordered by the court as a condition to the children's return was that the father pay for the children's airfare back to Belgium.

On appeal the court examined the affidavits submitted by the mother. Shortly after the marriage, the father seriously and repeatedly beat the mother, including choking and kicking her as well as slamming her into walls. The beatings continued when the couple moved from the United States to Belgium. The paternal mother-in-law sometimes joined in the beatings. The mother complained several times to police, but they said they could not intervene unless the mother went to a doctor to verify her injuries. After the birth of the couple's two children, the beatings continued, frequently in front of the children. The older child urged the father to stop the abuse, and became a target of the abuse when she began wetting the bed. She was hit by both her father and her paternal grandmother. When the mother attempted to intervene, she was assaulted also. The father verbally abused the mother and encouraged the eldest daughter to do so as well. Five years after their marriage, when the couple was visiting the mother's parents in the United States, the father had to be escorted from the house after making threats to kill the children, the mother, and "everybody." The father returned to Belgium, obtained an ex parte custody order from a Belgian court, and filed a petition for return of the children under the Convention.

The Seventh Circuit declined to follow the *Friedrich II* approach of leaving grave-risk issues to the courts of the habitual residence, stating that *Friedrich II*'s dictum

> has been repeated, . . . and it influenced the district court in this case, but we do not think it correct. . . . To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise. The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody.
>
> Moreover, to define the issue not as whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregards the language of the Convention and its implementing statute; for they say nothing about the laws in the petitioning parent's country.[832]

831. 431 F.3d 567 (7th Cir. 2005).

832. *Id*. at 570–71 (citing cases in the Sixth, Fourth, and Second Circuits).

The court then went on to discuss the possibility that in appropriate circumstances, undertakings might work to keep the children away from the offending parent until the courts of the habitual residence had an opportunity to address the custody issue. However, the court observed that undertakings, "as an alternative to refusing to return the child, will not always do the trick."[833] Citing *Danaipour v. McLarey* (*Danaipour I*),[834] the court observed that undertakings are most effective when they promote a resumption of the status quo ante. In contrast, undertakings are not appropriate where the status quo was an abusive situation.[835] The district court's grant of summary judgment was reversed, and the matter was remanded for further proceedings.

In *Baran v. Beaty*,[836] a factually similar case, the Eleventh Circuit affirmed the denial of a father's petition to return a child to Australia, based upon the father's physical abuse of the child's mother. A history of abuse began before the birth of the child, and increased thereafter. The father was a heavy drinker, and when he was drunk, he was violent and unstable. The abuse took place in front of the child, and while the mother was holding the child. There was no evidence that the father deliberately attempted to physically harm the child. Fleeing the abuse, the mother left with the child to the United States. The district court denied the father's petition.

The father argued that the district court erred in sustaining the grave-risk argument because there was no evidence showing that the child had been mistreated. The father cited to the First Circuit *Nunez-Escudero* and *Whallon* decisions holding the abuse of a spouse as insufficient grounds for a 13(b) defense. The court disagreed and ruled that it was not required that the child had been previously mistreated or physically harmed; rather, the test was whether the father's "violent temper and abuse of alcohol" would expose the child to a grave risk of harm were he to be returned to Australia.

The court also discussed the father's argument that before finding grave risk the court must determine whether the habitual residence is capable of protecting the child. This requirement was set forth in *Friedrich II* and repeated by several courts.[837] Noting that other courts have rejected this approach, the court found that where grave risk is evident, judges have "discretion to deny the petition for

833. *Id*. (citing Walsh v. Walsh, 221 F.3d 204, 219 (1st Cir. 2000)).

834. 286 F.3d 1, 25 (1st Cir. 2002).

835. *Id*.

836. Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).

837. Citing *In re* Adan, 437 F.3d 381, 395 (3d Cir. 2006).

return outright. . . . [a] position . . . consistent with the Convention's official commentary and with directives from the United States State Department."[838]

The court explored in detail whether undertakings could be used to ameliorate safety issues and allow for a child's return, despite a finding of a grave risk.[839] Although employing undertakings in this way has proponents and detractors, "[w]hen grave risk of harm to a child exists as a result of domestic abuse, . . . courts have been increasingly wary of ordering undertakings to safeguard the child."[840] Observing the father's potential for violence and the weakness of undertakings generally, and particularly in this case, the court affirmed the denial of the father's petition.

In *Ermini v. Vittori*,[841] the Second Circuit reversed a district court's determination that domestic violence did not cause a grave risk, and ruled that the father's history of domestic violence toward the children and their mother was sufficient to sustain a grave-risk defense.[842] The family had moved from Italy to New York for better treatment options for their autistic son. While in New York, the father attacked the mother, hitting her head against a cabinet and attempting to suffocate and strangle her in the presence of the children. This was just one incident in the father's acts of domestic violence that included verbal and physical abuse during their relationship. The father also hit the children; the older child stated that he was in fear of his father. The father ultimately pled guilty to criminal charges in New York, arising from the most recent incident of abuse, and a one-year restraining order prohibited any contact with the children. The father returned to Italy and later filed a petition for return of the two children in New York.

The district court denied return based upon the grave risk to the son with autism, as a return to Italy would interrupt his development in his therapeutic program. The court also ruled that separation would be harmful to both children because of the close relationship between them, and that this amounted to a grave risk for both. The court did not find that the domestic violence amounted to grave risk, and the mother cross-appealed on that ruling.

The Second Circuit affirmed the district court's holding that returning the autistic son would amount to a grave risk, noting the probable regression of his condition. The appellate court also held that the district court erred in not

838. *Baran*, 526 F.3d at 1347.

839. *See* fuller discussion of undertakings, *infra* section V.B.

840. *Baran*, 526 F.3d at 1351.

841. 758 F.3d 153 (2d Cir. 2014).

842. *Id.* at 164.

finding that the domestic violence toward the mother and children was sufficient to establish the grave-risk defense. The court ruled that it was not necessary to consider whether ameliorative measures might be available to enable a return of the children. The danger facing the autistic child if removed from his therapy regimen dispensed with the need to consider a range of alternatives that might otherwise exist.[843]

Significantly, the Second Circuit dismissed the petition with prejudice, amending the district court denial without prejudice. The circuit court ruled that the district court's order improperly invited prospective modifications in a manner the Convention was designed to prohibit, that is, making or enforcing custody orders. Once a ruling under the Convention is final, any remaining issues are outside of its reach.[844]

The Eleventh Circuit has also held that threats of violence directed at a parent can be enough to find a grave risk to the children. *Taylor v. Taylor*[845] is an unusual case. An Article 13(b) defense was established because of threats against the mother from both the father and unknown third parties. Although the mother wrongfully removed the child from the United Kingdom, the father was involved in illicit activities that precipitated threats to the entire family by third parties. This, combined with the father's direct threats against the mother and his continued participation in fraudulent activities, created a grave risk of harm. The father's petition for return of the child to the United Kingdom was denied.

The Eleventh Circuit ruled in 2016 that serious threats of violence directed at a parent may amount to a grave risk of harm to a child as well. *Gomez v. Fuenmayor*[846] involves a complex fact pattern of threats and violence directed at the father and his family by the child's mother and others. The parties lived in Venezuela and had a child together while the mother was married to another man and while the father had a girlfriend. After the mother and her husband took the child to Miami, the father filed a Hague petition, which was granted. The mother's husband was subsequently charged by a federal grand jury in Florida with wire fraud, conspiracy, and money laundering. While free on bond, the mother's husband absconded from the United States to Venezuela.

The father went into hiding with the child. While attending Venezuelan custody proceedings, the mother—having returned to Venezuela from Florida—was accompanied by armed guards. When the court granted the father primary

843. *Id.* at 165.

844. *Id.* at 167–68.

845. 502 F. App'x 854 (11th Cir. 2012).

846. 812 F.3d 1005 (11th Cir. 2016).

custody, the mother threatened to kill the father during an outburst in the courtroom. Three days later, the father's girlfriend drove him and child to the father's parents' home. While the girlfriend was on her way home from dropping them off, gunshots were fired at her car. She was shot three times but survived the attack. The car had tinted windows, preventing the shooter from seeing who was in the car. Additional acts of violence and intimidation were directed at the father's family, including attempts to plant drugs.

The father sought assistance from Venezuelan government officials. They advised him to leave the country. The father, child, paternal grandmother, and the father's sister left Venezuela for the United States.

The child's mother subsequently filed her own petition for return of the child to Venezuela. The district court found that although the mother established a prima facie case for return, the father established a grave-risk defense. The mother and her husband were involved in acts of violence against the father and his family, and although the violence was not directed against the child, the child was in peril and faced a high risk of danger.

On appeal, the mother argued that risk to the father was insufficient to show a grave risk to the child. The Eleventh Circuit disagreed, finding that "where violence is directed at a parent that may threaten the well-being of a child, the exception found in the Convention may apply. Moreover, the scope and severity of the threats to [the father] found in this case are clearly sufficient to establish a grave risk to his daughter."[847] The court cited to its holding in *Baran*, the Second Circuit's decision in *Ermini*, the First Circuit's decision in *Walsh*, and the Seventh Circuit's decision in *Van de Sande*.[848]

In *Acosta v. Acosta*,[849] the father had a violent temper and 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 the mother's friends who accompanied her to gather her belongings in preparation for her move to the United States. Affirming the district court's denial of the 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.[850]

847. *Id*. at 1013.

848. *Id*. at 1013–14.

849. 725 F.3d 868 (8th Cir. 2013).

850. *Id*. at 877.

IV.E.4

Zone of War

In theory, the return of a child to a country in the midst of a war could constitute a grave risk of harm. This exception to return was first referenced in dicta of the *Friedrich II* decision: "[T]here is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease."[851]

At the time of this writing, no case has finally found sufficient grounds to deny return on this issue.[852] In *Silverman v. Silverman*,[853] the district court found that the situation in Israel met the criteria for a zone of war, finding that recent increases in the number of suicide bombings placed the public at greater risk. The Eighth Circuit en banc reversed the district court, concluding that the children were not in any greater danger than they were when their mother relocated them to Israel in 1999. The violence in the region, while a threat to all inhabitants, was insufficient to establish a zone of war for purposes of a grave risk.[854]

851. *Friedrich II*, 78 F.3d 1060, 1069 (6th Cir. 1996).

852. Cases declining to find that a place is a zone of war: Salguero v. Argueta, 256 F. Supp. 3d 630, 641 (E.D.N.C. 2017) (El Salvador); Castro v. Martinez, 872 F. Supp. 2d 546, 556 (W.D. Tex. 2012)† (Monterrey, Mexico); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1365–66 (M.D. Fla. 2002) (Argentina—civil instability and violent demonstrations); Freier v. Freier, 969 F. Supp. 436, 443 (E.D. Mich. 1996) (Israel); Ajami v. Solano, No. 3:19-cv-00161, 2020 WL 996813, at *21 (M.D. Tenn. Feb. 28, 2020)† (Venezuela); Crespo Rivero v. Carolina Godoy, No. 18-23087-Civ-COOKE/GOODMAN, 2018 WL 7577757, at *4 (S.D. Fla. Oct. 12, 2018)† (Venezuela); Saltos v. Severino, No. 18-8704 (JLL), 2018 WL 3586274, at *9 (D.N.J. July 25, 2018)† (despite 2017 Human Rights Report of Ecuador that reported high amounts of sexual abuse and exploitation of children, no grave risk absent evidence to suggest that child will be exposed to such dangers upon return); Tomynets v. Koulik, No. 8:16-cv-3025-T-27AAS, 2017 WL 9401110, at *19 (M.D. Fla. May 26, 2017)† (Ukraine); Mendoza v. Esquivel, No. 2:16-cv-0001, 2016 WL 1436289, at *11 (S.D. Ohio Apr. 12, 2016)† (Michoacán, Mexico); Pacheco Mendoza v. Moreno Pascual, No. CV 615-40, 2016 WL 320951, at *6 (S.D. Ga. Jan. 26, 2016)† (Federal District of Mexico); Delgado v. Osuna, No. 4:15-CV-00360-CAN, 2015 WL 5095231, at *14 (E.D. Tex. Aug. 28, 2015)† (Venezuela); Vazquez v. Estrada, No. 3:10-CV-2519-BF, 2011 WL 196164, at *5 (N.D. Tex. 2011)† (drug cartel activity in Monterrey, Mexico, insufficient equivalent to a zone of war). On a different but related issue, see the facts of Avendano v. Balza, *infra* section IV.G.4, where circumstances in Venezuela were sufficiently severe to grant child's objection to return.

853. No. CIV. 00-2274(JRT), 2002 WL 971808, at *10 (D. Minn. May 9, 2002).†

854. *Silverman II*, 338 F.3d 886, 901 (8th Cir. 2003).

IV.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."

Some courts refer to this article as the "public policy" defense.[855] 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."[856] 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, courts assess the evidence based upon U.S. norms. And these "fundamental principles" must be applied without discrimination by the requested state.

Defenses mounted on the basis of an Article 20 violation are rare, and those raised in the United States have not been successful[857] as of this writing.[858]

855. Guerrero v. Oliveros, 119 F. Supp. 3d 894, 909 (N.D. Ill. 2015); Avendano v. Smith, 806 F. Supp. 2d 1149, 1163 (D.N.M. 2011).

856. Text & Legal Analysis, *supra* note 45. Some cases have suggested that the Article 20 defense and the grave risk are "so similar that they have suggested that the defenses are 'redundant.'" Monroy v. de Mendoza, No. 3:19-cv-1656-B, 2019 WL 7630631, at *8 (N.D. Tex. Sept. 20, 2019),† *vacated in part*, 2019 WL 9047217 (N.D. Tex. Nov. 4, 2019) (citing Danaipour v. McLarey, 183 F. Supp. 2d 311, 326 (D. Mass. 2002), *rev'd on other grounds by Danaipour I*, 286 F.3d 1 (1st Cir. 2002) and Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603, 614 n.37 (E.D. Va. 2002)).

857. *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*, 200 F. Supp. 2d 603 (family law procedures); Sabogal v. Velarde, 106 F. Supp. 3d 689, 711 (D. Md. 2015); Ortiz v. Martinez, 789 F.3d 722, 728 (7th Cir. 2015) (Article 20 defense raised but not discussed due to finding of grave risk that warranted a refusal to return the child); Watts v. Watts, No. 2:17-cv-1309-RJS, 2018 WL 10808728, at *15 (D. Utah Feb. 17, 2018),† *aff'd*, 935 F.3d 1138 (10th Cir. 2019) (asserted that father's petition was merely an attempt to forum-shop, therefore prohibited by Article 20); Tokic v. Tokic, No. 4:16-CV-1387, 2016 WL 4046801 (S.D. Tex. July 27, 2016);† Gomez v. Fuenmayor, No. 14-CV-24733-KMM, 2015 WL 12977397 (S.D. Fla. Apr. 29, 2015),† *aff'd*, 812 F.3d 1005 (11th Cir. 2016); De Souza v. Negri, No. 14-13788-DJC, 2014 WL 7330770 (D. Mass. Dec. 19, 2014);† 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 (N.J. 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. Jan. 21, 2009)† (ex parte ruling entered without notice); *In re* Hague Child Abduction Application, No. 08-2030-CM, 2008 WL 913325 (D. Kan. Mar. 17, 2008);† McCubbin v. McCubbin, No. 06-4110-CV-C-NKL, 2006 WL 1797922 (W.D. Mo. June 28, 2006).†

858. August 2022.

In *Salame v. Tescari*,[859] the Sixth Circuit affirmed the district court's finding that the conditions in Venezuela did not measure up to the "war or famine" dicta in its prior opinion in *Friedrich v. Friedrich* (*Friedrich II*).[860] The evidence here showed frequent protests, an incident of violence against the family occurring ten years ago, and shortages of gas, food, and water. The facts also showed that the family had access to everyday essentials, and the children were able to return to their schools and sports activities. Despite political and social crises in Venezuela, those situations did not pose threats to providing the children with shelter, food, and medication.[861] The mother also contended that the Venezuelan judicial system could not adjudicate her custody dispute because she was prevented by threats from participating in those proceedings. This argument was unavailing in light of facts showing that the mother's attorney actively represented her in the Venezuelan custody proceedings.[862]

In *Guerrero v. Oliveros*,[863] the mother petitioned the court for the return of her two children to Mexico. The children were retained by their father and paternal grandmother in Chicago. The respondents raised an Article 20 defense, arguing that social conditions in Mexico were "abysmal," alleging violence and corruption due to drug trafficking and rampant gang activity, as well as high rates of crime in the Guadalajara district. The court characterized the allegations as requesting it to pass judgment on the political and legal systems of the habitual residence. The court found the respondents' facts and argument unconvincing and concluded that the burden of establishing the Article 20 defense had not been met.

In *Kosewski v. Michalowska*,[864] the mother premised an Article 20 violation upon the harm that would ensue if her daughter were returned to Poland and separated from her half-sister. The court found that although separation of the two children would be detrimental to the child's psychological state, this harm was not sufficient to sustain the defense.[865]

In *Souratgar v. Lee* (*Souratgar I*),[866] the 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

859. 29 F.4th 763 (6th Cir. 2022).

860. 78 F.3d 1060, 1067 (6th Cir. 1996).

861. *Salame*, 29 F.4th at 769.

862. *Id*. at 771.

863. 119 F. Supp. 3d 894 (N.D. Ill. 2015).

864. No. 15-CV-928 (KAM)(VVP), 2015 WL 5999389 (E.D.N.Y. Oct. 14, 2015).†

865. *Id*. at *18.

866. 720 F.3d 96 (2d Cir. 2013).

decided by the Syariah court[867] in Singapore. Despite this agreement, the mother opposed the return on grounds that the Syariah courts in Singapore are incompatible with the provisions of Article 20 relating to the "protection of human rights and fundamental freedoms." The mother presented expert testimony that (1) a woman's testimony may be entitled to less weight than a man's testimony; (2) certain presumptions in Islamic law favored fathers over mothers in custody determinations; and (3) Islamic law favored Muslims over non-Muslims. The court dismissed the mother's Article 20 claim. The mother failed to establish 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 courts. The court declined to find that the presence of a Syariah Court in Singapore is per se violative of the provisions of Article 20. The court also observed that comity among signatory nations to the 1980 Convention is necessary to protect children. 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.[868]

In *Orellana v. Cartagena*,[869] the mother raised an Article 20 defense, arguing that she would be subject to gender-based discrimination if she were required to litigate child custody in Honduras. A provision of Honduran law stated a preference that children be left in the custody of their father.[870] The court found the mother's position insufficient to sustain the Article 20 defense, noting that the law did not shock the conscience of the court, and that principles that merely offended U.S. concepts of justice did not amount to a contravention of U.S. "fundamental principles."[871]

In *Carrascosa v. McGuire*,[872] 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, the mother filed an action to annul her marriage while the father filed a divorce

867. A Syariah court is one that implements Sharia law to persons of the Muslim faith.

868. *Souratgar I*, 720 F.3d 96, citing *Blondin II*, 189 F.3d 240 242, 248–49 (2d Cir. 1999).

869. No. 3:16-CV-444-CCS, 2017 WL 5586374 (E.D. Tenn. Nov. 20, 2017).†

870. "[I]t will generally rule that the children be left in the custody of the father in whose company they have been up to the moment of the disagreement, preferring the father if they were in the company of both except in any case where there are reasons which warrant any other solution." Honduran law, art. 194.

871. *Orellana*, 2017 WL 5586374 at *10.

872. 520 F.3d 249 (3d Cir. 2008).

action in New Jersey. Shortly thereafter, the mother removed the child to Spain. In response to the removal of the child, the New Jersey court awarded custody to the father and ordered the mother to return the child to the United States. The father thereafter filed a Hague Convention return case in Spain. The Spanish courts denied the father's Hague application and entered an order that the child was not to be removed from Spain until her eighteenth birthday. The mother subsequently failed to appear with the child as ordered by the New Jersey court. A warrant was issued for her arrest, resulting in her apprehension and incarceration. She continued to refuse to produce the child in New Jersey. The mother's petition for writ of habeas corpus in district court was denied.

On appeal, the Third Circuit found that the Spanish court committed several errors: custody determinations were made in violation of the Hague Convention; the court failed to consider the father's custody rights under New Jersey law; it wrongly applied Spanish law rather than New Jersey law to the parenting agreement; and the Spanish court found that the parenting agreement violated a Spanish citizen's right to travel in violation of Article 20. The Third Circuit refused to grant comity to the Spanish order denying the father's Hague Convention case, concluding that the errors committed by the Spanish courts were sufficient grounds for declining enforcement of the Spanish judgments. The denial of the mother's writ of habeas corpus was affirmed.

IV.G

A Child's Objection to Return

IV.G.1

A Child's Objection Generally

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."

A statement of "black-letter-law" concerning this defense can be characterized as follows. Two elements must be proved by a preponderance of the evidence: (1) the child has attained an age and sufficient degree of maturity for the court to consider the child's views; and (2) the child objects to return to the habitual residence. As with other defenses, this exception is subject to narrow interpretation. When the mature child's objection to return is the only reason for denying repatriation—and is not part of a broader analysis of the evidence, such as a grave

risk—the court must use a stricter standard for the application of this defense. The idiosyncratic nature of each case may yield seemingly disparate results. Accordingly, neither the Convention nor its interpretative documents specify a bright-line rule for setting a minimum age for determining whether a child is capable of expressing a mature opinion. The Convention requires that the child actually state an objection to return rather than a mere expression of preference to remain in a particular place or with a particular parent. The child's objection to return does not amount to a veto power. Courts should be alert to the possibility of undue influence on the child. The language of this exception is permissive, allowing the court discretion to order a child returned even if the defense of the mature child's objection is proved. The fact-specific nature of the issues involved in this defense usually requires an evidentiary hearing. The standard of review on appeal is for clear error.[873]

The child's objection to return is sometimes referred to as the "age and maturity defense,"[874] and sometimes as the "wishes of the child" exception.[875] Labeling the exception in terms of the "child's wishes" or "child's preference," however, can skew understanding of the essence of the exception. The wishes of a child might be relevant in the context of a child-custody case, but "wishes" are not sufficient under the Convention. Courts

> must distinguish between a child's objections as defined by the Hague Convention and the child's wishes as in a typical child custody case, the former being a "stronger and more restrictive" standard than the latter. 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. The defense does not apply if the "objection is simply that the child wishes to remain with the abductor." . . . 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.[876]

873. *See generally* Rodriguez v. Yanez, 817 F.3d 466 (5th Cir. 2016); *Yang II*, 499 F.3d 259 (3d Cir. 2007): de Silva v. Pitts, 481 F.3d 1279, 1287 (10th Cir. 2007); Walker v. Walker, 701 F.3d 1110 (7th Cir. 2012); Miller v. Miller, 240 F.3d 392 (4th Cir. 2001); *Blondin IV*, 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022); England v. England, 234 F.3d 268, 272 (5th Cir. 2000); Haimdas v. Haimdas, 720 F. Supp. 2d 183, 206 (E.D.N.Y. 2010); Sadoun v. Guigui, No. 1:16-cv-22349-KMM, 2016 WL 4444890 (S.D. Fla. Aug. 22, 2016);† Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1362 (M.D. Fla. 2002).

874. *E.g.*, Felder v. Wetzel, 696 F.3d 92, 101 (1st Cir. 2012); Larbie v. Larbie, 690 F.3d 295, 306 (5th Cir. 2012).

875. *Yang II*, 499 F.3d 259, 265 (3d Cir. 2007); Bowen v. Bowen, No. 2:13-cv-731, 2014 WL 2154905 (W.D. Pa. May 22, 2014).†

876. Hirst v. Tiberghien, 947 F. Supp. 2d 578, 597 (D.S.C. 2013) (citing Castillo v. Castillo, 597 F. Supp. 2d 432, 441 (D. Del. 2009); *In re* Nicholson v. Nicholson, No. 97-1273-JTM, 1997 WL 446432 (D. Kan. July 7, 1997)).

IV.G.2

Age and Maturity

Efforts to create a tipping point based on age alone have been criticized.[877] Courts have found the opinions of children as young as eight years old to be sufficiently mature,[878] whereas other courts have found that the opinions of fourteen- and fifteen-year-olds failed to meet this standard.[879]

877. *See* Tahan v. Duquette, 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992) (finding nine years old to be too young to consider at all); *contra* Escobar v. Flores, 107 Cal. Rptr. 3d 596, 605 (Cal. Ct. App. 2010) (rule of excluding children of a particular age is contrary to the intent of the Convention drafters); *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, at *4 (M.D. Fla. Dec. 28, 2006)† (finding that children, ages seven and four, were not mature enough for court to take into account their views).

878. *See, e.g.*, Anderson v. Acree, 250 F. Supp. 2d 876 (S.D. Ohio 2002) (eight-year-old's objection to returning to New Zealand without her mother sufficient grounds for declining return, but also considered as supporting finding that child was settled pursuant to Article 12); 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, No. 255772, 2004 WL 2883247 (Mich. Ct. App. Dec. 18, 2004)† (eight-year-old child sufficiently mature); Fernandez v. Bailey, No. 8:16-cv-2444-T-33TGW, 2016 WL 4474633 (M.D. Fla. Aug. 25, 2016)† (court denies pretrial motion to exclude children's objections based upon age—eight-year-old twins); Slight v. Noonkester, No. CV 13-158-BLG-SPW, 2014 WL 282642 (D. Mont. Jan. 24, 2014);† Tomynets v. Koulik, No. 8:16-cv-3025-T-27AAS, 2017 WL 9401110 (M.D. Fla. May 26, 2017),† *report and recommendation adopted*, 2017 WL 2645518 (M.D. Fla. June 17, 2017);† *In re* R.V.B., 29 F. Supp. 3d 243, 259–60 (E.D.N.Y. 2014) (child's opinion lacked a showing of maturity).

879. *See* England v. England, 234 F.3d 268, 272–73 (5th Cir. 2000) (finding fourteen-year-old child did not meet standard); Dietz v. Dietz, 349 F. App'x 930, 934 (5th Cir. 2009) (neither nine- nor thirteen-year-old child sufficiently mature to take account of views); 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. Oct. 13, 2006)† (finding fifteen-year-old failed to appreciate her immigration status as an incident of her nonreturn).

Cases are fairly uniform in declining to consider objections of children under eight years of age.[880] With some exceptions,[881] there seems to be a general reluctance to sustaining the objections of children in the nine- to twelve-year-old range.[882]

The objections of older children have generally been sustained.[883] The *Pérez-Vera Report* observes that "it would be very difficult to accept that a fifteen-

880. Vieira v. De Souza, 22 F.4th 304, 311 (1st Cir. 2022) (other contended that the trial judge erred by not interviewing the child or appointing a psychologist to represent the child's interest. She also argued that because she appeared pro se, that the trial court had a duty to be more solicitous of her arguments, even if she presented her arguments in an incomplete or oblique manner. The First Circuit held that the trial judge did not err by failing to pursue the mature child exception *sua sponte*, further clarifying that "a district court should not 'assume the role of advocate for the *pro se* litigant,' and may 'not rewrite a petition to include claims that were never presented.'"). *See also* Vazquez v. Vasquez, No. 3:13-CV-1445-B, 2013 WL 7045041 (N.D. Tex. Aug. 27, 2013),† *aff'd sub nom*. Sealed Appellee v. Sealed Appellant, 575 F. App'x 507 (5th Cir. 2014) (five-year-old had not yet entered kindergarten and was too immature to consider her opinion); Guerrero v. Oliveros, 119 F. Supp. 3d 894, 915 (N.D. Ill. 2015) (seven-year-old child); De La Riva v. Soto, 183 F. Supp. 3d 1182, 1200 (M.D. Fla. 2016) (seven-year-old child); Mendoza v. Silva, 987 F. Supp. 2d 883, 905 (N.D. Iowa 2013) (children aged four and five years old).

881. Rodriguez v. Yanez, 817 F.3d 466, 474 (5th Cir. 2016) (eleven-year-old sufficiently mature to express an opinion; case remanded to determine whether opinion amounted to an objection to return); *Escobar*, 107 Cal. Rptr. 3d at 606 (eight-year-old child); Castillo v. Castillo, 597 F. Supp. 2d 432, 441 (D. Del. 2009) ("These particularized objections evidence to the court that child's desire to remain in the United States is born of rational comparison between her life here and her life in Colombia. The court considers a desire based on such rational comparison to be a mature desire worth taking into account.").

882. *Yang II*, 499 F.3d 259 (child ten years old); Wtulich v. Filipkowska, No. 16-CV-2941 (JO), 2019 WL 1274694 (E.D.N.Y. Mar. 20, 2019)† (nine years old); Vite-Cruz v. Sanchez, 360 F. Supp. 3d 346 (D.S.C. 2018) (twelve years old); Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008) (ten years old); Aguilera v. De Lara, No. CV14-1209 PHX DGC, 2014 WL 3427548 (D. Ariz. July 15, 2014)† (child of nine); Pacheco Mendoza v. Moreno Pascual, No. CV 615-40, 2016 WL 320951 (S.D. Ga. Jan. 26, 2016)† (same); San Martin v. Moquillaza, No. 4:14-CV-446, 2014 WL 3924646 (E.D. Tex. Aug. 8, 2014)† (siblings aged nine and twelve); *In re* S.H.V., 434 S.W.3d 792, 800 (Tex. App. 2014) (court concluded child almost ten not old enough and mature to take account of his views); Alcala v. Hernandez, No. 4:14-cv-04176-RBH, 2015 WL 4429425 (D.S.C. July 20, 2015),† *aff'd in part, appeal dismissed in part*, 826 F.3d 161 (4th Cir. 2016) (ten-year-old's reasons for not wanting to return to Mexico were essentially expressions of a preference for living with one parent over another); Avila v. Morales, No. 13-cv-00793-MSK-MEH, 2013 WL 5499806 (D. Colo. Oct. 1, 2013)† (siblings nine and eleven—objections not appropriate to consider because of young age).

883. Kovačić v. Harris, 328 F. Supp. 3d 508 (D. Md. 2018) (fifteen-year-old daughter); Sadoun v. Guigui, No. 1:16-cv-22349-KMM, 2016 WL 4444890 (S.D. Fla. Aug. 22, 2016)† (twelve- and fourteen-year-old siblings); *cf*. Neumann v. Neumann, 187 F. Supp. 3d 848 (E.D. Mich. 2016) (thirteen- and fourteen-year-old siblings deemed insufficiently mature), *vacated and remanded on other grounds*, 684 F. App'x 471 (6th Cir. 2017); *see also* Trudrung v. Trudrung, 686 F. Supp. 2d 570, 578–79 (M.D.N.C. 2010) (fifteen-and-a-half-year-old son was sufficiently mature to voice an opinion, but the court characterized the opinion as a preference as opposed to an objection, and ordered the son returned to Germany).

year-old child should be returned against its will."[884] In *Felder v. Wetzel*,[885] 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 to credit the child's views, so the decision rests within the sound discretion of the trial court."[886] In *Custodio v. Samillan*,[887] the district court accepted the fourteen- and fifteen-year-old siblings' objections to return. Affirming the judgment on appeal, the Eighth Circuit noted that objections may be based upon custody considerations, reasoning that "[r]equiring the district court to distinguish between a child's custody-based and non-custody-based objections would likely be an impossible task—a task that the Convention does not require. Accordingly, the district court did not err in considering objections that may also be relevant to a custody proceeding."[888]

Even in a case involving an older, mature child, however, a court retains the discretion to decline the defense and order the child returned.[889] In *von Meer v. Hoselton*,[890] the parties' fifteen-year-old daughter was retained by the mother in Arizona after a summer vacation. The court found that the daughter objected to return to Italy, her habitual residence, and that she was of sufficient age and maturity to express that objection. The court, however, refused the daughter's objection and ordered her returned to Italy, finding that the daughter's objection to return was the likely product of undue influence, noting that the daughter had been with the mother for nine months before trial. The court also found that the mother's conduct was in direct violation of an order from Florence, Italy, awarding exclusive custody to the father. The court concluded that allowing the daughter to remain in Arizona let the mother profit from her own wrong, citing authority in *Custodio v. Samillan*[891] that "[d]istrict courts may decline to apply

884. Pérez-Vera Report, *supra* note 18, at 433, ¶ 30.

885. 696 F.3d 92 (1st Cir. 2012).

886. *Id.* at 101 (citing Kufner v. Kufner, 519 F.3d 33, 40 (1st Cir. 2008)) (child 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).

887. 842 F.3d 1084 (8th Cir. 2016).

888. *Id.* at 1091. *See also* Santana v. Benitez, No. 4:14-CV-400-BJ, 2014 WL 11484971, at *4 (N.D. Tex. Nov. 3, 2014)† (child fifteen years, ten months old).

889. Miller v. Miller, 240 F.3d 392, 402 (4th Cir. 2001). *See also* J.C.C. v. L.C., No. 20-3289, 2022 WL 985873 (3d Cir. Mar. 31, 2022)† (The Third Circuit held that hearing a child's objection to return was discretionary with the court, subject to review for an abuse of discretion. The court noted that a child's objection need not be considered when it was the result of undue influence.).

890. No. CV-18-00542-PHX-JJT, 2018 WL 1281949 (D. Ariz. Mar. 13, 2018).†

891. 842 F.3d 1084.

a defense where doing so would reward a parent for wrongfully [ ] retaining the child[ ] in violation of a Contracting State's custody orders."[892]

In *Zaoral v. Meza*[893] the court found that the "preference" of an almost sixteen-year-old child to remain in the United States was influenced by more favorable living conditions and concluded that the child was insufficiently mature for the court to give weight to her objection.[894]

When cases involve the interests of siblings, courts appear to be reluctant to order the return of a child that will result in a separation of that child from siblings.[895] In *McManus v. McManus*[896] the district court found that two of the children were mature enough to express opinions objecting to return to Northern Ireland, but the two younger were not mature children, and their opinions could not support an objection. The court noted its options: return all the children, some of the children, or none of the children. The court opted to deny return of all of the children as best accommodating the factors to be considered under the Convention.[897]

In *Velozny ex rel. R.V. v. Velozny*,[898] one child preferred to remain in the United States but had no objection to return to Israel. The second child's opinion seemed to be an objection to return to Israel, and the third child was too young to form a mature opinion. The district court ordered all the children returned to Israel even though two of them were sufficiently mature to object to their return. The court ruled in this way to keep all the children together. The Second Circuit affirmed, noting that one child was too young to express a mature opinion, and the remaining two children disagreed on whether they objected to return to Israel. The district court's decision not to apply the defense of a mature child's objection to return in order to keep the children together was "well within the district court's discretion in Hague Convention Proceedings."[899]

892. *Id*. at 1092.

893. No. H-20-1700, 2020 WL 5036521 (S.D. Tex. Aug. 26, 2020).

894. *Id*. at *14.

895. *See Blondin III*, 78 F. Supp. 2d 283, 290 n.9 (S.D.N.Y. 2000) (quoting Aristotle P. v. Johnson, 721 F. Supp. 1002, 1006 (N.D. Ill. 1989), and Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984): "children['s] relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State'"). *Accord* Sadoun v. Guigui, No. 1:16-cv-22349-KMM, 2016 WL 4444890, at *12 (S.D. Fla. Aug. 22, 2016),† and cases cited therein.

896. 354 F. Supp. 2d 62 (D. Mass. 2005).

897. *Id.* at 73.

898. No. 21-1993-cv, 2021 WL 5567265 (2d Cir. Nov. 29, 2021).†

899. *Id*. at *3.†

IV.G.3

Manner of Hearing Child's Objection

Judges have adopted different procedures for receiving evidence of a child's Article 13 objection: (1) allowing the child to testify in court in an evidentiary hearing;[900] (2) interviewing the child in camera;[901] (3) requesting a psychological evaluation of the child;[902] (4) appointing an attorney[903] or guardian ad litem[904] for the child to make recommendations to the court; and (5) taking testimony of witnesses concerning the maturity and objections of the child.[905] Courts have used all of these methods, but the majority have employed the technique of interviewing the child in camera with court personnel in attendance.[906]

900. *See, e.g.*, Custodio v. Samillan, No. 4:15-CV-01162 JAR, 2015 WL 9477429 (E.D. Mo. Dec. 29, 2015), *aff'd*, 842 F.3d 1084 (8th Cir. 2016) (children questioned in chambers and also testified in open court); von Meer v. Hoselton, No. CV-18-00542-PHX-JJT, 2018 WL 1281949 (D. Ariz. Mar. 13, 2018)† (child examined by counsel); *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).

901. Avendano v. Balza, 442 F. Supp. 3d 417, 420 (D. Mass. 2020) (court met with the child at the offices of the guardian ad litem; a court reporter was present and the parties were provided with a transcript of the meeting on that same day); Watts v. Watts, No. 2:17-cv-1309-RJS, 2018 WL 10808728 (D. Utah Feb. 17, 2018),† *aff'd*, 935 F.3d 1138 (10th Cir. 2019) (interviewed siblings in camera, in presence of law clerk and reporter); Vasconcelos v. Batista, 512 F. App'x 403 (5th Cir. 2013); Escobar v. Flores, 107 Cal. Rptr. 3d 596, 600 (Cal. Ct. App. 2010) (child interviewed in chambers with attorneys for the parties, bailiff, court clerk, and court reporter).

902. *See, e.g.*, Donnelly v. Manion, No. CIV-13-983-R, 2013 WL 12315101 (W.D. Okla. Sept. 26, 2013)† (forensic examiner); *McManus*, 354 F. Supp. 2d 62 (appointing a psychologist); Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953 (E.D. Mich. 2001) (ordering psychological report regarding wishes of eight-year-old).

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

904. *See, e.g.*, Diaz Arboleda v. Arenas, 311 F. Supp. 2d 336 (E.D.N.Y. 2004); San Martín v. Moquillaza, No. 4:14-CV-446, 2014 WL 3924646, at *7 (E.D. Tex. Aug. 8, 2014)† (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).

905. *Donnelly*, 2013 WL 12315101 (testimony of witnesses).

906. *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, No. 09-cv-00996-WYD-KMT, 2009 WL 1850928 (D. Colo. June 29, 2009);† Laguna v. Avila, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. May 7, 2008);† Di Giuseppe v. Di Giuseppe, No. 07-CV-15240, 2008 WL 1743079 (E.D. Mich. Apr. 11, 2008);† McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. Oct. 12, 2007);† Kofler v. Kofler, No. 07-5040, 2007 WL 2081712 (W.D. Ark. July 18, 2007);† *Yang II*, 499 F.3d 259 (3d Cir. 2007).

The following strategies reflect the experiences of other judges who have interviewed a child in camera:[907]

- Inform the child that the court will consider their statements, but the judge must make the final judgment—which may not reflect what the child wants. Informing the child that the decision rests with the court may spare them from feeling guilty about choosing between parents. Children who express a choice usually feel guilty for doing so—either now or later.
- Reinforce the fact that the child is not responsible for the conflict between the parents. Many psychologists believe that 60% of children from separated parents feel that they were a cause of the separation.
- Consider how the proceeding is to be reported. If the chambers interview of the child is reported, the parties will have a right to the transcript of the interview. If the interview is not reported, then the parties should be alerted to the fact that they may be waiving their right to contest the propriety of the court's decision, as there will be no record of questions asked and the child's responses.
- Do not interview the child alone in your chambers. A member of the court staff (reporter, court clerk) should attend all proceedings in chambers. The perceptions of the child may differ from the judge's actions or words.

IV.G.4

Generalized Desires Versus Particularized Reasons

Courts have distinguished between a child's objections to return that are expressed as "generalized desires" versus explicit reasons supporting those objections.

In *In re S.H.V.*[908] a psychological report disclosed that the child did not object to a return to Panama; rather, he preferred the United States because he perceived that the United States had better educational and social opportunities. The court refused to uphold the child's preference, noting that a child's generalized desire to live in one country versus another did not compel the court to apply the exception.[909]

907. Copied in part from Mary Ann Grilli & James D. Garbolino, California Center for Judicial Education and Research, California Family Law Bench Manual 19–20 (3d ed. 2000).

908. 434 S.W.3d 792 (Tex. App. 2014).

909. *Id.* at 801. *Accord* Tokic v. Tokic, No. 4:16-CV-1387, 2016 WL 4046801 (S.D. Tex. July 27, 2016)† (child failed to make an explicit objection to returning to France).

In *Avendano v. Balza*,[910] the eleven-year-old child's mother obstructed the child's 2016 and 2018 annual visits with the father in Medford, Massachusetts. As a result of the mother's recalcitrance, the father obtained a Venezuelan court order compelling the child's visit in 2018. During that visit with the father in Massachusetts, the child was granted U.S. citizenship. As a result, the child's "green card" was forfeited. The child thus needed a passport in order to travel internationally. The mother refused to authorize the issuance of a passport in the United States, and insisted that the child could get a passport at the U.S. Embassy in Caracas.[911] When time came for the child to be returned at the end of his visit with his father, the child indicated to his mother that he wished to stay in the United States. Because of the passport problems and the mother's reluctance to comply with the father's ordered visits, if the child were returned to Venezuela, it would be unlikely that the child could return to the United States. The father refused to send the child back without a passport to reenter the United States. The mother petitioned for return of the child.

The father raised the issue of the child's objection to return under Article 13. The court heard the testimony of a psychologist that the child was mature and had concerns about returning to Venezuela because of the country's socioeconomic and political conditions.

Evidence adduced in the case showed that Venezuela was experiencing high rates of crime, civil unrest, poor health infrastructure, kidnapping, arbitrary arrest, and detention. The conditions in that country resulted in the First Circuit finding that there were sufficient facts to support an asylum claim.[912] Expert testimony related that Venezuela was "a failed state in the midst of a humanitarian crisis, including a corrupt government, a food shortage, an ineffective judicial system, the failure of public utilities, and a high rate of violence," among other serious difficulties.[913]

The Department of State issued a Level 4 Travel Advisory that warned, "Do not travel to Venezuela due to *crime, civil unrest, poor health infrastructure, kidnapping, and arbitrary arrest and detention of U.S. citizens*."[914]

The court noted that the child's desire to remain in the United States was an insufficient reason to refuse the child's return. But the court also noted that the

910. 442 F. Supp. 3d 417 (D. Mass. 2020).

911. The U.S. Embassy in Caracas has since closed.

912. *Avendano*, 442 F. Supp. 3d at 431–32 (citing Cabas v. Barr, 928 F.3d 177, 182 (1st Cir. 2019)).

913. *Avendano*, 442 F. Supp. 3d at 426. *But see* Ajami v. Solano, No. 3:19-cv-00161, 2020 WL 996813, at *22 (M.D. Tenn. Feb. 28, 2020)† (court found no grave risk or intolerable situation created either by Venezuela's court system or by general living conditions—ordered children returned).

914. *Avendano*, 442 F. Supp. 3d at 427.

child had a "realistic understanding" of the situation in Venezuela.[915] Accordingly, the court sustained the mature child's objection[916] and denied the mother's application for return.

On appeal, the First Circuit affirmed the trial court's decision allowing the child's objection to return, finding no clear error.[917] The appellate court affirmed the district court's finding that the child was sufficiently mature to have his views considered. The court noted testimony from expert witnesses, the child's guardian ad litem, and the mother's witnesses. It considered the district judge's interview of the child in the offices of the guardian ad litem, as well.

The First Circuit rejected the mother's contention that the maturity of the child should be determined retrospectively as of the time that the child was initially retained in the United States. The appellate court deferred to the discretion of the trial court in its factual findings regarding the sufficiency of the child's maturity and found no clear error in the lower court's decision.

In *Alcala v. Hernandez*,[918] the court denied the objections of a ten-year-old boy. The court noted that the comparisons between the United States and Mexico were not "born of rational comparison" between his life in both countries[919] and concluded that the child's reasons were preferences for one lifestyle over another and not a particularized, mature objection.[920]

In some instances, a distinct, particularized objection may not be apparent, but may nevertheless be inferred from a child's statements. In *Tann v. Bennett*,[921] the child stated that he did not always feel safe in Northern Ireland, would "really feel bad" if he were returned, and might hurt himself or others if he were forced to return. On that record, the trial court found that the child objected to return, and that decision was upheld by the Second Circuit.[922]

915. *Id*. at 430.

916. Although the court did not entertain the question whether a grave risk existed because of the humanitarian conditions in Venezuela, the court noted that the deplorable social and political situation in Venezuela could potentially amount to a grave risk, citing Velasquez v. Funes de Velasquez, 102 F. Supp. 3d 796 (E.D. Va. 2015).

917. Avendano v. Balza, 985 F.3d 8 (1st Cir. 2021).

918. No. 4:14-cv-04176-RBH, 2015 WL 4429425 (D.S.C. July 20, 2015),† *aff'd in part, appeal dismissed in part*, 826 F.3d 161 (4th Cir. 2016).

919. *Id*. at *14 (citing Castillo v. Castillo, 597 F. Supp. 2d 432, 441 (D. Del. 2009)).

920. *Alcala*, 2015 WL 4429425, at *14.

921. 648 F. App'x 146 (2d Cir. 2016).

922. *Id.* at 149. *Cf*. Dubikovskyy v. Goun, 54 F.4th 1042, 1049 (8th Cir. 2022) (District court's finding of mature-child defense was reversed. Although child was deemed to be sufficiently mature to express an opinion, child's statements amounted only to an expression of preference, not an objection.).

In *Tsai-Yi Yang v. Fu-Chiang Tsui* (*Yang II*),[923] the district court denied the child's request to remain in the United States, finding that the child had no particularized objection to returning to Canada and lacked sufficient age and maturity for her view to be considered.[924]

In *de Silva v. Pitts*,[925] 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."[926] The child voiced no particularized objections to returning to Canada.

In *Bowen v. Bowen*,[927] the court sustained a ten-year-old child's objections to a return to Ireland. The child explained that he was born in the United States, he was more attached to his father than his mother, 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 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.[928]

923. 499 F.3d 259 (3d Cir. 2007).

924. *See also* Haimdas v. Haimdas, 720 F. Supp. 2d 183, 206 (E.D.N.Y.), *aff'd*, 401 F. App'x 567 (2d Cir. 2010) ("A child's expression of a preference to remain in the United States rather than a particularized objection to repatriation may provide a basis for a court to find the mature child exception inapplicable.").

925. 481 F.3d 1279 (10th Cir. 2007).

926. *Id.* at 1287.

927. No. 2:13-cv-731, 2014 WL 2154905 (W.D. Pa. May 22, 2014).†

928. *Id.* at *16. *See also* Fernandez v. Bailey, No. 8:16-cv-2444-T-33TGW, 2016 WL 5149429, at *8 (M.D. Fla. Sept. 21, 2016),† *vacated and remanded*, 909 F.3d 353 (11th Cir. 2018) (children lived solely with the abducting parent for a large portion of the eight-year-old's life).

IV.G.5

Preference for Living with a Specific Parent

Many courts[929] have held that a child's objection to return should not simply be the child's preference for one parent over another.[930] But in *Rodriguez v. Yanez*[931] the Fifth Circuit determined that if otherwise considered and mature, a child's objection can be based upon the child's desire to live with one parent over the other. The father urged the court to find that a child's objection cannot be based on preference, arguing that this would embroil the court custody determinations that belong to the courts of the habitual residence. The Fifth Circuit disagreed. Citing the *Pérez-Vera Report*, the court recognized that the Convention gives children "the possibility of interpreting their own interests."[932] The issue involving the child's testimony was carefully addressed.

> For most wrongfully removed children, the choice between countries is effectively a choice between parents. If the court honors the child's objection to returning, she will almost certainly live with the abducting parent—at least until the custody dispute is resolved. As a result, whether the child *wants* to live with the abducting parent is very relevant to her interpretation of her immediate "interests." Indeed, it is likely the most important consideration.
>
> * * * * *
>
> [The father] is correct that a child's objection should be ignored if the court believes the abducting parent has exercised "undue influence over the child." But otherwise, as we see it, an objection by the child to being returned, if found to be a considered and mature decision, will be honored whether or not it rests in part on her objection to living with the abducting parent.[933]

The Fifth Circuit did agree with the father, however, on the issue of whether the child's stated reasons were sufficient to be considered an objection as opposed

929. The following cases were cited in Rodriguez v. Yanez, 817 F.3d 466, 475 n.33 (5th Cir. 2016): Hirst v. Tiberghien, 947 F. Supp. 2d 578, 597 (D.S.C. 2013) ("The defense does not apply if the 'objection is simply that the child wishes to remain with the abductor.'") (citing *In re* Nicholson v. Nicholson, No. 97-1273-JTM, 1997 WL 446432, at *3 (D. Kan. July 7, 1997);† *Haimdas*, 720 F. Supp. 2d at 208; Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1126 (D. Colo. 2008); Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603, 615 (E.D. Va.), *aff'd*, 52 F. App'x 207 (4th Cir. 2002).

930. *See* Alcala v. Hernandez, No. 4:14-cv-04176-RBH, 2015 WL 4429425 (D.S.C. July 20, 2015),† *aff'd in part, appeal dismissed in part*, 826 F.3d 161 (4th Cir. 2016).

931. 817 F.3d 466 (5th Cir. 2016).

932. *Id.* at 475.

933. *Reasoning followed in* Custodio v. Samillan, 842 F.3d 1084, 1091 (8th Cir. 2016); Colon v. Mejia Montufar, No. 2:20-cv-14035-KMM, 2020 WL 3634021, at *11 (S.D. Fla. July 2, 2020).†

to a preference. The appellate court remanded the matter back to the district court to reinterview the child and determine whether the child's position amounted to an objection or merely a preference.[934]

IV.G.6

Undue Influence

If there is evidence that the child's objection was the result of undue influence from a parent, courts have uniformly rejected the defense. In *Tomynets v. Koulik*[935] both the court and a court-appointed psychologist concluded that the child's objection to return to Ukraine was the product of the father's undue influence concerning both Ukraine and the child's mother.

The length of time a child spends with the abducting parent can be a factor that influences a child's objection to returning to the habitual residence. In *Tsai-Yi Yang v. Fu-Chiang Tsui* (*Yang II*),[936] the Third Circuit affirmed the district court's findings on this issue and held that the district court appropriately concluded that the child's desire to remain in the United States was the result of attachments the child made while wrongfully retained.

> 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 [the father] for violating [the mother's] custody rights, and defeat the purposes of the Convention.[937]

Similarly, in *Soonhee Kim v. Ferdinand*,[938] the court rejected the children's preferences, observing that children's preferences tend to be influenced by the parent with whom they are living[939] and noting that for the last six months, the children had lived idyllic lives where they enjoyed time with loving relatives, private school, and Harry Potter World.[940]

934. *Rodriguez*, 817 F.3d at 478.

935. No. 8:16-cv-3025-T-27AAS, 2017 WL 9401110 (M.D. Fla. May 26, 2017),† *report and recommendation adopted*, 2017 WL 2645518 (M.D. Fla. June 17, 2017).

936. 499 F.3d 259 (3d Cir. 2007).

937. *Id*. at 280.

938. 287 F. Supp. 3d 607 (E.D. La. 2018).

939. *Id*. at 626 (citing Linda D. Elrod, *"Please Let Me Stay": Hearing the Voice of the Child in Hague Abduction Cases*, 63 Okla. L. Rev. 663, 687 (2011)).

940. *Soonhee Kim*, 287 F. Supp. 3d at 626.

IV.G.7

Child's Standing to Object to Return

In *Sanchez v. R.G.L.*,[941] relatives brought three children into the United States from Mexico without consent of their mother. Upon the mother's demand for return of the children to Ciudad Juárez, the relatives escorted the children to the border so that they could walk across the border back into Mexico. The children objected to returning to Mexico; they described their mother's boyfriend as a gang member, drug trafficker, and child abuser, and they expressed fear of him. The children were detained by Homeland Security and 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, the mother petitioned for return of the children in the U.S. District Court for Western District of Texas. The relatives were named as respondents, as was the private agency responsible for the children's foster placement. At the hearing on the mother's petition, the relatives who had taken the children did not appear. The agency placing the children in foster care appeared, but it did not take a position on whether the mother's petition should be granted. The district court ordered the children's return, but the children appealed.

The Fifth Circuit found that the children had standing to appeal. The court applied its three-part test for standing: (1) Did the nonparty participate in the proceedings below? (2) Do the equities weigh in favor of hearing the appeal? (3) Does the nonparty have a personal stake in the outcome?[942] The attorney representing the children in deportation proceedings appeared and played an active role in the Convention proceeding. Neither the children's relatives, nor the foster agency, nor the government responded to assert defenses that could result from the children's return. The court found that the equities and the children's personal stake in the outcome of the case weighed heavily in their favor. Because no respondent made an effort to represent the interests of the children, the court ordered the appointment of a guardian ad litem on remand, citing Federal Rule of Civil Procedure 17(c)(2).[943] However, the court declined to grant the children

941. 761 F.3d 495 (5th Cir. 2014).

942. *Id.* at 502.

943. "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."

leave to intervene on their own behalf, because their rights could be adequately asserted by their guardian ad litem.

IV.H

Nonstatutory Equitable Defenses

The Convention sets forth defenses in Articles 12, 13, and 20. Equitable defenses such as waiver, unclean hands, and equitable estoppel are not mentioned in the Convention. While most courts have declined to recognize equitable defenses in Hague cases,[944] some have applied these and other equitable principles.[945]

IV.H.1

Waiver

The first U.S. case to apply waiver in a Hague proceeding was *Journe v. Journe*.[946] When the couple separated, the father filed for divorce and custody of their three children in a French court. The mother, alleging a history of spousal abuse, moved with the children to Puerto Rico. She returned to France voluntarily to contest the father's custody petition. Some months later, the father filed his Hague petition in Puerto Rico; he dismissed his French divorce and custody action, claiming that the couple had reconciled. The mother denied this claim and opposed the father's petition for return, arguing that his dismissal of the French custody action was evidence that he intended to have the children returned to France to relitigate custody. The court found the mother's testimony credible and ruled that the

944. Stead v. Menduno, 77 F. Supp. 3d 1029, 1037 (D. Colo. 2014) ("The conduct of the parents, other than the claim of abduction or retention, is not mentioned in the Hague Convention except to the extent that [it] may be relevant to one of the affirmative defenses.").

945. 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.

946. 911 F. Supp 43.

father's voluntary dismissal of the French custody case served as a waiver of his rights under the Convention.[947]

The waiver argument was rejected in *Holder v. Holder* (*Holder I*).[948] The Ninth Circuit held that the father did not waive his right to pursue a Hague claim by contemporaneously filing 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.[949]

Similarly, in the case of *In re J.J.L.-P*,[950] a Texas court found that waiver did not apply where the father, without knowledge of the existence of the 1980 Convention, filed an action for custody in Texas state court in response to the mother's refusal to return the child to Mexico. Distinguishing the case from *Journe*, the court found that the father did not knowingly waive his rights under the Convention. His custody action in Texas was filed well before he returned to Mexico and learned of his rights under the Hague Convention.[951]

In *Willard v. Willard*[952] the family lived in Vicenza, Italy, at the father's military posting. The family temporarily returned to the United States when the father was assigned to additional training. The mother began custody proceedings in Michigan, and the father did the same in Texas. After the state-court judges

947. *Journe*, 911 F. Supp. at 48 (citations and footnotes omitted):

> Throughout 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. No other reasonable explanation of his conduct is possible. 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.

948. 305 F.3d 854 (9th Cir. 2002).

949. *Id.* at 873 n.7 (emphasis in original).

950. 256 S.W.3d 363 (Tex. App. 2008).

951. *Id*. at 371.

952. No. 17-cv-11645, 2017 WL 3278745 (E.D. Mich. Aug. 2, 2017).†

communicated with one another in accordance with the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), they determined that the proper venue was Michigan. The father filed a Hague petition for return of the parties' two children to Italy. The mother moved to dismiss the Hague case, alleging that the father waived his right to invoke proceedings under the Convention because of his election to pursue custody in Texas state court. The district court denied the motion to dismiss, finding that neither state court issued a decision in the custody matter, and the Michigan court stayed its action. Finding no intentional relinquishment of the father's rights to pursue a Convention case, the district court denied the mother's motion to dismiss based on waiver.[953]

In *Leon v. Ruiz*[954] the mother attempted to present affirmative defenses for the first time in her opening statement. The court found that under Federal Rule of Civil Procedure 8(c)(1), the mother had waived her right to present defenses and did not give the father sufficient time to respond to them.[955]

IV.H.2

Unclean Hands

No U.S. cases have accepted a defense of unclean hands.[956] In *Karpenko v. Leendertz*,[957] the court declined to apply the equitable doctrine, concluding that

> application 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."[958]

953. *Id*. at *5.

954. No. MO:19-CV-00293-RCG, 2020 WL 1227312 (W.D. Tex. Mar. 13, 2020).†

955. Nevertheless the court allowed mother to give evidence of her belated defenses, but after the matter was submitted, the court found that those defenses lacked merit. *Id*. at *6.

956. Rodriguez Palomo v. Howard, 426 F. Supp. 3d 160, 178 (M.D.N.C. 2019), *aff'd sub nom*. Palomo v. Howard, 812 F. App'x 155 (4th Cir. 2020) ("Unclean hands" is not a supported defense to a Hague Petition.); LaSalle v. Adams, No. CV-19-04976-PHX-DWL, 2019 WL 6135127, at *7 (D. Ariz. Nov. 19, 2019)† (argument lacks merit); Uzoh v. Uzoh, No. 11-cv-09124, 2012 WL 1565345, at *6 (N.D. Ill. May 2, 2012)† ("The Hague Convention does not recognize unclean hands as a defense."). *Cf.*, Von Wussow-Rowan v. Rowan, No. CIV.A. 98-3641, 1998 WL 461843 (E.D. Pa. Aug. 6, 1998)† (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, resulting in the child being reabducted back to the United States by the father).

957. 619 F.3d 259 (3d Cir. 2010). The Third Circuit's position on the unclean hands issue was reiterated in Didon v. Castillo, 838 F.3d 313, 318 (3d Cir. 2016).

958. *Karpenko*, 619 F.3d at 265 (quoting Convention, art. 1(b)).

The court observed 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.

However, unclean hands arguments have been raised successfully in requests for fee awards. In *Souratgar v. Lee Jen Fair* (*Souratgar II*),[959] the mother was subjected to domestic violence; this contributed to her wrongful removal of the child. The court concluded that it would be inappropriate to award the father fees and costs related to his successful Hague petition. The appellate court noted that denying fees under these circumstances was analogous to the unclean hands doctrine.

> Where, as here, the respondent's removal of the child from the habitual country is related to intimate partner violence perpetrated by the petitioner against the respondent, the petitioner bears some responsibility for the circumstances giving rise to the petition. In line with this reasoning, district courts in other circuits have concluded that "family violence perpetrated by a parent is an appropriate consideration in assessing fees in a Hague case."[960]

In *Delgado-Ramirez v. Lopez*,[961] the court found that both the petitioner and the respondent had unclean hands. The court questioned whether the abduction would have occurred but for the petitioner's conduct, refusing court-ordered visitation for over ten months. Accordingly, the court denied the successful petitioner an award of fees and costs based on her deliberate thwarting of the father's visitation rights before the abduction took place.[962]

Conversely, in *Saldivar v. Rodela*,[963] 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 therefore not bar a fee award.[964]

959. 818 F.3d 72 (2d Cir. 2016).

960. *Id.* at 79. *Accord* Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 428357, at *1 (E.D. Mich. Jan. 28, 2020);† *cf.* Paulus *ex rel.* P.F.V. v. Cordero, No. 3:12-CV-986, 2013 WL 432769, at *5 (M.D. Pa. Feb. 1, 2013)† (citing *Karpenko* in denying allegation of "unclean hands" to avoid payment of court costs).

961. No. EP-11-CV-009-KC, 2011 WL 692213 (W.D. Tex. Feb. 17, 2011).†

962. *Id.* at *8.

963. 894 F. Supp. 2d 916 (W.D. Tex. 2012).

964. *Id.* at 932–33.

IV.H.3

Fugitive Disentitlement

The doctrine of fugitive disentitlement has been accepted in a few Hague cases, but it has not been applied uniformly. This lack of consistency reflects differences in fact patterns rather than differences in doctrinal analysis. Most courts have held that the doctrine of fugitive disentitlement should be narrowly construed and applied under only the most compelling circumstances.

The first appellate case to apply the doctrine of fugitive disentitlement was *Prevot v. Prevot*.[965] In *Prevot*, the 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 his attempts to prevent the mother and the children from leaving France, she succeeded in returning to the United States two years later. The father's petition for the children's return to France was granted by the district court but reversed by the Sixth Circuit. The circuit court concluded that the father was a fugitive and therefore not entitled to relief from U.S. courts.

> The power of an American court to disentitle a fugitive from access to its power and authority is an equitable one.
>
> * * * * *
>
> 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. [T]he 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 of American criminal process, to defiance of judicially imposed obligations owed to victims of crime, and to flights from financial responsibilities to our government.[966]

In *Pesin v. Rodriguez*,[967] the Eleventh Circuit applied the fugitive disentitlement doctrine to bar a parent from appealing the district court's grant of a return petition. The father's Hague petition was granted by the district court, and the mother was ordered to return the children to Venezuela within ten days.[968] She returned the children to Venezuela within the ten-day limit, but removed herself and the children the very next day. The district court issued an order to show cause and set the matter for hearing. The mother did not attend the hearing, and the court found her in contempt. The court ruled that the contempt could be

965. 59 F.3d 556 (6th Cir. 1995).

966. *Id.* at 562, 566 (citations omitted). *Prevot* was decided prior to Degen v. United States, 517 U.S. 820 (1996), wherein the Court clarified the use of the doctrine.

967. 244 F.3d 1250 (11th Cir. 2001).

968. *See* Pesin v. Rodriguez, 77 F. Supp. 2d 1277 (S.D. Fla. 1999).

purged by presenting the children before the district court or a Venezuelan court; the mother did neither. While still in contempt, the mother appealed the order of return. Noting that the fugitive disentitlement doctrine had been previously used to bar proceedings by those held in civil contempt,[969] the court held that application of the doctrine was appropriate and dismissed the mother's appeal.[970]

In *Walsh v. Walsh*[971]—a case decided later and differently than *Prevot*—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*[972] and found that the case for disentitlement was too weak to bar the 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. . . . 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.[973]

In *March v. Levine*,[974] the Sixth Circuit declined to extend its fugitive disentitlement analysis in *Prevot* to a conviction for civil contempt. The children were habitual residents of Mexico. After a visit, their maternal grandparents wrongfully retained the children in the United States. They contested the father's petition for return, arguing that the children's mother, who had been missing for four years, was presumed dead. The grandparents secured a default judgment against the father for the mother's wrongful death. 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

969. *See, e.g.*, United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997).

970. 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); Moscona v. Shenhar, 649 S.E.2d 191, 198 (Va. Ct. App. 2007), *aff'd sub nom*. Sasson v. Shenhar, 667 S.E.2d 555 (Va. 2008) (after father was found in contempt, he appealed the order for him to return child to the United States, and the connection between father's fugitive status and his appeals was direct—imposition of doctrine upheld).

971. 221 F.3d 204 (1st Cir. 2000).

972. 517 U.S. 820 (1996).

973. *Walsh*, 221 F.3d at 216.

974. 249 F.3d 462 (6th Cir. 2001).

'restraint in resorting to inherent power' and its use must 'be a reasonable response to the problems and needs that provoke it.'"[975]

The doctrine also was not authorized in *Gomez v. Fuenmayor*,[976] where a mother had fraudulently obtained her child's passport, but where no charges were filed against her, she had not been arrested, and she had not ignored any court orders. The court determined that under the circumstances, application of the fugitive disentitlement doctrine was unwarranted.

IV.I

Asylum Proceedings

Asylum proceedings may have an impact on issues that arise in Convention cases, most notably habitual residence, grave risk, and the Article 12 delay defense. The pendency of an asylum claim can also introduce procedural issues such as jurisdiction.[977]

IV.I.1

Asylum: Habitual Residence, Acclimatization, and Settlement

Habitual residence questions might be influenced by a pending or parallel asylum claim. As noted previously, a child's or parent's potential risk of being deported may bear on the issue of whether the child has acclimatized to his or her new surroundings. From an evidentiary standpoint, asylum applications may support arguments that parents harbored the intent to seek a new habitual residence. In *Delgado v. Osuna*,[978] a family disenchanted with life in Venezuela decided to relocate to a safer country. On arrival in Miami, according to their plan to relocate, they obtained assistance preparing their applications for political asylum in the United States. The father abandoned his plans for asylum when he found out that as a physician, he could not be licensed to practice in the United States without significant retraining. The mother moved with their two sons to Texas.

The father petitioned for the return of the children, arguing that the family relocated without the intention of seeking political asylum. His petition was denied.

975. *Id.* at 470 (citing *Degen*, 517 U.S. at 823–24).

976. No. 14-CV-24733-KMM, 2015 WL 12977397 (S.D. Fla. Apr. 29, 2015),† *aff'd*, 812 F.3d 1005 (11th Cir. 2016).

977. *E.g.*, Rafael Rodriguez v. Alvarez, No. 8:19-cv-01552-PWG, 2019 WL 2367061, at *4 (D. Md. June 5, 2019).†

978. 837 F.3d 571 (5th Cir. 2016).

> There is at least some evidence that supports this finding, namely that he attended the meeting . . . where he learned that he would be unable to practice medicine in the United States without multiple years of additional schooling and training. Regardless, [the father's] intentions concerning his seeking political asylum are largely irrelevant for purposes of his petition. The important finding is that [the father] and [the mother] agreed that she would seek political asylum for the children because this finding establishes the conclusion that [the mother] and [the father] intended to abandon Venezuela as the children's habitual residence.[979]

A pending and parallel asylum claim may also be persuasive evidence on the habitual residence question. A child's immigration status—and risk of deportation—may be relevant to whether the child has become acclimatized in the child's new environment.[980] But in other cases, parents' undocumented status has been found to undermine claims of habitual residence.[981]

As with immigration status, courts may consider the pendency of asylum proceedings when assessing acclimatization and settlement. In some cases, courts have concluded that a child's or parent's undocumented status overrides evidence of the child's connections to the United States.[982] In *da Silva v. de Aredes*,[983] the mother and child had pending petitions for asylum. Although the district court found that the child had "meaningful relationships and lasting emotional bonds with a community in East Boston,"[984] it ruled that the child was not settled, based on the totality of the evidence, including the child's immigration status. After the Hague proceedings ended, the immigration court set a trial date for the asylum petition three years in the future. The mother moved for a new trial in the Hague case, arguing that this three-year period eliminated the risk of deportation and

979. *Id*. at 580.

980. *See, e.g.*, *Barzilay III*, 600 F.3d 912, 918 (8th Cir. 2010); Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995), and Robert v. Tesson, 507 F.3d 981, 992 (6th Cir. 2007), incorporating the factors enunciated in the seminal case of *In re* Bates, 1989 WL 1683783, EWHC (Fam) CA 122/89 (Eng.), defining habitual residence as a place a child moves to with a "settled purpose"; Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012); Alonzo v. Claudino, No. 1:06CV00800, 2007 WL 475340 (M.D.N.C. Feb. 9, 2007).† *Cf*. *In re* B. del C.S.B., 559 F.3d 999 (9th Cir. 2009) (immigration status is not dispositive on the question of the child's degree of settlement); *see also* Aranda v. Serna, 911 F. Supp. 2d 601 (M.D. Tenn. 2013). *See* Immigration Status, *supra* section III.F.9.

981. Alanis v. Reyes, 230 F. Supp. 3d 535, 540–42 (N.D. Miss. 2017) ("Their illegal immigration status and the unsteady and temporary nature of their living arrangements in the United States indicate that the United States was not (the child's) habitual residence.").

982. *In re* Hague Child Abduction Application, No. 08-2030-CM, 2008 WL 913325, at *11 (D. Kan. Mar. 17, 2008).† *See also In re* Ahumada Cabrera, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004).

983. 953 F.3d 67 (1st Cir. 2020).

984. *Id.* at 75.

was material to her Article 12 settlement defense. The district court disagreed and was affirmed on appeal.[985]

A pending asylum case is not likely to result in a continuance of a stay of Convention proceedings. The Convention's requirement that proceedings be conducted promptly and expeditiously is in tension with the concept of delaying proceedings to await a decision in an asylum matter. Given the potential delays in the hearing of asylum cases—sometimes amounting to a matter of years[986]—courts are reluctant to grant stays.[987]

IV.I.2

Asylum and Grave Risk

The merits of a pending asylum claim may be relevant when courts consider a request to stay a Hague proceeding.[988] Asylum granted during a Hague case may be grounds to reassess claims of grave risk.

Parallel asylum proceedings that were ongoing during a Convention case were the subject of the Fifth Circuit case *Sanchez v. R.G.L.*[989] The children were deemed unaccompanied minors and placed in mandatory removal proceedings. Their counsel applied for asylum and relief from removal. The mother filed a petition for return of the children. The court denied the children's request for appointment of a guardian ad litem, declined to stay the Hague case until the asylum proceeding was heard, and granted the mother's petition for return.[990] While the appeal was pending, the children were granted asylum. On appeal, the

985. *Id.* at 71–72, 77.

986. *Id.* at 71; Valles Rubio v. Veintimilla Castro, No. 19-CV-2524(KAM)(ST), 2019 WL 5189011, at *12 (E.D.N.Y. Oct. 15, 2019),† *aff'd*, 813 F. App'x 619 (2d Cir. 2020) (three to five years in immigration court plus additional time for Board of Immigration Appeals).

987. Sanchez v. R.G.L., 761 F.3d 495, 511 (5th Cir. 2014) (district court denied stay, remanded for further consideration after asylum granted); Hernandez v. Peña, NO: 15-3235, 2016 WL 8275092, at *6 (E.D. La. July 20, 2016) (prompt resolution outweighs merits of a stay); De Souza v. Negri, No. 14-13788-DJC, 2014 WL 7330770 (D. Mass. Dec. 19, 2014);† Mendoza v. Esquivel, No. 2:16-cv-0001, 2016 WL 1436289, at *11 (S.D. Ohio Apr. 12, 2016).†

988. Mendoza v. Esquivel, No. 16-CV-0001, 2016 WL 2757551 (S.D. Ohio May 12, 2016)† (failure to provide any evidence why appeal from denial of asylum would be successful); Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008) (court determines asylum applications do not appear meritorious); Olupo v. Olupo, No. C8-02-109, 2002 WL 1902892 (Minn. Ct. App. Aug. 20, 2002)† (eligibility for asylum was "problematic").

989. 761 F.3d 495 (5th Cir. 2014). For additional facts relating to the case, see *supra* section IV.G.7.

990. The district court did not consider what, if any, effect the asylum proceedings would have on the outcome of the Hague petition, but correctly noted that promptness in the disposition of the Hague case would be impaired by a continuance.

children[991] argued that (1) the grant of asylum prohibited their return in a Hague proceeding, and (2) in the alternative, the case should be remanded to district court with instructions to consider the asylum grant. The government agreed with option two.

The appellate court found a "significant overlap" between Article 13(b) defenses and grounds for asylum; both address the harm children will face if returned to their home country. However, the court found that the two proceedings have different burdens of proof: clear and convincing evidence[992] in a 13(b) Hague defense versus a preponderance of the evidence[993] in asylum cases. Accordingly, an asylum grant does not mandate a finding of grave risk under Article 13. While a credible asylum claim may be relevant to a grave-risk determination, it does not divest courts of the obligation to determine whether a 13(b) defense exists.[994] Upholding the order of return, the court concluded that the findings of other governmental agencies are not dispositive in a Hague case, and courts hearing petitions for return must evaluate defenses based upon "all offered relevant evidence."[995]

IV.I.3

Hague Priority over Asylum Decisions

Asylum claims and proceedings do not control the outcome of Hague Convention cases. The most authoritative discussion of the tension between pending asylum claims and return cases under the 1980 Convention can be found in the Fifth Circuit's opinion in *Sanchez*, discussed above.[996] In *Sanchez*, the court rejected the children's claim that asylum orders took priority over Hague return orders by virtue of the "last in time" rule.[997] The court reasoned that while asylum grants are binding on the attorney general or secretary of homeland security, those

991. The court disposed of preliminary issues: (1) the children's standing, themselves, to appeal (The court determined that they did have standing, noting their interest in the outcome of the case, and that no other person or individual or entity responded meaningfully to the mother's petition and failed to assert any exceptions to the children's return. *Sanchez*, 761 F.3d. at 502); (2) the need for the appointment of a guardian ad litem for the children, given that no respondent was making an effort to represent the children's interests; and (3) whether the children were allowed to intervene (they were not). *Id.* at 508.

992. 22 U.S.C. § 9003(e)(2)(A) (stating that "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.").

993. 8 C.F.R. § 1208.13(a), (b)(1)(i).

994. Sanchez v. R.G.L., 761 F.3d 495, 510–11 (5th Cir. 2014).

995. *Id.* at 510.

996. *Id*.

997. Ntakirutimana v. Reno, 184 F.3d 419, 426–27 (5th Cir. 1999).

grants do not take precedence over judicial orders of return. This conclusion was based on the principle that Hague Convention return orders do "not affect the responsibilities of either the Attorney General or Secretary of Homeland Security under the INA."[998]

In *Ordonez v. Benitez-Guillen*[999] a mother brought her child from Honduras and was paroled by the Department of Homeland Security (DHS) into the United States. The father petitioned for the child's return, and the mother filed a motion to dismiss on the grounds that ICARA and the Immigration and Nationality Act (INA) are irreconcilably in conflict. At the time that the court heard the motion, it had not heard the merits of the father's petition for return, nor had DHS or the attorney general determined whether the mother and child qualified for asylum. The mother argued that a potential grant of asylum conferred a right to remain in the country despite any orders that may be forthcoming in the Hague action. The court denied the mother's motion to dismiss, reasoning that the mother's argument would result in the simple expedient of making an asylum claim to defeat a pending Hague case. The mother also contended that the pendency of an asylum claim deprived the district court of jurisdiction to decide the Hague case. The court disagreed, ruling that ICARA specifically grants the court original jurisdiction over Hague petitions. The INA does not "strip" the district court of that jurisdiction.[1000]

In *Salame v. Tescari*[1001] the mother and her children had been granted asylum in the United States. The mother argued that the executive branch's grant of political asylum to her and her children precluded a judicial order of return. She also argued that the district court erred in failing to properly consider the preclusive effect of an asylum grant. The Sixth Circuit acknowledged that the district court's order did not explicitly mention the grant of asylum. However, the asylum grant was discussed at trial, and the "Asylum Approval" document was admitted into evidence. Additionally, the mother failed to present evidence at trial from the asylum proceedings that might have been relevant to the Article 13(b) or 20 inquiries, or to point to evidence that the district court failed to cover at trial. Rather, the mother's argument on appeal proposed that the trial court failed to discuss the effect of an asylum grant itself on the case for return.

998. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993).

999. No. 2:18-CV-1191, 2019 WL 2289831 (S.D. Ohio May 29, 2019).†

1000. *Id*. at *2.

1001. 29 F.4th 763 (6th Cir. 2022).

The Sixth Circuit agreed that the factors relevant to an asylum grant may also be relevant to defenses under the Hague Convention,[1002] but it held that courts had the authority to make return orders for wrongfully removed children under the Convention regardless of whether the children were previously granted asylum. The court held, "We reject [the mother's] argument that a grant of asylum deprives federal courts of authority to enforce the Hague Convention."[1003]

The court relied on the conclusions the Fifth Circuit reached in *Sanchez*[1004] that discretionary grants of asylum were binding upon the attorney general or the secretary of homeland security, but that such grants did not confer a right for the child or children to remain in the United States despite judicial orders to the contrary.[1005] The Sixth Circuit also adopted the reasoning of the Fifth Circuit that "'[t]he judicial procedures under the Convention do not give to others, even a governmental agency, authority to determine [the] risks' children may face upon return to their country of habitual residence."[1006]

While *Salame*, *Sanchez*, and *Ordonez* are persuasive authority for resolving conflicts between asylum grants and return orders made under the 1980 Hague Convention, one court[1007] extended the priority of Hague Convention orders to applications for withholding the removal of a child under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).[1008] In *Hernandez v. Peña*, the district court found that the child was settled and denied the father's petition for return of the child to Honduras. While the father's appeal was pending, the mother and child moved to reopen their previously filed immigration proceedings. The mother applied for asylum, and the child applied for withholding of removal under CAT. The immigration court granted the motions to reopen the case and set the matter for hearing. Shortly thereafter, the Fifth Circuit reversed the trial court's decision and granted a judgment of return in favor of the father,[1009] holding that the mother and child were in active removal proceedings and that this fact had to be considered when analyzing the impact of

1002. *Id.* at 773. *See also* Sanchez v. R.G.L., 761 F.3d 495, 510 (5th Cir. 2014) ("While the factors that go into a grant of asylum may be relevant to determinations under the Hague Convention, the district court has a separate and exclusive responsibility to assess the applicability of an Article 13(b) affirmative defense.").

1003. *Salame*, 29 F.4th at 773.

1004. 761 F.3d at 510.

1005. *Id.*

1006. *Salame*, 29 F.4th at 772.

1007. Hernandez v. Peña, No. CV 15-3235, 2016 WL 8275092, at *6 (E.D. La. July 20, 2016).†

1008. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified as a note under 8 U.S.C. § 1231).

1009. Hernandez v. Garcia Peña, 820 F.3d 782 (5th Cir. 2016)

the child and mother's immigration status. The Fifth Circuit remanded the case to the trial court to order the child's return.

The mother moved for relief from final judgment, arguing that the district court should stay the Hague case pending the adjudication of the son's CAT petition because, if granted, his return to Honduras would be prohibited. The father countered, arguing that a stay would violate the Fifth Circuit order and the facts of the CAT petition were based on the same grave-risk facts the mother asserted in the Hague case. The district court noted the potential for conflicting orders, but based upon the authority of *Sanchez v. R.G.L.*,[1010] the court found that CAT did not automatically supersede orders made under ICARA.[1011] Although a change in the child's immigration status may be relevant to the settlement issue, balancing the factors for and against a stay, the district court found that the Hague Convention's mandate for promptness was dispositive and denied the mother's motion.[1012] This avoided potential conflicting orders in the two cases.

Whether and to what extent an order for return of a child in Hague Convention proceedings might adversely affect a parent's or child's asylum proceedings is an open question. Although a court may not compel a parent to accompany a child back to the habitual residence, it is common for an abducting parent to do so. A parent who accompanies the child back to the habitual residence may risk their asylum claims. Applicants for asylum may be presumed to have abandoned their applications by leaving the United States under Code of Federal Regulation § 208.8(a).[1013] A return to the previous habitual residence is deemed to contraindicate a fear of future persecution.[1014] The same is true if the applicant's family has returned to the habitual residence without evidence of further persecution.[1015]

1010. 761 F.3d 495 (5th Cir. 2014).

1011. International Child Abduction Remedies Act, 22 U.S.C. § 9001 et. seq. ICARA is the implementing statute for the 1980 Hague Convention in the United States.

1012. *Hernandez*, 2016 WL 8275092, at *5.

1013. 8 C.F.R. § 208.8(a) provides that "[a]n applicant who leaves the United States without first obtaining advance parole under § 212.5(f) of this chapter shall be presumed to have abandoned his or her application under this section." 8 Code Fed. Reg. § 208.8(b): "An applicant who leaves the United States pursuant to advance parole under § 212.5(f) of this chapter and returns to the country of claimed persecution shall be presumed to have abandoned his or her application, unless the applicant is able to establish compelling reasons for such return."

1014. The problem was recognized in *Garcia v. Duarte Reynosa*, No. 2:19-cv-01928-RAJ, 2020 WL 777247, at *2, *5 (W.D. Wash. Feb. 18, 2020)† ("The Court understands that Respondent is currently engaged in immigration proceedings that may limit her ability to leave the United States"); *see, e.g.*, Attia v. Gonzales, 477 F.3d 21, 24 (1st Cir. 2007) (applicant returned to Egypt where members of his immediate family continued to reside); Gilca v. Holder, 680 F.3d 109, 117 (1st Cir. 2012) (voluntary return to Moldova).

1015. Ambati v. Reno, 233 F.3d 1054, 1060–61 (7th Cir. 2000).

The presumptions of §208.8 may be overcome. When a person's return to the habitual residence is based upon factors that contraindicate voluntariness, return may be insufficient to show abandonment, and the applicant may be able to show an objectively credible fear of future persecution.[1016] If a child is ordered returned to the habitual residence, an abducting parent who accompanies the child may have grounds to assert that the parent's return to the habitual residence overcomes the presumption of abandonment of asylum under §208.8. A reasonable interpretation of a parent's actions in returning with a child would classify such a return as compelling[1017] rather than undermining that parent's subjective fear of persecution.[1018]

1016. *See, e.g.*, De Santamaria v. U.S. Att'y Gen., 525 F.3d 999, 1011–12 (11th Cir. 2008) (escalating violence after each return to Columbia supported objective fear of persecution); *see also* Kalaj v. Gonzales, 185 F. App'x 468, 473–74 (6th Cir. 2006) (nineteen-day return to bury sister and attend funeral services unlike cases evidencing a lack of compulsion); Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

1017. Kalaj v. Gonzales, 185 F. App'x 468, 473–74 (6th Cir. 2006).

1018. *De Santamaria*, 525 F.3d at 1011–12.

V
Issuing Orders of Return

V.A
Specificity: Time, Manner, and Date of Return

When making an order for the return of a child, courts should focus on enforcement, specificity, and the safety of the child.[1019] Orders should clearly state the mandated time, place, and details of the child's return.[1020] Specificity in return orders is essential, particularly in those cases where there is little cooperation between the parents. In an example of a parent who was determined to evade the court's jurisdiction, in *Rosasen v. Rosasen*[1021] the court issued its findings of fact and conclusions of law, and it ordered that the physical custody of the children be transferred from the father to the mother within two days. Failing the agreement of the parents as to the time and place of the transfer, the court set the time and place to occur in front of the courthouse in Los Angeles. The father failed to turn over the children or appear with them at the courthouse. Shortly thereafter, the court entered an order finding the father in contempt and issued enforcement orders. Law enforcement officers located the father and children in Dubuque, Iowa, and it appeared that the father was attempting to cross into Canada with the children.

1019. *See* Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980, § 1.8.2 (2006), https://assets.hcch.net/upload/concl28sc5_e.pdf:

> 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.

1020. *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. Oct. 23, 2008)† (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).

1021. No. CV 19-10742-JFW(AFMx), 2020 WL 4353679, at *3 (C.D. Cal. June 5, 2020).†

The latest quadrennial Special Commission report recommended that

> . . . to ensure compliance and avoid delays, a court order for return should be as detailed as possible, including, for example, the manner and timing of the return, and should specify with whom, where, when and how the child should be returned. Where possible, the order should make provision for voluntary compliance and specify the progressive coercive measures to be applied in the event of non-compliance.[1022]

Careful attention to the "practical arrangements"[1023] of the child's return is reflected in a number of orders from U.S. courts.[1024] 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.[1025] The

1022. Conclusions and Recommendations on the Seventh Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (2017), https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf.

1023. Guide to Good Practice, Part VI, *supra* note 42, at 35, ¶ 49, provides that

> [i]n some jurisdictions, courts ordering the prompt return of the child may provide for practical arrangements to facilitate the implementation of the return of the child to the State of habitual residence. An example of practical arrangements is where the return order states who is to buy the airplane tickets for the child's return. Such arrangements are different from protective measures in that they are not intended to address a grave risk of harm. Practical arrangements should neither create obstacles to the child's return nor overburden either party (particularly the left-behind parent), nor exceed the court's limited jurisdiction.

1024. Neumann v. Neumann, 684 F. App'x 471, 484 (6th Cir. 2017) ("return order should provide sufficient practical detail so that return can be accomplished promptly without further appreciable litigation delay"); Hernandez v. Garcia Peña, 820 F.3d 782, 790 (5th Cir. 2016) (remand directed district court to finalize details of child's return); March v. Levine, 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001) (respondents to provide "written notice of the date, flight numbers and arrival time to the Petitioner . . . with a copy furnished to the court UNDER SEAL 24 hours in advance of the arrival of the children in Mexico. [Father] shall meet his children at the arrival gate for the designated flight, and custody is to be given to him at that time."); Cocom v. Timofeev, No. 2:18-cv-002247, 2019 WL 76773, at *14 (D.S.C. Jan. 2, 2019)† ("The court will issue a separate and un-redacted order contemporaneously with this order including more details about the timing and logistics of that return"); Paroginog v. Paroginog, No. 0:17-cv-00381-MLD-FLN, 2017 WL 630575, at *1 (D. Minn. Feb. 15, 2017)† (ordering the exact travel itinerary for the minor children's return to British Columbia, Canada, including airline and flight number).

1025. *See, e.g.*, *Rosasen*, 2020 WL 4353679, at *3; Leon v. Ruiz, No. MO:19-CV-00293-RCG, 2020 WL 1227312, at *8 (W.D. Tex. Mar. 13, 2020)† (warning of "serious sanctions," including contempt for failure to abide by court orders).

initial order of return is entitled to "full faith and credit"[1026] and is enforceable in state courts "as if it were a child-custody determination."[1027]

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 to finalize transportation arrangements and incorporate them into the order of return.[1028] The order may include any provisions that must be enforced by the U.S. Marshals Service or other relevant law enforcement agency.[1029]

V.B

Undertakings and Ameliorative Measures

V.B.1

Characterization

Before the adoption of the 1980 Hague Convention, references to undertakings in U.S. law typically pertained to contractual guarantees made to ensure the performance or nonperformance of an act, course, or conduct. They were frequently referenced as sureties in financial matters.[1030] Undertakings in the context of Hague Convention cases, however, were not absorbed into U.S. law until 1995, when the Third Circuit decided *Feder v. Evans-Feder*.[1031] Citing the Canadian Supreme Court case *Thomson v. Thomson*[1032] and the decision in the U.K. case *Re O*,[1033] the *Feder* court referred to undertakings as conditions of return that

1026. 22 U.S.C. § 9003(g): "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."

1027. Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) §§ 301–302 (1997).

1028. Torres Garcia v. Guzman Galicia, No. 2:19-cv-00799-JAD-BNW, 2019 WL 4192729, at *1 (D. Nev. Sept. 4, 2019)† (ordered hearing to finalize details for the minor child's return); East Sussex Child. Servs. v. Morris, 919 F. Supp. 2d 721, 735 (N.D. W. Va. 2013) (same); Mendez v. May, 85 F. Supp. 3d 539, 559 (D. Mass.), *rev'd on other grounds*, 778 F.3d 337 (1st Cir. 2015) (requiring report to the court that "sets forth the parties' joint plan to return the child to Argentina, which is to include the date of travel, the flight number, and the adult with whom the child will travel.").

1029. *See Cuellar I*, 596 F.3d 505, 512 (9th Cir. 2010); Sullivan v. Sullivan, No. CV-09-545-S-BLW, 2010 WL 227924 (D. Idaho Jan. 13, 2010)† ("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.").

1030. *See, e.g.*, Carey v. Sugar, 425 U.S. 73, 75 (1976).

1031. 63 F.3d 217 (3d Cir. 1995).

1032. [1994] 3 S.C.R. 551, ¶ 53 (Can.).

1033. [1999] 2 F.L.R. 349 (Eng.).

would "ameliorate any short-term harm to the child."[1034] State courts adopted this idea of undertakings shortly thereafter.[1035]

In *Simcox v. Simcox*,[1036] the Sixth Circuit proposed that undertakings be limited by focusing only on the immediate issues that may arise between the time of the child's repatriation and the time that the court of habitual residence has the opportunity to make its custody determinations. The Sixth Circuit warned that undertakings that continue for a longer period of time are more likely to embroil the court in child-custody issues. But other courts may justify more extended measures, depending on the potential risks of harm that may persist after the child's return. These courts note that the risk of harm does not have to be immediate—only grave.[1037]

A broad definition of *ameliorative measures* suggested by the recent Supreme Court case *Golan v. Saada*[1038] is any measure taken by the parents or by the authorities of the habitual residence that could "reduce whatever risk might otherwise be associated with a child's repatriation."[1039] Although the terms *undertakings* and *ameliorative measures* may have similar but distinct meanings, the Supreme Court in *Golan* noted that appellate courts use the terms interchangeably.[1040] As such, this guide will also use the terms interchangeably.

1034. Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995).

1035. *See, e.g.*, Panazatou v. Pantazatos, No. FA 960713571S, 1997 WL 614519, at *3 (Conn. Super. Ct. Sept. 24, 1997);† Turner v. Frowein, 752 A.2d 955, 976 (Conn. 2000) (advocating analysis of "protective arrangements"); Strout v. Campbell, 864 So. 2d 1275, 1277–78 (Fla. 2004) (children's return refused because father violated his undertakings before the return of the children).

1036. 511 F.3d 594 (6th Cir. 2007).

1037. Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000); *Danaipour I*, 286 F.3d at 26 ("Undertakings that will protect the child from grave risk for only a very limited time are insufficient to defeat an Article 13(b) claim.").

1038. 142 S. Ct. 1880 (2022).

1039. *Id.* at 1887 (citing *Blondin IV*, 238 F.3d 153, 163 n.11 (2d Cir. 2001)).

1040. *Golan*, 142 S. Ct. at 1890 n.4. The term *ameliorative measures* appears first in *Blondin II*, 189 F.3d 240, 248–49 (2d Cir. 1999), where the court reasoned that: "For this reason, it is important that a court considering an exception under Article 13(b) take into account any ameliorative measures . . . that can reduce whatever risk might otherwise be associated with a child's repatriation." When *Blondin* was reheard by the Second Circuit on appeal after remand (*Blondin IV*, 238 F.3d 153), the court referred to its previous holding that trial courts "take into account any ameliorative measures." In the same opinion, the court referred to the measures as "undertakings." *Blondin IV*, 238 F.3d at 159–60.

V.B.2

Use and Scope of Undertakings and Ameliorative Measures

A party seeking an order of return may attempt to obtain a more favorable ruling by proposing undertakings or ameliorative measures that would enhance the child's safety or reduce the potential trauma caused by a return. Since courts have the discretion to order a child returned even though a defense to return has been established,[1041] such measures have been employed successfully to ensure optimal conditions for the child's return. For example, a father who petitions for the return of his child may promise or "undertake" to make travel arrangements that allow the child to finish out his or her school year before returning, and to pay for a child's transportation back to the habitual residence.

Undertakings or ameliorative measures can be used to tailor orders of return to mitigate threats to the child's safety and to minimize inconveniences or upsetting circumstances that might otherwise accompany the child's transition back to the habitual residence. Despite these benefits, courts are encouraged to exercise caution when considering undertakings to avoid unenforceable orders or orders that contravene accepted policy.

Courts have employed a wide range of measures, demonstrated by the following examples of orders to

- require that the parents and the child receive counseling on return[1042]
- provide financial support and maintenance including use of the marital residence until the court of habitual residence makes other arrangements[1043]
- rent an apartment for a number of months, and agree to refrain from pressing charges for abduction and seek dismissal of criminal charges that may have been brought[1044]

1041. Text & Legal Analysis, *supra* note 45, at 10,509 ("The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies."). *See also Yang II*, 499 F.3d 259, 278 (3d Cir. 2007) (citing de Silva v. Pitts, 481 F.3d 1279, 1285 (10th Cir. 2007)); *accord* Custodio v. Samillan, 842 F.3d 1084, 1091 (8th Cir. 2016); Martinez v. Cahue, 826 F.3d 983, 993 (7th Cir. 2016); Yaman v. Yaman, 730 F.3d 1, 19 (1st Cir. 2013).

1042. Rodriguez v. Romero, No. 14-80885-CIV, 2014 WL 4063112, at *5 (S.D. Fla. Aug. 14, 2014).†

1043. Nixon v. Nixon, 862 F. Supp. 2d 1168, 1181 (D.N.M. 2011).

1044. Rial v. Rijo, No. 1:10-cv-01578-RJH, 2010 WL 1643995, at *3 (S.D.N.Y. Apr. 23, 2010).†

- pay past-due support and arrears and airfare for the mother and children, and use reasonable efforts to schedule court proceedings to minimize disruption of the children's schooling[1045]
- promptly seek a custody adjudication from the court of habitual residence, support, and orders for visitation, and a *pendente lite* award of full custody of the child to the mother pending determination by the court of habitual residence[1046]
- locate and pay for housing, airfare, and three months of child support—all before departing[1047]
- dismiss a criminal action against the mother for not returning children, and arrange for therapy for children[1048]
- take all available steps to ensure that the abducting parent will not be prosecuted[1049]

The following types of undertakings have been rejected by courts:

- requirement that the mother accompany the child back to the habitual residence[1050]
- mandate that the father provide evidence that the mother will not be under threat of arrest or prosecution upon return to the habitual residence[1051]
- a condition that required the father to provide an assurance that was beyond his power to deliver[1052]
- requirement that the father reimburse third parties for his fraudulent financial activities, thus eliminating the threats that third parties made to kill the father and mother[1053]

1045. Wilchynski v. Wilchynski, No. 3:10-CV-63-FKB, 2010 WL 1068070, at *10 (S.D. Miss. Mar. 28, 2010).†

1046. Nicolson v. Pappalardo, No. 09-cv-541-P-S, 2009 WL 5227666, at *10 (D. Me. May 27, 2009).†

1047. Krefter v. Wills, 623 F. Supp. 2d 125, 138 (D. Mass. 2009).

1048. Jaet v. Siso, No. 08-81232-CIV, 2009 WL 35270, at *9 (S.D. Fla. Jan. 5, 2009).†

1049. *In re* D.D., 440 F. Supp. 2d 1283, 1300 (M.D. Fla. 2006);† Tabacchi v. Harrison, No. 99 C 4130, 2000 WL 190576, at *16 (N.D. Ill. Feb. 10, 2000).†

1050. Simcox v. Simcox, 511 F.3d 594, 610 (6th Cir. 2007) (disapproved on the principle that the Hague Convention allows children to be ordered returned, not others).

1051. *Id.*

1052. *Id.*

1053. Taylor v. Taylor, No. 10-61287-CIV-JORDAN, 2011 WL 13175008, at *9 (S.D. Fla. Dec. 13, 2011), *aff'd*, 502 F. App'x 854 (11th Cir. 2012).†

V.B.3

Consideration of Ameliorative Measures

V.B.3.a

Golan v. Saada

The Supreme Court recently resolved a circuit split[1054] on the question whether after finding the existence of a grave risk under Article 13(b), a court is required to independently examine the "full range of options" that might allow the safe return of a child before denying the child's return. Writing for a unanimous court, Justice Sotomayor reversed the Second Circuit's opinion in *Saada v. Golan*[1055] and ruled that a "categorical requirement to consider all ameliorative measures is inconsistent with the text and other express requirements of the Hague Convention."[1056]

For concise guidance, the Supreme Court concluded its analysis in *Golan* with black-letter law on undertakings or ameliorative measures:

> . . . [A]lthough nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard.[1057]

1054. The *Blondin* cases (*Blondin IV*, 238 F.3d 153 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022); *Blondin II*, 189 F.3d 240 (2d Cir. 1999)) were criticized in Baran v. Beaty, 479 F. Supp. 2d 1257, 1274 (S.D. Ala. 2007), *aff'd*, 526 F.3d 1340 (11th Cir. 2008) (range of efforts required by *Blondin* were "more than a little disquieting"). *See also Danaipour I*, 286 F.3d 1 (1st Cir. 2002) (authority to return is limited in sexual abuse cases where the court needs to focus on the child's particular situation); *Simcox*, 511 F.3d 594 (undertakings are viewed more skeptically where case involves spousal abuse—referencing Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005) and *Danaipour I*, 286 F.3d 1, 25–26 (1st Cir. 2002)); Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289, 303–04 (1st Cir. 2004) (no inquiry required as to remedies available in habitual residence where grave risk exists because of sexual abuse).

1055. 930 F.3d 533 (2d Cir. 2019).

1056. *Golan*, 142 S. Ct. at 1888.

1057. *Id.* at 1895.

Golan involved a father who was an Italian citizen and a mother who was a U.S. citizen; they met in Italy in 2014.[1058] Shortly thereafter, the mother relocated to Milan, and the parties married in August 2015. Their child, B.A.S., was born in June 2016. The marriage was marred from the beginning by the father's repeated acts of psychological, emotional, verbal, and physical abuse of the mother. He slapped her, pushed her, pulled her hair, called her names, threw things, and, on one occasion, threatened to kill her. Many of the incidents occurred in the presence of the child. The parties lived together for approximately two years until July 2018, when the mother came to the United States with the child to attend a family wedding. After the wedding, the mother moved into a domestic violence shelter in New York and refused to return to Italy.

In September 2018, the father initiated actions in Italian courts seeking sole custody of the child and filed a criminal complaint against the mother for kidnapping. In January 2019, the father filed his Hague petition in New York for return of the child. After a nine-day trial, the district court granted the father's petition, finding that Italy was the child's habitual residence, and that the child was wrongfully retained by the mother. The district court further concluded that returning the child to Italy would expose the child to a grave risk due to domestic violence that would adversely affect the child's cognitive and social development and psychological well-being. The court further found that the father had no capacity to change his behavior, attempted to excuse his violent behavior, and lacked the ability to control his anger or take responsibility for his conduct.

The district court followed Second Circuit precedents[1059] that a trial court must order return of a child "if at all possible" and examine the full range of options that might make possible the safe return of a child to the home country before the court could "deny repatriation on the ground that a grave risk of harm exists." The district court conditioned the child's return to Italy upon the father's agreement that he would (1) provide $30,000 for housing, support, and legal fees to the mother before the child's return; (2) agree to the issuance of a stay-away order from the mother until Italian courts addressed this issue; (3) exercise visits with the child only with the mother's consent; (4) begin a course of behavioral therapy in Italy; and (5) waive any rights to an award of fees or costs in the Hague Convention proceeding.

The Second Circuit affirmed the trial court's holding that Italy was the child's habitual residence but expressed concern, noting that a child's repatriation supported only by unenforceable undertakings is "generally disfavored,"

1058. For clarity, some of the facts recited below were taken from the Second Circuit's opinion in Saada v. Golan, 833 F. App'x 829 (2d Cir. 2020).

1059. *Blondin IV*, 238 F.3d 153, and *Blondin II*, 189 F.3d 240.

particularly where an offending parent's compliance with any promises is not sufficiently guaranteed.[1060] Among the Second Circuit's concerns were the frailty of a stay-away order and the requirement for the mother to consent to the father's contact with the child. Because the undertakings were not sufficient, the Second Circuit remanded the case to the district court to determine whether there were alternative measures available to ameliorate the grave risk to the child upon his return.[1061] The court specifically noted that alternative measures should be either (1) enforceable by the district court or (2) supported by other sufficient guarantees of performance.[1062]

On remand and after a period of nine months that included multiple hearings and contacts with the Italian Central Authority and the Italian ministry of justice, the district court found insufficient evidence to deny repatriation based on psychological harm. The district court also found that a combination of ameliorative measures was sufficient to allow the child's safe return to Italy. Those measures included (1) an order for the payment of $150,000 to the mother for support of the mother and child, payable before the child's return to Italy, (2) issuance of an Italian protective order against the father prohibiting him from going near the mother or the child for one year, (3) an order allowing the father supervised visits, and (4) a court order for social services to oversee the father's parenting classes and behavioral therapy.

The Second Circuit affirmed the district court's order returning the child to Italy. The Second Circuit reiterated its previous adherence to the *Blondin*[1063] criteria that before denying a child's return on the grounds of a grave risk, the trial court "must examine the full range of options that might make possible the safe return of a child."[1064] The Second Circuit found that the district court correctly applied the standards previously set forth in *Saada*, and that the district court did not commit clear error.

The Supreme Court granted the mother's petition for certiorari.

1060. *Saada*, 930 F.3d at 540.

1061. In this regard, the court raised the possibilities that Italian courts might (1) enforce the visitation and stay-away orders, inviting the parties to make such a request of Italian authorities; (2) modify undertakings as conditions before repatriation is granted; (3) involve the U.S. State Department in requesting whether Italian courts would enforce certain undertakings, and (4) take additional evidence on father's compliance with the trial court's previous undertakings.

1062. *Saada*, 930 F.3d at 541.

1063. *Blondin IV*, 238 F.3d 153, 163 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022).

1064. *Blondin IV*, 238 F.3d at 163 n.11.

V.B.3.b

Guided Discretion to Consider

The core holding of *Golan* is that courts are not categorically required to consider a range of ameliorative measures that might make the return of a child possible. The Court found that such a requirement is "inconsistent with the text and other express requirements of the Hague Convention."[1065] *Golan* holds that where a grave risk under Article 13(b) has been established, a district court retains the discretion to consider ameliorative measures that might allow a safe return of the child. The expression of discretion is found in the language of Article 13(b) itself, where the Convention states that a court "is not bound to order the return of the child" if it is established that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[1066]

The Court further noted that "a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return, without purporting to decide subsequent custody matters or weighing in on permanent arrangements."[1067] The Court referenced the comments of Department of State officials who noted that

> undertakings 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 questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.[1068]

Other State Department comments the Court referenced stated that undertakings

> (1) are appropriate in scope; (2) facilitate the Article 12 objective of return of the child "forthwith"; (3) help to minimize the issuance of non-return orders based on Article 13; and (4) respect the jurisdictional

1065. *Golan*, 142 S. Ct. at 1888.

1066. Convention, art. 13(b).

1067. *Golan*, 142 S. Ct. at 1894.

1068. Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affs., U.S. Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995), *cited in Danaipour I*, 286 F.3d 1, 22 (1st Cir. 2002), *reprinted in* Brief for the United States as Amicus Curiae at Appendix, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034), https://www.supremecourt.gov/DocketPDF/20/20-1034/197913/20211027195748877_20-1034%20Golan.pdf.

> nature of the Convention by not encroaching on substantive issues relating to custody and maintenance properly left to the court of the habitual residence.[1069]

The *Golan* Court's observation on the process regarding ameliorative measures concluded that "[w]hile a district court has no obligation under the Convention to consider ameliorative measures that have not been raised by the parties, it ordinarily should address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case."[1070] The Court rejected the assertion that if grave risk is determined to exist, any ameliorative measures must necessarily be considered, observing that the two concepts are separate. The Court noted, however, that "the question whether ameliorative measures would be appropriate or effective will often overlap considerably with the inquiry into whether a grave risk exists."[1071] The Court also noted that trial courts may find it appropriate to consider the two issues at the same time.

If a court chooses to consider ameliorative measures, the margins of a court's discretion should be guided by the principles and requirements of the Convention and the International Child Abduction Remedies Act (ICARA).[1072] Among those principles is that return should not be applied exclusively or "at all costs"; rather, the Convention is designed to protect the interests of both children and parents. Those interests, along with the other objectives and requirements of the Convention, constrain courts' discretion to consider ameliorative measures in three circumstances:[1073] (1) prioritizing the child's physical and psychological safety, if it appears that the proposed measures are unworkable because the gravity of the risk is so severe; (2) whether the proposed ameliorative measures would draw the court into determinations properly reserved for the courts of the habitual residence;[1074] and (3) whether consideration of the ameliorative measures would risk overly prolonging return proceedings.[1075]

1069. Kathleen Ruckman, *Undertakings as Convention Practice: The United States Perspective*, The Judges' Newsletter (Hague Conf. on Private Int'l L.), Volume XI (2006), at 45, https://assets.hcch.net/docs/b3f445a5-81a8-4ee8-bc42-720c6f31d031.pdf.

1070. *Golan*, 142 S. Ct. at 1893.

1071. *Id.* at 1892 (citing Simcox v. Simcox, 511 F.3d 594, 607–08 (6th Cir. 2007), where the Sixth Circuit observed that the appropriateness of ameliorative measures correlates with the "gravity of the risk to the child").

1072. *Golan*, 142 S. Ct. at 1893.

1073. *Id.*

1074. *Id.* at 1893–94.

1075. *Id.* at 1894–95.

V.B.3.b.i

Safety of the Child

The Supreme Court emphasized that courts must be guided by prioritizing the child's physical and psychological safety, noting that where the risk to the child is grave enough, the gravity may foreclose consideration of ameliorative measures as unworkable. The Court gave examples of the types of risks that might fall into this category, including sexual abuse of a child, serious neglect, domestic violence, or situations that give rise to the expectation that ameliorative measures will not be followed.[1076]

For example, in *Danaipour v. McLarey* (*Danaipour I*),[1077] the First Circuit examined whether it is appropriate to rely on undertakings where grave risk involves allegations of child abuse, citing the State Department's comments in the *Text and Legal Analysis*:

> An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition.[1078]

One objective for using undertakings is to allow the return of the child to the status quo existing before the child's removal from the habitual residence; but that is not the goal where the status quo ante was an abusive situation.[1079]

The *Danaipour I* court concluded with the admonition that

> under the Convention and its implementing legislation, the American courts have a duty to ensure that a child is not returned to a situation of grave risk or an intolerable situation. . . . Where substantial allegations are made and a credible threat exists, a court should be particularly wary about using potentially unenforceable undertakings to try to protect the child. Undertakings that will protect the child from grave risk for only a very limited time are insufficient to defeat an Article 13(b) claim.[1080]

As noted in *Abbott v. Abbott*,[1081] the executive branch opinions are entitled to "great weight" in the interpretation of the Convention. The *Text and Legal Analysis* makes clear that abuse of a child is just such an "intolerable situation."

1076. *Id*. at 1894 (citing Walsh v. Walsh, 221 F.3d 204, 221 (1st Cir. 2000)).

1077. 286 F.3d 1 (1st Cir. 2002).

1078. Text & Legal Analysis, *supra* note 45, at 10,510.

1079. *Danaipour I*, 286 F.3d at 25.

1080. *Id.* at 25–26 (citations omitted).

1081. 560 U.S. 1, 15 (2010).

> 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.
>
> * * * *
>
> An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.[1082]

V.B.3.b.ii

Measures That Usurp the Role of the Foreign Court

Golan advises that trial courts should not adopt undertakings or ameliorative measures that usurp the purview of the court that will be determining the custody dispute.[1083] Any measures adopted should be limited to permit a safe return, but not infringe on custody determinations or permanent orders. The court further noted that Article 16 of the Convention prohibits the court hearing the petition for return from adjudicating custody issues.[1084]

V.B.3.b.iii

Expedited Proceedings and Procedures

Noting that Hague Convention return proceedings are "provisional" remedies, *Golan* emphasized that consideration of undertakings or ameliorative measures must be guided by the Convention's exhortation for expeditious proceedings and the use of the most expeditious procedures.[1085] The court observed that a requirement for consideration of the full range of available ameliorative measures is in tension with the requirement for expeditious handling of the case. Finally, the

1082. Text & Legal Analysis, *supra* note 45, at 10,510.

1083. Golan v. Saada, 142 S. Ct. 1880, 1894 (2022).

1084. Article 16 provides: "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."

1085. *Golan*, 142 S. Ct. at 1888 (citing Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020)).

court noted that the Convention itself envisions that a court explain, on request of the parties, if proceedings last longer than six weeks.[1086]

V.B.4

Potential Disadvantages to the Use of Undertakings or Ameliorative Measures

Despite their widespread use in U.S. courts, undertakings or ameliorative measures have inherent limitations. A threshold consideration is enforceability. A U.S. court's order accepting undertakings can be enforced within the United States,[1087] but jurisdiction to enforce those orders stops at the border.[1088] U.S. judges sitting in state and federal courts of general jurisdiction enjoy broad inherent and equitable powers to dispense justice.[1089] In many foreign jurisdictions, however, judges may be constrained from exercising such powers unless they are specifically enumerated by their constitution or other sources of law. One cannot assume that simply because a U.S. court has entered an order based on a party's

1086. *Golan*, 142 S. Ct. at 1894–95.

1087. 22 U.S.C. § 9003(g) provides that "[f]ull 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." The UCCJEA specifically grants jurisdiction to state courts to enforce an order for return of a child under the Hague Convention. UCCJEA, § 302 ("[A] court of this State may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination."), https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/uccjea_final_97.pdf.

1088. *See, e.g.*, Baran v. Beaty, 526 F.3d 1340, 1350 (11th Cir. 2008); *Danaipour I*, 286 F.3d 1, 23 (1st Cir. 2002) ("undertakings should be limited, and are not themselves binding on foreign courts"); Kufner v. Kufner, 519 F.3d 33, 41 (1st Cir. 2008) (undertakings may be imposed in the absence of a grave risk of harm).

1089. *See, e.g.*, *In re* Prevot, 59 F.3d 556, 565–66 (6th Cir. 1995) (fugitive disentitlement); *accord* Bardales v. Duarte, 104 Cal. Rptr. 3d 899, 905 (Cal. Ct. App. 2010); Moscona v. Shenhar, 649 S.E.2d 191, 198 (Va. Ct. App. 2007); Peppin v. Lewis, 752 N.Y.S.2d 807, 811 (N.Y. Fam. Ct. 2002) ("Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.") (citing Degen v. United States, 517 U.S. 820, 823–24 (1996)).

promise, a foreign court will be able to enforce it—even if inclined to do so as a matter of comity.[1090]

In *Danaipour v. McLarey* (*Danaipour I*),[1091] the First Circuit addressed undertakings and a foreign court's ability to enforce, duplicate, or even entertain orders of a U.S. court. Typically courts in the United States have looked to the experience of other common-law countries.[1092] But many Hague signatories have different legal systems, including civil law and Islamic Law. Procedures or remedies that are routine in common-law countries[1093] may be extraordinary or nonexistent in other systems.

Danaipour I clearly illustrates this dilemma. The district court ordered the children returned to Sweden despite substantial evidence that they had been sexually molested by their father. The court concluded that the children could be safely returned with undertakings requiring that the Swedish judicial system monitor the father's conduct and the Swedish social service agencies conduct a full forensic evaluation of the case.[1094] On appeal, the First Circuit was skeptical. The court observed that, in some cases, narrowly crafted undertakings focusing on expediting the return of the child and imposing reciprocal obligations on both

1090. The point is illustrated in reverse by Roberts v. Roberts, No. 95-12029-RGS, 1998 WL 151773 (D. Mass. Mar. 17, 1998),† a case involving return of children ordered returned to the United States from the United Kingdom. The case prompted early communications between the U.K. and the U.S. authorities on the propriety and scope of undertakings. *See* Brown–Nicholls Letter & Legal Memo, *supra* note 1068. In *Roberts*, the father filed a divorce action in Massachusetts and obtained an ex parte order giving him custody of his three children who were in the United Kingdom with their mother. After obtaining his custody order, the father initiated a Hague Convention case in the United Kingdom for the return of the children. With the mother's consent, the English court ordered the children's return to the United States, conditioned upon the father's undertakings to the English court that upon the children's return he would not seek to enforce the ex parte Massachusetts court order granting him custody of the children. When the mother returned the children pursuant to the English court's order, the father was waiting at Boston Logan International Airport; he had the mother served with process in the divorce case, and proceeded to remove the children from her custody. The next day, the mother filed a motion in Massachusetts family court for enforcement of the undertakings given by the father to the English court. The Massachusetts court denied the mother's motion to enforce the undertakings on the basis that the application of the Hague Convention was "jurisdictional." The mother's motion for leave to appeal was denied by the Massachusetts Court of Appeals. The father retained the children until the family court in Massachusetts set aside its ex parte order and granted the mother temporary physical custody of the children.

1091. 286 F.3d 1 (1st Cir. 2002).

1092. *See, e.g.*, Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995) (Canada and the United Kingdom); Silberman, *supra* note 98.

1093. In addition to the United States, other countries with common-law legal systems include the United Kingdom and Northern Ireland, Scotland, Wales, Ireland, Canada, Australia, New Zealand, Hong Kong, and Singapore.

1094. *Danaipour I*, 286 F.3d at 25–26.

parents can be effective. Ideally, undertakings imposed by U.S. courts should not require enforcement by a foreign court. However, undertakings that require a foreign court to issue an order incorporating the terms of the undertaking ordered by a U.S. court are problematic and may be deemed intrusive by the foreign court.[1095] If courts in a foreign country lack the power to enforce orders by equitable relief or contempt, a mirror-image or safe-harbor order will be ineffectual.[1096] At trial, the district court heard testimony from an expert on Swedish law. The expert explained that orders from foreign jurisdictions are usually not implemented and that, even with both parents' consent, a Swedish court can refuse to order a forensic evaluation and lacks the power to compel one if a party refuses to participate.

Elaborate undertakings also take time. Preconditions may require parties to arrange for orders abroad to ensure that the conditions needed for a child's safety will be made and enforced. Obtaining orders abroad can be time-consuming, and if they must be settled before the child actually returns, a court should balance the Convention's exhortation to decide the case promptly against the utility of the undertaking.

Courts have also criticized undertakings that are unrealistic or too onerous.[1097] For example, in *Maurizio R. v. L.C.*,[1098] a California state court found that a psychologically vulnerable child would suffer a grave risk if removed from his mother and returned to Italy. The court concluded that the child had PTSD, and the evidence established that the child, despite his young age (he was six years old), might take his own life. Ordering return of the child, the trial court assumed that the mother would accompany the child on his return to Italy and imposed certain additional conditions: (1) the father would secure the dismissal of the criminal complaint pending in Italy against the mother for child abduction; (2) pending further custody proceedings in Italy, the father would obtain a protective order in Italy protecting the mother; (3) the father would secure an order from an Italian court awarding the mother sole legal and physical custody of the child with monitored visits with the father; and (4) the father must obtain an order from an Italian court (or an enforceable undertaking) obliging the father to

1095. *See* Pérez-Vera Report, *supra* note 18, commenting on Article 15's application to uncertainties concerning the law of the habitual residence, noting that "the return of the child cannot be made conditional upon such decision or other determination being provided" pursuant to Article 15.

1096. P.R. Beaumont & P.E. McEleavy, The Hague Convention on International Child Abduction 161 (1999).

1097. *See* Baran v. Beaty, 526 F.3d 1340, 1350–351 (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).

1098. 135 Cal. Rptr. 3d 93 (Cal. Ct. App. 2011).

provide housing and living expenses for the 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 the mother's cooperation, the mother could frustrate the order by simply refusing to accompany the child to Italy.[1099] Second, a dismissal of criminal proceedings in Italy was beyond the father's control. The trial court exceeded its authority by requiring the father to obtain assurance from the Italian government that a prosecution would not occur. The case was remanded to the trial court to fashion new orders relating to the child's return.[1100]

V.B.5

Undertakings or Ameliorative Measures in the Absence of Grave Risk

The Supreme Court's decision in *Golan v. Saada*[1101] addressed protective measures once a grave risk is proven. The decision does not address whether undertakings or ameliorative measures are appropriate in a return order where grave risk has not been found. One line of cases supports undertakings without an established defense, reasoning that undertakings may ensure a child is safely returned to the habitual residence.[1102] In *Krefter v. Wills*,[1103] the court denied the mother's grave-risk defense, but held that a court has authority to accept undertakings as part of an order returning a child, even where an Article 13(b) defense is not established. The father had a history of failing to provide financial support. The court ordered the father to pay for airfare for the mother and child, housing in advance of their departure, and three months' child support until the courts in Germany had the opportunity to rule on the case. The court cited the ruling in *Feder v. Evans-Feder*[1104] requiring the lower court on remand to consider undertakings if the Article 13(b) defense was not sustained.

1099. *Id*. at 112 (citing 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)).

1100. *Maurizio R.*, 135 Cal. Rptr. 3d at 116.

1101. 142 S. Ct. 1880 (2022).

1102. *Baran*, 526 F.3d at 1351 (undertakings may be useful in some situations, particularly in cases where parental violence is not alleged).

1103. 623 F. Supp. 2d 125, 137–38 (D. Mass. 2009).

1104. 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").

In *Kufner v. Kufner*,[1105] the district court ordered undertakings even though the mother's Article 13(b) defense was denied. The court found that the relationship between the mother and the children was essential, and that there should be no disincentives to her returning to Germany. As such, the court ordered that the children's return was subject to the father securing the dismissal of criminal charges and producing evidence of this to the court, and that the father obtain prescribed medical treatment for one child and not oppose the mother's efforts to obtain reasonable access and visitation with the children. On appeal, the First Circuit affirmed.[1106]

In *Simcox v. Simcox*[1107] the Sixth Circuit took a different approach, ruling that undertakings are only appropriate where an Article 13(b) defense exists. In *Simcox,* the district court found that the mother had not established a defense against the return of the parties' two children, but the court conditioned the children's return on her accompanying them back to Mexico, where they would remain in her custody until Mexican courts heard whether a protective order should be issued. The father was to have no contact with the mother pending further court proceedings in Mexico. The Sixth Circuit reversed the district court's denial of the grave-risk defense, finding that the mother had established grave risk based on evidence of the father's domestic violence. The court agreed that undertakings might be appropriate where a grave-risk defense is made out, depending on whether valid undertakings are possible.

> 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 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.[1108]

1105. 480 F. Supp. 2d 491 (D.R.I. 2007).

1106. *See In re* A.L.C., 16 F. Supp. 3d 1075, 1094 (C.D. Cal. 2014), *vacated in part, aff'd in part*, 607 F. App'x 658 (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 the mother's grave risk had not been proved, the father's promises were reflected in the return order.

1107. 511 F.3d 594 (6th Cir. 2007).

1108. *Id.* at 608.

Note that *Simcox* did not consider it inappropriate to craft orders relating to logistical matters that usually occur in connection with an order for 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," we are speaking specifically of those conditions on return designed to ameliorate the risk of harm in the context of abusive situations.[1109]

V.B.6

Inability of Authorities to Protect

Dicta in *Friedrich v. Friedrich* (*Friedrich II*) suggested that the party alleging grave risk must establish that the courts of the habitual residence cannot adequately protect the child.[1110] This position creates an additional element necessary to prevail on a grave-risk exception. It has been followed by some courts but rejected by others.[1111] Given the holding in *Golan* that a categorical requirement (mandating consideration of all possible ameliorative measures) is not supported by the text of the Convention or ICARA, it would appear that a further factual showing of institutional inability to protect in a grave-risk case is likely to run afoul of the *Golan* reasoning. For example, in *Baran v. Beaty* the court wrote, "[W]e decline to impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return."[1112] Elaborating in a footnote, the court continued,

> As we discuss below, our rule does not prohibit courts from considering, as part of the discretionary decision to deny return under Article 13(b), whether the child's country of habitual residence may be able to protect the child from harm. We simply hold that the responding parent may meet her burden of proving grave risk of harm without adducing evidence regarding the home country's ability or willingness to offer the child protection.[1113]

1109. *Id*. at 607 n.5 (citing Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1366 (M.D. Fla. 2002)). *See also* Neumann v. Neumann, 684 F. App'x 471, 484 (6th Cir. 2017) ("even if the district court finds no affirmative defense to the return order, that court may still 'deal with ordinary logistical considerations that frequently accompany the return of any child.'").

1110. 78 F.3d 1060, 1069 (6th Cir. 1996).

1111. *See, e.g.*, Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005).

1112. 526 F.3d 1340, 1348 (11th Cir. 2008).

1113. *Id.* at 1348 n.2.

Other courts have similarly rejected the theory that a grave risk only exists if the authorities in the country of habitual residence are unable to protect the child upon return.[1114]

> To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise. The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody.[1115]

V.C

Mirror-Image Orders

Mirror-image orders are entered both in the courts of the states hearing the petition and in the courts of the child's habitual residence. The orders are "mirror images" of one another, containing the same terms with differences only in syntax. Such orders typically contain the ameliorative measures or undertakings that apply to the parties. These orders are meant to be enforceable in both the jurisdiction of the court hearing the return case and the courts of the habitual residence.[1116] Mirror-image orders give some assurance that the court of the

1114. Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995):

> We reject Nunez-Escudero's argument, however, that the Article 13b "intolerable situation" exception applies only if the government agencies and courts of Mexico are unable to protect the child if he is returned to that country. "[I]t is clear that Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint. If that were all that were required, the drafters of the Convention could have found a clear, more direct way of saying so."

(citing Tahan v. Duquette, 613 A.2d 486, 489 (N.J. Super. Ct. App. Div. 1992)). *See also* Wigley v. Hares, 82 So. 3d 932, 944 (Fla. Dist. Ct. App. 2011) ("the Convention does not place a burden on the mother to prove that St. Kitts would not, or could not, protect her child"); *Cuellar I*, 596 F.3d 505, 510 (9th Cir. 2010) (calling *Friedrich II*'s statement into doubt—"This statement is in some tension with the theory of the Hague Convention and our holding that the grave risk inquiry focuses only on 'the period necessary to obtain a custody determination.'") (citing *Friedrich II*, 78 F.3d 1060, 1069 (6th Cir. 1996), via Gaudin v. Remis, 415 F.3d 1028, 1035 (9th Cir. 2005)).

1115. *Van De Sande*, 431 F.3d at 570–71.

1116. *See, e.g.*, Grammes v. Grammes, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. Oct. 6, 2003)† (entering mirror orders in Pennsylvania and Canada); *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).

habitual residence will enforce the order if the petitioning parent defaults on its obligations.[1117]

There are some potential complications regarding mirror-image orders.[1118] 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 that an order be entered.[1119] 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.[1120] In some circumstances, the courts of the habitual residence are not permitted to order the kind of relief that the mirror-image order requires. This is an issue that the parties' counsel should clarify, but judges should be aware of the procedural complexities that may come from working with the courts of another nation.

1117. *See, e.g.*, Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 219567, at *1 (E.D. Mich. Jan. 15, 2020):†

> Mirror Image Orders: The parties are **ORDERED** to seek entry of the following orders by the Mexican court in which their divorce action is pending: (a) Order For Interim Parenting Time (ECF No. 17); (b) Opinion and Order Granting Petitioner's Complaint for Immediate Return of Children Per Hague Convention (ECF No. 26); and (c) this Order. The foregoing orders are intended to be stipulated "mirror orders" that are enforceable by the Mexican divorce court. Each party is ordered to instruct their attorney of record in the Mexican divorce action to take all steps necessary, including cooperating with one another, to implement this Order.

1118. *See* Saada v. Golan, 930 F.3d 533, 541 n.32 (2d Cir. 2019) (noting the different considerations between *Danaipour I*, 286 F.3d at 23 ("Conditioning a return order on a foreign court's entry of an order . . . raises serious comity concerns."); Baran v. Beaty, 526 F.3d 1340, 1349 (11th Cir. 2008) ("Undertakings may take many forms, including direct orders by the reviewing court providing conditional return of the child and mirror-orders. . . .")). *See also* Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, Prel. Doc. No. 14 (2011), https://assets.hcch.net/upload/wop/abduct2012pd14e.pdf. Annex 5, § 1.8.2, provides:

> 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. . . .

1119. *See* Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 56 (2007), https://assets.hcch.net/upload/wop/abd_2006_rpt-e.pdf ("The Permanent Bureau noted difficulties with mirror orders, particularly where there were no legal proceedings ongoing in the requesting State or where there were jurisdictional problems.").

1120. *See Danaipour I*, 286 F.3d at 23 (problems with entry or enforcement of mirror image orders in Swedish courts); *Baran*, 526 F.3d at 1349 ("courts in common law countries have been willing to enter mirror orders, safe-harbor orders, and other undertakings, while civil law countries have been more resistant to their use") (citing Silberman, *supra* note 98, at 1076).

V.D

Safe-Harbor Orders

Safe-harbor orders are orders issued by a court of the child's habitual residence that go into effect before the child's return. A safe-harbor order is designed to avoid severe, immediate physical or psychological harm to the child. The orders may provide, inter alia, for a parent[1121] or relative to deliver the child back to the habitual residence, for a child welfare agency to be involved in the placement or monitoring of the child, or for the habitual residence Central Authority to be involved in the physical return of the child. A safe-harbor order may also consist of a restraining order, protective order, barring order, or other order that excludes one parent from the family residence, or prohibits contact between parents, or circumscribes the terms of visitation in the habitual residence.

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 U.S. court's order of return may be conditioned upon obtaining such an order.[1122] Where the parties are in agreement that a safe-harbor order should issue, the U.S. court may wish to engage in direct communication with the appropriate court in the habitual residence to 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

1121. The Hague Convention does not empower courts to order a parent to relocate to another country. Simcox v. Simcox, 511 F.3d 594, 610 (6th Cir. 2007) (district court ordered mother to return to Mexico with children, granting mother power to evade the order of return by her refusal to accompany the children). *Accord* Redmond v. Redmond, 724 F.3d 729, 735 n.1 (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, "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, authorizes the court to order the relocation of parents.") (citations omitted). *See also* Maurizio R. v. L.C., 135 Cal. Rptr. 3d 93 (Cal. Ct. App. 2011) (child's return contingent on mother's cooperation held invalid).

1122. *See* Skolnick v. Wainer, No. 3:13cv1420 (JBA), 2014 WL 1653247, at *12 (D. Conn. Apr. 23, 2014):†

> Although Petitioner contends that the Singaporean court is unlikely to address temporary custody issues until the children return to Singapore, to the extent that the parties can obtain orders from the Singaporean Court before the children's arrival in Singapore, the Court encourages them to do so. This approach would be consistent with the State Department's recommended "safe harbor" strategy in which the jurisdiction that will ultimately determine custody issues assumes this responsibility at the earliest possible moment, avoiding the potential problems associated with this Court issuing an order that must be at least partially performed in a foreign jurisdiction.

to ensure the parties' compliance than one issued only by the court hearing the petition for return.[1123]

V.E

Returns to Countries Other Than the Habitual Residence

Both the *Pérez-Vera Report* and the *Text and Legal Analysis* interpret the Convention to mean that children need not be returned to their habitual residence if the petitioning parent no longer lives in that location.[1124] If this is the case, the child must be returned to the successful petitioning parent, regardless of that parent's place of residence.[1125]

In *Neumann v. Neumann*,[1126] an American family that had lived in Michigan for ten years relocated to Mexico for the father's job. The family lived in Mexico for almost four years before the mother returned to Michigan with the couple's three teenage children. This move was precipitated by the father's excessive drinking, an argument, and a physical altercation leaving the mother with three broken ribs. The couple's children confirmed that their father had a pattern of domestic violence fueled by alcoholism.

The father petitioned for return of the children to Mexico. After an evidentiary hearing, the district court determined that the children's habitual residence was in Mexico, and ordered the children returned to the father. The district court concluded that the return would not pose a grave risk to the children, who expressed no fear of him.

During appellate argument, counsel informed the court that as a result of an employee transfer, the father had returned to Michigan for an indefinite period of time. The appellate court noted the significance of the father's return to the United States: with neither parent residing in Mexico, Mexican courts may be

1123. *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 1, 22 (1st Cir. 2002).

1124. "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, *supra* note 45, at 10,511.

1125. *See, e.g.*, Pérez-Vera Report, *supra* note 18, at 459, ¶ 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).

1126. 684 F. App'x 471 (6th Cir. 2017).

unable to resolve the custody dispute. In determining jurisdiction over the custody case, the court cited its opinion in *Pliego v. Hayes*,[1127] noting that a grave risk or intolerable situation might arise where the courts of the habitual residence are unable to "practically or legally" adjudicate custody issues.[1128] The court also noted that when material facts underlying a district court's ruling have changed, appellate courts may remand to the district court for further proceedings. The Sixth Circuit remanded the case to the district court to make findings as to whether Mexico could adjudicate the custody dispute and, if not, whether this presented a grave risk under the Convention.[1129]

V.F

Mootness and Stays

V.F.1

Mootness

If an order directing the return of a child to a foreign country is not stayed, does the case become moot when the child is removed from the United States in conformity with the return order? Resolving a split among the courts of appeal, in *Chafin v. Chafin*[1130] the Supreme Court held that the removal of a child from the United States under an order of return does not cause the case to become moot where the parties maintain a "concrete interest," however small, in the outcome of the case.[1131]

In *Chafin*, the mother was a citizen of the United Kingdom, and the father was a U.S. serviceman. A child was born to the parties in Germany, where the

1127. 843 F.3d 226 (6th Cir. 2016).

1128. *Id.* at 228–29.

1129. A robust dissent was filed by Daughtrey, J. (concurring in part and dissenting in part), pointing to the authority in *Von Kennel Gaudin*, 282 F.3d at 1182–83, that the Convention does not indicate the country where the child should be returned, and that the Pérez-Vera Report, *supra* note 18, indicated that if the petitioner relocated to a different country, the child would be transferred to the new residence (also citing Text & Legal Analysis, *supra* note 45, to the same effect). The dissent argues that the only legally correct result in this case was to determine the matter moot and dismiss the petition, given the fact that the petitioner, respondent, and children all lived in the same state. *Neumann*, 684 F. App'x at 486.

1130. 568 U.S. 165 (2013).

1131. *Id.* at 172 (quoting Knox v. SEIU, Local 1000, 567 U.S. 298, 307–08 (2012) (internal quotation marks and brackets omitted)). *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).

father was stationed. When the father was deployed to Afghanistan in 2007, the mother took the child to Scotland. The father was later transferred to Alabama. The child and her mother joined him there in 2010. The father subsequently filed for divorce and for custody of the child in Alabama. The mother overstayed her visa and was deported back to the United Kingdom in February 2011, leaving the child in the father's custody in Alabama. In May 2011, the mother filed a petition for the return of the child. After a trial, the district court granted the mother's petition and directed the child's return to Scotland. The father's request for a stay of the order was denied, and the mother promptly returned to Scotland with the child.

The father appealed the district court's return order to the Eleventh Circuit. Citing the holding in *Bekier v. Bekier*,[1132] the Eleventh Circuit dismissed the father's appeal as moot because the child had already returned 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."[1133] The Court found that the parties' custody case was still viable: 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 the 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 that interest, "'however small,'" "is enough to save this case from mootness."[1134] The prospects of the 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 observed, 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. Granting stays routinely would delay 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 then be motivated to immediately exit the United States with their children in order to render any appeal moot.[1135]

1132. 248 F.3d 1051 (11th Cir. 2001).

1133. *Chafin*, 568 U.S. at 172 (citing *Knox*, 567 U.S. at 307).

1134. *Chafin*, 568 U.S. at 172 (citing *Knox*, 567 U.S. at 307–08). The Court in *Knox* cited 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."

1135. *Chafin*, 568 U.S. at 179.

V.F.2

Re-Return Orders

If an appellate court reverses a trial court's order to return a child to a foreign country, the child may have already been physically returned under the trial court's order. In this situation, courts retain the discretion to order that a child be "re-returned" to the United States.

In *Chafin v. Chafin*, the Court examined 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 reversed the district court's return order. The mother argued that a re-return order would be ineffectual because enforcement was not required in Scotland. Rejecting this argument, the Supreme Court noted that (1) the mother was still subject to personal jurisdiction in the U.S. courts and was therefore subject to further court orders; (2) the mother's refusal to obey could be met with sanctions; and (3) the mother could choose to voluntarily comply with an order of re-return.

Following *Chafin*, the court in *Redmond v. Redmond*[1136] 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 the father and in Illinois by the mother. The Illinois court deferred jurisdiction to the Irish court. Despite the Illinois decision to defer to Irish jurisdiction over the custody issue, the question of the child's habitual residence would be before the district court on remand. Depending on the resolution of the habitual residence question, the previous state-court decision deferring jurisdiction could be modified.[1137]

In the case of *In re A.L.C.*,[1138] the father petitioned for the return of his two children to Sweden. The older child had acclimatized to Sweden. He accompanied his mother to Los Angeles, where the parties' second child was born. The district court found that the habitual residence of both children was Sweden despite the fact that the younger child had never been to Sweden. The Ninth Circuit affirmed the trial court's finding that Sweden was the older child's habitual residence, but vacated the decision regarding the younger child, finding that the

1136. 724 F.3d 729 (7th Cir. 2013).

1137. *Id.* at 736.

1138. 607 F. App'x 658 (9th Cir. 2015).

child had no habitual residence.[1139] Although the appellate court had authority to order the re-return order of the younger child, the court declined to exercise this discretion, noting that an automatic re-return would be "deeply inimical" to the younger child's best interest, considering the impact of rival custody proceedings in both Sweden and California.[1140]

While the enforcement of a re-return order might be difficult,[1141] such difficulty does not render a case moot. In *Pliego v. Hayes*,[1142] the court discussed several factors leading it to conclude that the case was not moot: the child was still in Turkey; an exit ban prevented his removal from that country; the father, a Spanish diplomat, had been assigned to an embassy in the Ukraine but was still located in Ankara; and the Turkish courts were in the process of hearing a custody determination.[1143]

V.F.3

Stays

Neither the Convention nor ICARA contain guidelines for issuing stays.[1144] The grant of a stay after an order for return is governed by the law on the issuance

1139. *Id*. at 661–62 (observing that "[w]hen 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.'") (citing *Holder II*, 392 F.3d 1009, 1020 (9th Cir. 2004) (quoting Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 89, 112 (1999)) and Delvoye v. Lee, 329 F.3d 330, 333 (3d Cir. 2003)).

1140. *In re* A.L.C., 607 F. App'x at 663 n.2 (quoting Chafin v. Chafin, 568 U.S. 165, 182 n.2 (2013) (Ginsburg, J., concurring)).

1141. *See, e.g.*, Mendoza v. Silva, 987 F. Supp. 2d 883 (N.D. Iowa 2013) (re-return order from Mexico would still be effective given that the respondent was still present in the United States, and subject to court orders to take action outside the United States); Escobar Villatoro v. Figueredo, No. 8:15-cv-1134-T-36TBM, 2015 WL 12838861, at *2 (M.D. Fla. June 26, 2015)† (petitioner worked for an American company in Guatemala).

1142. 843 F.3d 226, 231 (6th Cir. 2016).

1143. *Id.* at 231.

1144. 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* cmt., UCCJEA § 102. Hence, the UCCJEA does not control the issuance of stays for state or federal courts.

of stays generally.[1145] In *Chafin v. Chafin*[1146] the Supreme Court cautioned that issuing routine stays would conflict with the Convention's exhortation for prompt disposition and could increase the number of appeals. The Court suggested that the four traditional factors[1147] be applied when determining whether a stay should issue:[1148]

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[1149]
3. Whether the stay will cause substantial injury to parties opposed to the stay
4. Any risk of harm to the public interest

These factors should be considered on a sliding scale so that a stronger showing on one factor may excuse a lesser showing on others.[1150] The Supreme Court did note that the combination of granting stays and expediting proceedings is one of the "judicial tools" that allows courts to achieve the goals of the Convention.[1151] "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

1145. *See* Fed. R. Civ. P. 62(c). Pursuant to Federal Rule of Appellate Procedure 8(a)(1)(A), a party must ordinarily apply for a stay in the district court for a stay pending appeal.

1146. 568 U.S. 165 (2013).

1147. *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

1148. 568 U.S. at 179.

1149. In *Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at *8 (W.D. Tex. Apr. 30, 2020),† the district court ordered an indefinite stay of proceedings for the following reasons:

> [T]he effective date of this Order is stayed, indefinitely, until such time as the Court and the parties can be reasonably confident that the COVID-19 pandemic no longer renders international travel unsafe and widespread social distancing practices are no longer necessary. . . . The Court will schedule status conferences as necessary to determine the precise date and the logistics of [the child's] return, involving the Mexican Consulate when appropriate and keeping in mind the need to ensure [the child's] return is both "prompt" and "safe."

(citing Convention, art. 7: ". . . to secure the prompt return of children . . . take all appropriate measures . . . to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child . . . .").

1150. *See* Mendoza v. Silva, 987 F. Supp. 2d 883, 908 (N.D. Iowa 2013) (father failed to make a strong showing of likelihood of success on appeal); Thapa v. Gonzales, 460 F.3d 323 (2d Cir. 2004).

1151. *Chafin*, 568 U.S. at 178.

individualized treatment necessary for appropriate consideration of the child's best interests."[1152]

When appellate courts issue stays in Hague cases, they frequently order expedited appeals.[1153] The decision whether or not to grant a stay of an order of return lies within the sound discretion of the court.[1154]

1152. *Id.* at 179. The downside of not granting a stay was set forth where the Fifth Circuit vacated a district court's order of return, but the child had already been transported to Mexico, noting that "[d]enying a stay, however, entrenches the return order while it may yet be vacated." Berezowsky v. Rendon Ojeda, 652 F. App'x 249, 254 (5th Cir. 2016).

1153. *See, e.g.*, da Silva v. de Aredes, 953 F.3d 67, 72 (1st Cir. 2020); *Souratgar I*, 720 F.3d 96 (2d Cir. 2013); Trott v. Trott, No. 20-CV-1392 (AMD) (CLP), 2020 WL 4926336, at *9 (E.D.N.Y. Aug. 21, 2020) (order granting return stayed for thirty days to allow respondent to seek a decision on expedited appeal); 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 I*, 286 F.3d 1, 11 (1st Cir. 2002); Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001).

1154. *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. *See also* Palomo v. Howard, No. 1:19CV884, 2019 WL 9633647, at *2 (M.D.N.C. Dec. 17, 2019)† (court weighed the four factors that impact the decision whether to enter a stay of a return order); Taglieri v. Monasky, 876 F.3d 868, 874 (6th Cir. 2017), *reh'g en banc*, 907 F.3d 404 (6th Cir. 2018), *aff'd*, Monasky v. Taglieri, 140 S. Ct. 719 (2020) (stay denied, finding that "a balance of . . . [relevant] factors weighed against staying the return order.").

VI
Procedural Issues

VI.A
Findings of Fact Required

In *Khan v. Fatima*,[1155] the trial court heard evidence over one day, but did not make any findings of fact. The trial court ordered the child returned to Canada where the father lived and made no findings on the mother's 13(b) defense based on domestic violence. The Seventh Circuit reversed, holding that the mandate of Federal Rule of Civil Procedure 52(a)(1),[1156] 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.[1157]

In *Neergaard-Colón v. Neergaard*,[1158] the trial court made its decision to return the 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.[1159] Under applicable law, findings on parental intent were critical to assess whether a new habitual residence had been acquired. The case was reversed and remanded to the district court to make findings on the issue of

1155. 680 F.3d 781 (7th Cir. 2012).

1156. Rule 52(a)(1) provides:

> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

1157. *In re* Salah, 629 N.W.2d 99, 104 (Minn. Ct. App. 2001).

1158. 752 F.3d 526 (1st Cir. 2014).

1159. Darín v. Olivero-Huffman, 746 F.3d 1, 11–13 (1st Cir. 2014).

whether the parties' previous habitual residence had been abandoned.[1160] A more recent Ninth Circuit case reversed the district court's decision denying a party leave to obtain a psychological evaluation, finding that the district court's decision adopted verbatim the proposed findings prepared by the prevailing party's attorney.[1161] The Ninth Circuit found that the district court failed to explain how it exercised its discretion and also did not assess the parties' credibility.[1162]

VI.B

The Manner of Taking Evidence

At the case-management conference, the court can inquire about how the parties intend to present their evidence.[1163] Some cases can be tried by submitting the matter on the parties' declarations or affidavits.[1164] Other cases require live testimony or a combination of declarations and testimony.

1160. *See also* Noergaard v. Noergaard, 197 Cal. Rptr. 3d 546, 553 (Cal. Ct. App. 2015) (court did not decide issue of death threats that were relevant to grave-risk analysis).

1161. Colchester v. Lazaro, 16 F.4th 712 (9th Cir. 2021).

1162. *Id.* at 728–29.

1163. 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.

Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Conclusion 7 (1993), https://assets.hcch.net/docs/432981e4-238b-4ed4-a41e-bb239d5acdac.pdf.

1164. *See, e.g.*, *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).

VI.B.1

Taking Testimony by Remote Contemporaneous Transmission: Telephone and Videoconferencing

Hague Convention cases frequently involve parties who are likely to be permanently situated in foreign countries. Since cases heard in U.S. courts are requests for return to a foreign country, issues concerning both the prima facie case and the exceptions to return may require the testimony of witnesses living in that country. Parties and witnesses may not be able to attend a hearing in a U.S. court for myriad reasons, including financial inability to travel, physical inability to travel long distances, legal obstacles to crossing borders (for example, lack of a visa or other required travel documents), family or business responsibilities, exorbitant fees for international court appearances of expert witnesses, or more recently travel restrictions because of disease or illness.[1165] Consequently, Hague

1165. *See, e.g.*, Nowlan v. Nowlan, No. 5:20cv00102, 2021 WL 217139 (W.D. Va. Jan. 21, 2021) (overruling objections to videoconferencing in light of Covid-19 pandemic's risks and difficulties that accompany travel and father's military duties in Canada); Forcelli v. Smith, No. 20-699 (JRT/HB), 2020 WL 5015838, at *6 (D. Minn. Aug. 25, 2020)† (because of Covid-19, all testimony and exhibits handled by Zoom videoconferencing software); Gallegos v. Garcia Soto, No. 1:20-CV-92-RP, 2020 WL 2086554, at *1 (W.D. Tex. Apr. 30, 2020)† (return order stayed because of Covid-19 pandemic until child can be safely returned); Guerra v. Rodas, No. CIV-20-96-SLP, 2020 WL 2858534, at *7 (W.D. Okla. June 2, 2020)† (same—return stayed because of travel ban to and from Guatemala due to Covid-19); Stone v. U.S. Embassy Tokyo, No. 19-3273 (RC), 2020 WL 4260711, at *5 (D.D.C. July 24, 2020)† (Covid-19 pandemic has prevented father from appearing at the U.S. Embassy in Tokyo to complete children's citizenship documents); Chambers v. Russell, No. 1:20CV498, 2020 WL 5044036, at *3 (M.D.N.C. Aug. 26, 2020)† (because of the Covid-19 pandemic, parties consented to conducting the bench trial over videoconferencing software from Jamaica); Bejarno v. Jimenez, No. 19-17524, 2020 WL 4188212, at *3 (D.N.J. July 21, 2020)† (case adjourned because of pandemic, and remaining hearings conducted by telephone).

Convention cases are replete with instances where courts have permitted parties and witnesses to appear both telephonically[1166] and by videoconferencing.[1167]

Federal Rule of Civil Procedure 43(a) provides,

> At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

1166. Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012) (district court held a two-day trial with one party participating and presenting testimony of several witnesses by phone); *see also* Valenzuela v. Michel, 736 F.3d 1173 (9th Cir. 2013) (same procedure was employed for both the petitioner and her witnesses); Tavarez v. Jarrett, 252 F. Supp. 3d 629, 634 (S.D. Tex. 2017) (telephone); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1114 (D. Colo. 2008) (petitioner appeared by telephone from Mexico); Carvajal Vasquez v. Gamba Acevedo, 931 F.3d 519 (6th Cir. 2019) (many witnesses testified by telephone); Lopez v. Bamaca, 455 F. Supp. 3d 76, 79–80 (D. Del. 2020) (father made attempts to attend the hearing in Delaware, but was denied a visa despite having no criminal record; he testified by phone from Mexico); Escobar v. Flores, 107 Cal. Rptr. 3d 596 (Cal. Ct. App. 2010) (father was allowed to appear by telephone); Cuellar v. Joyce, No. CV-08-0084-BU-RFC, 2008 WL 11394155, at *9 (D. Mont. Dec. 23, 2008),† *rev'd*, 596 F.3d 505 (9th Cir. 2010) (expert witness permitted to testify via telephone). *In re* Prevot, 59 F.3d 556, 560 (6th Cir. 1995) (father refused to attend trial in the United States, gave telephone deposition from France).

1167. Charalambous v. Charalambous, 627 F.3d 462, 465 (1st Cir. 2010) (video testimony of witnesses in Cyprus); Haimdas v. Haimdas, 720 F. Supp. 2d 183, 187 (E.D.N.Y.), *aff'd*, 401 F. App'x 567 (2d Cir. 2010) (petitioner, who had been unable to obtain a visa to travel to this country, testified via a live video link from London); *Tavarez*, 252 F. Supp. 3d at 634 (video); Gonzalez v. Preston, 107 F. Supp. 3d 1226, 1229 (M.D. Ala. 2015) (witnesses by live video); Fernandez v. Bailey, 909 F.3d 353, 358 (11th Cir. 2018) (father testified in English by video from Panama); Jenkins v. Jenkins, 569 F.3d 549, 553 (6th Cir. 2009) (petitioner and her witnesses testify by telephone from the United States Consulate in Israel); Habrzyk v. Habrzyk, 775 F. Supp. 2d 1054, 1060 (N.D. Ill. 2011) (witness testified by video from Poland); Valenzuela v. Michel, 736 F.3d 1173, 1175 (9th Cir. 2013) (petitioner and witnesses testified via telephone from Mexico with the assistance of an interpreter); Luis Ischiu v. Gomez Garcia, 274 F. Supp. 3d 339, 342 (D. Md. 2017) (seven of the parties' witnesses testified by videoconference from Guatemala); Ambrioso v. Ledesma, 227 F. Supp. 3d 1174, 1177 (D. Nev. 2017) (father's request for all of his witnesses to testify by videoconference was denied, but exceptions were made for one of father's witnesses, a pediatrician; immigration issues prevented both father and one other witness from entering the United States, and both were allowed to testify remotely); *In re* Lozano, 809 F. Supp. 2d 197, 203 (S.D.N.Y. 2011), *aff'd sub nom*. Lozano v. Alvarez (*Lozano I*), 697 F.3d 41 (2d Cir. 2012), *aff'd by Lozano III*, 572 U.S. 1 (2014) (petitioner testified and observed the hearing via videoconference in the London office of his counsel; court conducted telephonic conference to discuss pretrial issues); Mikovic v. Mikovic, 541 F. Supp. 2d 1264, 1266 (M.D. Fla. 2007) (father appeared by trans-Atlantic videoconferencing from Wales, where he resides; video link facilitated by judge and clerk in South Wales); Orellana Joya v. Munguia Gonzales, No. 20-236, 2020 WL 1181846, at *2 (E.D. La. Mar. 12, 2020)† (father appeared by live video feed from Honduras).

In *Cunningham v. Cunningham*,[1168] the father moved for the court's permission to allow out-of-state, non-party witnesses to testify by phone or videoconference. The court overruled the mother's objections and permitted video testimony accompanied by the following procedural safeguards as conditions:

1. Witnesses must testify from a court reporter's office that has videoconference equipment compatible with the district court's technology.
2. In the event that the video transmission fails or is ineffective, the court will not delay or continue the proceedings, even if this results in the respondent not being able to present evidence.
3. Witnesses must be sworn in from the remote location by a person authorized to administer oaths.[1169]
4. Witnesses must testify from a room where they are alone.
5. Witnesses must be provided with relevant documents in advance.
6. The respondent must pay for the costs associated with the video link.
7. The respondent must coordinate with the court's technology specialists to arrange for the videoconference and allow appropriate testing.
8. As a last resort, a witness may testify by a declaration that fully sets forth pertinent supporting details.

The respondent—the alleged abducting parent—will almost always be available to appear and testify at trial, as that parent will likely be within the court's geographic jurisdiction with the child. For this reason, courts may have to confer with the parties as to how the petitioning parent, if not present, can be involved with the cross-examination of the respondent-parent.[1170]

In *Gil-Leyva v. Leslie*,[1171] the respondent alleged on appeal that the magistrate judge abused her discretion in permitting the children's father to appear telephonically at the evidentiary hearing after previously denying the father's Rule 43(a) motion to testify by phone. The district court hearing the case was located in Colorado, and the father lived in British Columbia, Canada. The magistrate's reasons

1168. No. 3:16-cv-1349-J-34JBT, 2016 WL 8261726, at *1 (M.D. Fla. Dec. 27, 2016),† *modified on reconsideration*, 2017 WL 662016 (M.D. Fla. Jan. 3, 2017).†

1169. In the modification (2017 WL 662016), the court permitted an expert witness to be sworn in by the courtroom deputy in the district court.

1170. *See* Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. Sept. 8, 2010)† (scheduling order in unreported disposition); *Escobar*, 107 Cal. Rptr. 3d 596 (having petitioner participate in pretrial hearing by telephone).

1171. 780 F. App'x 580 (10th Cir. 2019).

for reconsidering the father's telephonic appearance was to prevent prejudice to the mother for her trial preparation and to avoid the necessity of a continuance. The Tenth Circuit found good cause for allowing remote testimony. The requirement that Hague cases be heard expeditiously supported the court's exercise of discretion to allow the telephonic testimony.[1172]

But in *Hamprecht v. Hamprecht*,[1173] the trial court found that the petitioner-father did not establish good cause or compelling circumstances for giving his testimony by videoconference from Germany. The father told the court that he had been threatened by individuals in Florida, causing him to flee to Germany with his two oldest children. The mother opposed the father's motion, claiming that the alleged threats to his life were not reported to the police for over ten hours, and the father was unable to provide any information to assist the police with identifying the source of the threats. Citing to the Advisory Committee Notes to the 1996 Amendment,[1174] the court found that the father's reasons for requesting a videoconference hearing did not amount to good cause.

In *Nowlan v. Nowlan*[1175] the mother objected to the father appearing by videoconference link. The mother intended to raise a defense of grave risk based on allegations that the father sexually abused the child. The mother argued that under the Sixth Amendment right to due process, she was entitled to cross-examine the father in person. The court held that the Sixth Amendment right to in-person confrontation[1176] was inapplicable to civil cases, citing *Walden v. City of Chicago*[1177] and *United States v. Cox*.[1178]

Although advances in technology have enabled courts to conduct hearings with testimony from remote locations, teleconferencing and video communications can be frustrating when they do not work correctly or as anticipated. In

1172. *Id.* at 587–88.

1173. No. 2:12-cv-125-FtM-29DNF, 2012 WL 1367534, at *2 (M.D. Fla. Apr. 19, 2012).†

1174. The 1996 Amendments to the Advisory Committee notes for Federal Rule of Civil Procedure 43 provide, in part:

> Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

1175. No. 5:20cv00102, 2021 WL 217139 (W.D. Va. Jan. 21, 2021).†

1176. *See* Crawford v. Washington, 541 U.S. 36 (2004).

1177. 846 F. Supp. 2d 963, 971 n.3 (N.D. Ill. 2012).

1178. 549 F. App'x 169, 170 (4th Cir. 2013).

MG v. WZ[1179] a New York state court permitted the respondent's participation via videoconference from the Dominican Republic but noted the technology-related delays.

> In addition to Respondent, Respondent's witnesses also appeared by video hook-up. Malfunctions with the video hook-up and coordinating dates and times with the Court in the Dominican Republic where Respondent and his witnesses appeared, presented unique challenges to this Court's efforts to expeditiously conduct the hearing on Respondent's petition. Given these challenges, it was not possible to resolve Respondent's petition within six weeks of filing.[1180]

VI.B.2

Evidentiary Hearings and Summary Dispositions

Some cases are decided after courts hold evidentiary hearings,[1181] and others are decided by summary judgment or are submitted for decision on affidavits and documents provided by the parties.[1182] Courts tend to grant evidentiary hearings where genuine issues of material fact exist,[1183] experts are required, issues are unusually complex, or credibility is difficult to assess without live testimony.[1184]

1179. 998 N.Y.S.2d 563, 565 (N.Y. Fam. Ct. 2014); *see also* LM v. JF, 75 N.Y.S.3d 879, 882 n.1 (N.Y. Sup. Ct. 2018):

> Although the Court is cognizant of time limitations imposed by Article 11 of the Convention, it was not possible for the Court to reach a decision within six weeks from the date of the commencement of this proceeding due to a variety of reasons including the scheduling of testimony for witnesses traveling from the Dominican Republic, the Court's efforts to set up video equipment to enable witnesses to testify from the Dominican Republic, and the availability of the three attorneys and the parties.

1180. *MG*, 998 N.Y.S.2d at 565 n.2.

1181. *See, e.g.*, Seaman v. Peterson, 766 F.3d 1252 (11th Cir. 2014) (five days); *Souratgar I*, 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 Cir. 2010) (two days); Nixon v. Nixon, 862 F. Supp. 2d 1168 (D.N.M. 2011) (one day).

1182. 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, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. Oct. 12, 2007).†

1183. *See In re* Tsarbopoulos, 243 F.3d 550 (9th Cir. 2000)† (holding that the facts of the case precluded summary judgment, thus requiring an evidentiary hearing).

1184. *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 the International Child Abduction Remedies Act (ICARA) requires a plenary hearing). *See generally* Fed. R. Civ. P. 56.

In *March v. Levine*[1185] the Sixth Circuit affirmed the summary judgment and return of the parties' children to Mexico. When parties oppose summary judgment, they must provide affidavits or some other admissible evidence setting forth specific facts showing there is a genuine issue for trial. In this case the court found the denial of an evidentiary hearing appropriate, noting that (1) neither the Hague Convention nor the International Child Abduction Remedies Act (ICARA) require 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 a finding of treaty defenses.[1186]

In *West v. Dobrev*,[1187] while his children were visiting him in Utah, the father requested an emergency custody decree from a state court following a foreign decree granting full custody to the mother.[1188] The mother petitioned in the federal district court for return of the children. At a preliminary hearing, the mother presented a prima facie case for the children's return. The father's proffer of evidence consisted of a letter from a clinical psychologist recommending investigation of the children's living conditions with the mother, based on the father's discussions with the children. The father requested additional time to defend the case so that he could develop evidence on whether the children were being abused.[1189] Based on this record, the district court summarily granted the petition and ordered that the children be returned to Belgium. The Tenth Circuit affirmed, citing the father's inability to present any evidence that would support a viable defense:[1190]

> [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. Where circumstances warrant, both the Convention and

1185. 249 F.3d 462 (6th Cir. 2001).

1186. *Id*. at 474–75.

1187. 735 F.3d 921 (10th Cir. 2013).

1188. Father fully participated in the custody trial and later waived his right to appeal.

1189. The Tenth Circuit characterized request as a "fishing expedition" that was contrary to the mandate of the Convention for prompt returns. *West*, 735 F.3d at 932.

1190. *But see* Colchester v. Lazaro, 16 F.4th 712, 716 (9th Cir. 2021) (Ninth Circuit held that the district court abused its discretion in refusing to permit examination of child by psychologist to substantiate claims of abuse perpetrated by father).

> ICARA provide the district court with "the authority to resolve these cases without resorting to a . . . plenary evidentiary hearing."[1191]
>
> * * * * *
>
> 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 meaningful opportunity to be heard. That is all due process requires in the context of a Hague Convention petition.[1192]

In *Van De Sande v. Van De Sande*,[1193] the Seventh Circuit reversed summary judgment that was based only on affidavits and remanded the case to the district court to conduct an evidentiary hearing on issues of grave risk and the adequacy of the petitioner's proposed conditions for return. The mother presented six affidavits attesting to the existence of serious domestic violence in the presence of the children, incidents of violence directed at the children, and threats to kill her and the children. The Seventh Circuit held that the mother's affidavits presented clear and convincing evidence of a grave risk of harm to the children and an evidentiary hearing was necessary to explore the evidence.[1194]

But the court in *Douglas v. Douglas*[1195] granted a summary judgment on the issue of habitual residence where the parties had asserted countervailing facts to support their theories. The court noted that infants or young children are unable to acclimate, and, as such, facts indicating parental intent to make a particular place the child's home are relevant. The court found that the declarations of the

1191. *West*, 735 F.3d at 929 (citing March v. Levine, 249 F.3d 462, 474 (6th Cir. 2001) (internal quotation marks omitted)).

1192. *West*, 735 F.3d at 932. *See also* Pope *ex rel.* T.H.L-P v. Lunday, 835 F. App'x 968 (10th Cir. 2020)† (Tenth Circuit affirmed a district court's finding that an evidentiary hearing was not required to determine the existence of a parental agreement regarding the child's habitual residence. The court noted that pursuant to the authority enunciated in *West,* district courts enjoyed a "substantial degree of discretion in determining the procedures necessary to resolve a [Hague Convention] petition.").

1193. 431 F.3d 567 (7th Cir. 2005).

1194. *Accord* Noergaard v. Noergaard, 197 Cal. Rptr. 3d 546, 559–60 (Cal. Ct. App. 2015) (court of appeal reversed and remanded case because of trial court's rulings that prevented mother from testifying, presenting witnesses, admitting her own documentary evidence, reviewing transcript of in camera hearing with child).

1195. No. 21-1335, 2021 WL 4286555 (6th Cir. Sept. 21, 2021),† *cert. denied*, 142 S. Ct. 1443 (2022).

parties satisfied *Monasky v. Taglieri*'s[1196] "totality of the circumstances" test and found that Australia was not the children's habitual residence. [1197]

VI.C

Appellate Standards of Review

In *Monasky*[1198] the Supreme Court restated the general rules[1199] for appellate review: in the context of the Hague Convention, questions of law are reviewed de novo, and questions of fact are reviewed for clear error. Where mixed questions of law and fact are involved, the review "depends . . . on whether answering it entails primarily legal or factual work."[1200] The question of habitual residence is a mixed question of law and fact but "barely." *Monasky* defines the legal standard for determining a habitual residence as "depend[ent] on the totality of the circumstances specific to the case."[1201] The habitual-residence issue is subject to deferential review for clear error.

1196. 140 S. Ct. 719 (2020).

1197. *Douglas*, 2021 WL 4286555, at *5.† The court considered facts tending to establish residence in Australia were: mother obtained debit card linked to father's Australian bank account; the [parents] signed a twelve-month lease for an apartment; mother obtained an Australian driver's license; the parties considered a ten-year plan to live in Australia; and mother applied for a Permanent Partner Visa. Evidence tending to negate an Australian habitual residence showed that: at the time of the alleged wrongful retention, the child had lived in Michigan for seven months; the parents intended that the child live in the United States; mother told father she wanted a divorce; three days after the child was born, father ordered mother from their apartment; the parties lived separate and apart after their separation that occurred three days after the child's birth; mother's lawyers informed father that she wanted to move to the United States; father acknowledged that the marriage was over and that mother was not returning to him; father agreed to sign the child's passport application, noting on the back that he had no conditions or expectations; father voluntarily dismissed his Australian custody proceeding; father acknowledged in writing that mother was free to go to the United States; father authorized mother and child to travel to the United States; the child lacked any degree of integration in a social or family environment in Australia.

1198. 140 S. Ct. 719.

1199. 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 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. 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. 2010); 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).

1200. *Monasky*, 140 S. Ct. at 730 (citing U.S. Bank N.A. *ex rel.* CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018)).

1201. *Monasky*, 140 S. Ct. at 723.

In *Berenguela-Alvarado v. Castanos*,[1202] the Eleventh Circuit upheld a district court's pre-*Monasky* decision that employed a totality-of-the-circumstances test for habitual residence.[1203] 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.[1204] The defenses or exceptions to return are reviewed in the same fashion: conclusions reached on the defenses of consent, acquiescence, delay, settlement,[1205] grave risk,[1206] and violation of fundamental human rights are subject to plenary (de novo) review.[1207]

Review for clear error also accords with the goals of the Convention. It "'speeds up appeals and thus serves the Convention's premium on expedition.' Under clear error review, any plausible finding as to a witness's credibility 'can virtually never be clear error.'"[1208]

1202. No. 20-11618, 2020 WL 3791569 (11th Cir. July 7, 2020).†

1203. *See also* Smith v. Smith, 976 F.3d 558, 563 (5th Cir. 2020); Farr v. Kendrick, 824 F. App'x 480 (9th Cir. 2020)† (thorough findings of the District Court allowed the Ninth Circuit to apply *Monasky*'s "totality of circumstances" test, affirming the district court's denial of the petition for return).

1204. Rodriguez v. Yanez, 817 F.3d 466, 473 (5th Cir. 2016) (district court's application of custody rights standard is reviewed de novo); Baxter v. Baxter, 423 F.3d 363, 367 (3d Cir. 2005) (plenary review over the district court's choice and interpretation of legal standards); *Yang I*, 416 F.3d 199, 201 (3d Cir. 2005) (plenary review of legal requirements for *Younger* abstention and stays, abuse of discretion for court's discretionary decision); Custodio v. Samillan, 842 F.3d 1084, 1089 (8th Cir. 2016) (objections of the child: "Clear error is appropriate because the district court's finding that a child has or has not objected is a 'fact-intensive' determination that is based in part on the court's personal observations of the child."); Vasconcelos v. Batista, 512 F. App'x 403 (5th Cir. 2013) (same); Grano v. Martin, 821 F. App'x 26 (2d Cir. 2020)† (grave risk—factual findings for clear error, application of Convention to findings de novo).

1205. *In re* B. del C.S.B., 559 F.3d 999, 1008 (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.").

1206. *Blondin IV*, 238 F.3d 153, 158 (2d Cir. 2001), *abrogated by* Golan v. Saada, 142 S. Ct. 1880 (2022); 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 II*, 338 F.3d 886 (8th Cir. 2003); *Cuellar I*, 596 F.3d 505 (8th Cir. 2010); Taylor v. Taylor, 502 F. App'x 854 (11th Cir. 2012).

1207. *In re* 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.").

1208. da Silva v. de Aredes, 953 F.3d 67, 72–73 (1st Cir. 2020) (citations omitted).

VI.D

Expeditious Handling Required

There are two separate provisions in the Convention addressing the expectation that judicial proceedings will be administered without delay. The first requirement, that courts "act expeditiously" in handling proceedings for the return of children, is found in Article 11: "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children."[1209]

The Convention also urges contracting states to use "the most expeditious procedures available."[1210] These principles are reflected in the Convention's stated purpose of protecting children from the effects of parental abduction and ensuring "their prompt return."[1211]

The reality is that, on average, U.S. trial courts take substantially longer to resolve Convention cases than the six-week target.[1212] Where return was ordered, the average case took 202 days from the receipt of the application to the final outcome. Where the court refused to return the child, the average number of days to final outcome was 326. Where cases were appealed, the time from first receipt of the application by the Central Authority to final disposition in the first-instance court was 315 days, and the time to reach a decision on appeal was 421 days.[1213] The Convention provides,

> 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

1209. The Convention's call for expedition applies to appellate proceedings as well as courts of first instance. Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020) (citing an earlier edition of this guide); Chafin v. Chafin, 568 U.S. 165, 179 (2013) ("[C]ourts can and should take steps to decide these cases as expeditiously as possible."); *id*. at 180 (Ginsburg, J., Scalia, J., and Breyer, J., concurring: obligation to process return applications expeditiously extends to appellate procedures).

1210. Convention, art. 2. *See Monasky*, 140 S. Ct. at 724 (art. 11 "prescribe[es] six weeks as normal time for return-order decisions"); *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). Orvalle v. Perez, 681 F. App'x 777, 786 (balancing due process rights with the use of procedures supporting expeditious handling); *see also* Pérez-Vera Report, *supra* note 18, at 444, ¶ 63.

1211. Convention preamble; art. 1.

1212. As of September 2021, the most recent data available is from 2015.

1213. Lowe & Stephens, *supra* note 52, at 147–49.

> State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant.

The emphasis on prompt disposition also applies to appellate proceedings.[1214] In *Chafin v. Chafin*,[1215] the Supreme Court urged both district and appellate courts to take steps to handle Hague cases expeditiously,[1216] noting that many courts already do. The concurring opinion in *Chafin* underscored the need for procedures to enhance speed and certainty in Hague cases. It cited examples where courts used expedited appellate procedures and noted that some countries even require parties to seek leave to appeal a return order. The concurring opinion also suggested courts should adopt formal, uniform rules to implement such practices[1217] and use stays judiciously to prevent there being competing custody proceedings in multiple jurisdictions.

Expedited procedures for briefing and handling appeals have become common in most circuits.[1218] Appellate courts have also avoided remand by

1214. *See, e.g.*, *In re* Adan, 437 F.3d 381, 398 (3d Cir. 2006).

1215. 568 U.S. 165 (2013).

1216. "[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 178.

1217. In response to Justice Ginsburg's suggestion in *Chafin*, the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference advised that the Appellate and Civil Rules Committees discuss the issue; they concluded that judicial education represented the best initial response to promote best practices for treating Hague cases expeditiously. *See* Minutes of Spring 2013 Meeting of Advisory Comm. on App. Rules 33 (Apr. 22–23, 2013), https://www.uscourts.gov/sites/default/files/fr_import/appellate-minutes-04-2013.pdf.

1218. *See, e.g.*, da Silva v. de Aredes, 953 F.3d 67, 72 (1st Cir. 2020); Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013); Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010); Diorinou v. Mezitis, 237 F.3d 133, 138 (2d Cir. 2001); *Souratgar I*, 720 F.3d 96 (2d Cir. 2013); *In re Adan*, 437 F.3d at 398; Bader v. Kramer, 445 F.3d 346, 351 (4th Cir. 2006) (remand to district court for expeditious handling); England v. England, 234 F.3d 268, 269 (5th Cir. 2000); Sealed Appellant v. Sealed Appellee, 394 F.3d 338 (5th Cir. 2004); 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); Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 379 (8th Cir. 1995) (remand noting it is essential to expedite the case); 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); West v. Dobrev, 735 F.3d 921, 929 (10th Cir. 2013) (recognizing that discovery and plenary hearings are not required in Convention cases); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); Chafin v. Chafin, 742 F.3d 934 (11th Cir. 2013); Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1213 (D.C. Cir. 2019); *In re* J.P.L., 359 S.W.3d 695, 702 (Tex. App. 2011); *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).

identifying potential remand issues[1219] and resolving factual matters where possible based on a "well developed record."[1220]

For example, in *Charalambous v. Charalambous*,[1221] the district court ordered the return of a child to Cyprus. The First Circuit stayed the return order 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—fifty-seven days after the district court's decision.[1222]

Although the Convention does not explicitly impose the obligation on petitioners to prosecute their applications promptly once filed,[1223] one California court held that the Convention does not deprive courts of their inherent power to manage their affairs, including the power to dismiss a case for delayed prosecution.[1224]

VI.D.1

Application of Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure govern how to handle 1980 Hague Convention cases in the federal courts.[1225] In *Kijowska v. Haines*[1226] the Seventh Circuit found that Illinois law prohibited the stay of an order that enforced a child-custody proceeding while an appeal was pending, absent exigent circumstances. But the court noted that matters of procedure in federal courts are governed by federal

1219. *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).

1220. *See, e.g.*, Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

1221. 627 F.3d 462 (1st Cir. 2010).

1222. *Author's note:* Within the fifteen-and-a-half-year period from September 2004 to March 2020, 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 184 days per case—the lowest average amount for appellate courts that handled a statistically relevant number of cases. *Source:* author's review of reported and unreported appellate opinions based on district court decisions rendered commencing 2004.

1223. 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 *supra* section IV.B.

1224. Bardales v. Duarte, 104 Cal. Rptr. 3d 899, 905 (Cal. Ct. App. 2010); *see also* Cruz v. Cruz, 33 Conn. L. Rptr. 594 (Conn. Super. Ct. 2002)† (mother waited almost two years to prosecute petition for return, and she had attempted no contact with the child during that time).

1225. *See* Norinder v. Fuentes, 657 F.3d 526, 532 (11th Cir. 2011) ("There is no question that the Federal Rules of Civil Procedure apply to cases brought under the Act and the Convention in federal court.").

1226. 463 F.3d 583, 589 (7th Cir. 2006).

law, not state law, and the court upheld the stay of a return order and the denial of a subsequent application to dissolve the stay pending appeal.

VI.D.2

Expedited Discovery

A court may adopt an expedited discovery schedule[1227] when considering a petition for return.[1228] 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."[1229] The court in *Norinder v. Fuentes*[1230] reasoned that

> the 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.[1231]

In some cases, discovery has been limited or denied.[1232]

1227. Kufner v. Kufner, 480 F. Supp. 2d 491, 501 (D.R.I. 2007), *aff'd*, 519 F.3d 33 (1st Cir. 2008) (case conference, discovery expedited, hearing set); Bejarno v. Jimenez, No. 19-17524, 2020 WL 4188212 (D.N.J. July 21, 2020)† (expedited discovery permitted); Edoho v. Edoho, No. H-10-1881, 2010 WL 3257480 (S.D. Tex. Aug. 17, 2010)† (parties granted expedited discovery to be completed in thirty days); Slagenweit v. Slagenweit, 841 F. Supp. 264, 265 (N.D. Iowa 1993); Sasson v. Sasson, 327 F. Supp. 2d 489, 490 (D.N.J. 2004).

1228. *See, e.g.*, Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012).

1229. Norinder v. Fuentes, 657 F.3d 526, 533 (7th Cir. 2011).

1230. *Id.*

1231. *Id.*

1232. Walker v. Walker, No. 11 C 2967, 2013 WL 1110876 (N.D. Ill. Mar. 16, 2013)† (court allowed limited, expedited discovery); Skolnick v. Wainer, No. CV 2013-4694(WFK)(MDG), 2013 WL 5329112, at *1 (E.D.N.Y. Sept. 20, 2013) (expedited discovery on single issue); Dionysopoulou v. Papadoulis, No. 8:10-CV-2805-T-27MAP, 2010 WL 5439758, at *2 (M.D. Fla. Dec. 28, 2010)† (court exercised its discretion and denied respondent's request for discovery) (citing March v. Levine, 249 F.3d 462, 474 (6th Cir. 2001)); Saldivar v. Rodela, 894 F. Supp. 2d 916, 941 (W.D. Tex. 2012) (court dispensed with traditional discovery).

VI.D.3

Relaxed Rules for Document Admissibility

Furthering the goal of expedited procedures, ICARA provides a "generous authentication rule"[1233] that eliminates the need to authenticate documents that are submitted with the petition for return.[1234] Courts have held that § 9005 of ICARA authorizes consideration of translated excerpts from foreign law,[1235] foreign custody decisions,[1236] translated documents from foreign courts,[1237] and affidavits submitted by the parties.[1238]

In *Amsalem v. Amsalem*,[1239] the respondent argued that documents submitted as part of a motion for preliminary injunction were not attached to the petitioner's "application" as required by § 9005 of Title 22 of the U.S. Code, and that the admissibility of the documents was not automatic because they contained hearsay. The district court found that the documents were properly authenticated under § 9005 as documents related to the application, and that the documents did not have to be appended to the original petition. But the court also ruled that the

1233. *March*, 249 F.3d at 475. *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.

1234. Brosselin v. Harless, No. C11-1853MJP, 2011 WL 6130419 (W.D. Wash. Dec. 8, 2011)† (The court cited *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.). *Cf.* Avendano v. Smith, No. Civ. 11-0556 JB/CG, 2011 WL 3503330, at *2 (D.N.M. Aug. 1, 2011)† ("This provision [9005] of the International Child Abduction Remedies statute [22 U.S.C. §§ 9001–9011], 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).

1235. Seaman v. Peterson, 762 F. Supp. 2d 1363 (M.D. Ga. 2011); Norinder v. Fuentes, No. 10-CV-391-WDS, 2010 WL 4781149 (S.D. Ill. Nov. 17, 2010).†

1236. Chechel v. Brignol, No. 5:10-cv-164-Oc-10GRJ, 2010 WL 2510391 (M.D. Fla. June 21, 2010);† Doudle v. Gause, 282 F. Supp. 2d 922 (N.D. Ind. 2003).

1237. Kufner v. Kufner, 480 F. Supp. 2d 491 (D.R.I. 2007).

1238. *In re* Walsh, 31 F. Supp. 2d 200 (D. Mass. 1998), *rev'd in part on other grounds*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

1239. No. 1:19-CV-119-RP, 2019 U.S. Dist. LEXIS 218812 (W.D. Tex. Dec. 20, 2019).†

authentication of the documents did not equal their admissibility, since the Federal Rules of Evidence still applied; therefore, hearsay statements were subject to proper objections.[1240]

In *Padilla v. Troxell*[1241] counsel for the petitioner objected to the authentication of an affidavit that the child had not been abducted. The petitioner disputed the authentication of the affidavit but did not challenge the content of the affidavit under Rules 803 and 804 on hearsay. The district court admitted the document over the petitioner's objections to authentication. The Fourth Circuit found that an evidentiary objection on one basis is insufficient to later challenge the admissibility of a document on another. Therefore the court did not err to admit the affidavit into evidence because the petitioner's only objection was to the method of authentication, not its admissibility under hearsay rules.[1242]

VI.E

Parallel Jurisdiction Issues

Where ICARA has granted concurrent original jurisdiction in Hague cases, parties have raised issues of abstention and, to a lesser extent, removal. When a state case is pending, there may be an argument for abstention. Federal courts must then examine whether the pending state case presents a claim under the Convention or whether it is principally a custody dispute.

VI.E.1

Younger Abstention

If federal adjudication would disrupt an ongoing state proceeding, the abstention doctrine of *Younger v. Harris*[1243] may apply, provided three conditions are met: (1) the federal plaintiff is a party in an ongoing state judicial action and federal proceedings would interfere with that action; (2) the litigation in state court implicates important state interests; and (3) the state proceedings afford the parties the opportunity to raise the claims they are seeking to present in federal

1240. *Id.* at *3.

1241. 850 F.3d 168 (4th Cir. 2017).

1242. *Id.* at 178–79.

1243. 401 U.S. 37 (1971).

court.[1244] Courts have been reluctant to apply *Younger* abstention in the context of Hague Convention cases.[1245]

The Supreme Court revisited the *Younger* doctrine in *Sprint Communications, Inc. v. Jacobs*,[1246] emphasizing the narrow circumstances of *Younger*'s application. The Court held that the three *Younger* conditions are not dispositive of the issues, but rather serve as additional factors to be considered before invoking the abstention doctrine.[1247] It was central to the Court's ruling that the *Sprint* case involved civil actions, rather than criminal actions where the state's interests in its judicial functions is evident. Rejecting *Younger*'s application to all parallel state and federal proceedings, the Court found that "even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'"[1248]

Where state custody proceedings are ongoing, but Hague Convention claims have not been raised in state court, the first condition of *Younger* is not satisfied.[1249] Article 16 of the Convention requires that the merits of any custody dispute be stayed pending the outcome of the Hague petition. If a federal court is presented with a Hague petition while a state custody action is proceeding, abstention should not apply.[1250]

1244. *See 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.

1245. *See, e.g.*, Silverman v. Silverman (*Silverman I*), 267 F.3d 788, 792 (8th Cir. 2001) ("abstention principles do not permit an outright dismissal of a Hague petition"); *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* Dawson v. Dylla, No. 21-1225, 2021 WL 5232251 (10th Cir. Nov. 10, 2021)† (district court should have abstained under *Younger* when custody issues were before both U.K. and U.S. courts, and father was asking for modification of custody rights, not the child's return); 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 that was stayed by state appeals court pending determination of dependency petition, whereupon mother filed identical Hague return petition in federal court); Tucker v. Ellenby, No. 11-22857-CIV, 2011 WL 5361154, at *3 (S.D. Fla. Nov. 4, 2011)† (no Hague Convention claim pending in the state custody proceeding, hence adjudication of Hague Convention case in federal court would not interfere with the state proceeding).

1246. 571 U.S. 69 (2013).

1247. *Id.* at 81–82.

1248. *Id.* at 82. *See also* Dawson v. Dylla, No. 21-1225, No. 21-1225, 2021 WL 5232251 (10th Cir. Nov. 10, 2021)† (ruling that *Younger* applied where father's Hague petition sought enforcement only of his access rights under U.K. custody order).

1249. *See, e.g.*, *Barzilay I*, 536 F.3d at 850.

1250. *See, e.g.*, *id.*; *Yang I*, 416 F.3d 199, 203 (3d Cir. 2005); Karpenko v. Leendertz, 619 F.3d 259, 262 (3d Cir. 2010).

The second condition of *Younger*—that state proceedings must implicate important state interests—has been interpreted not to apply to Hague cases.[1251] But it is clear that state cases that involve orders issued to prevent child abduction fall "squarely" within the state's interest in enforcing its own orders.[1252]

In *Minette v. Minette*,[1253] the father was assigned to a U.S. Air Force base in Italy. The mother refused to return to Italy with the parties' two children after a trip to Ohio. The father filed for divorce in Ohio state court and moved for an order restraining the mother preventing the children to return to Italy. The state court ultimately granted custody to the mother, despite the father's pleadings implicating Hague Convention issues. The state court later ruled on custody and support issues, but it did not address the Hague Convention issues, concluding that the divorce proceeding was not sufficient to raise them. While the father's motion to set aside the state court's order was pending, he filed a Hague petition in federal district court.

The *Minette* court noted that

> [f]or a ruling short of a judgment, *Sprint* now provides that a federal court should abstain under *Younger* only if the civil proceeding in state court "implicate[s] a State's interest in enforcing the orders and judgments of its courts" or . . . involves "certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[1254]

The district court found it appropriate to abstain from the ongoing proceedings in state court, which involved the state court's ability to determine its own posture to the case before it. The district court noted that its decision accorded with pre-*Sprint* cases where a Hague claim had been raised but not yet resolved by final judgment. The district court cautioned that if, on appeal, the state court did not address the father's Hague Convention claim, he could move for the federal court to lift its stay.

1251. *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 (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 obligations. 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.

1252. Matrai v. Hiramoto, No. 21-15084, 2021 WL 5276021 (9th Cir. Nov. 12, 2021)† (father's request for injunctive relief from state-court custody order imposing $5 million bond as a condition of exercising visitation rights was denied, finding *Younger* abstention applied).

1253. 162 F. Supp. 3d 643 (S.D. Ohio 2016).

1254. Sprint Comms. Inc. v. Jacobs, 571 U.S. 69, 70 (2013).

VI.E.2

Colorado River Abstention

Federal courts may abstain if there are parallel proceedings. "Wise judicial administration" may justify a stay of federal proceedings in deference to the parallel state proceedings.[1255] Abstention under the *Colorado River*[1256] doctrine allows for either a stay of proceedings in federal court or a dismissal of the action.[1257]

As with *Younger* abstention, if Hague claims have not been raised in the state action, *Colorado River* abstention does not apply.[1258] In *Holder v. Holder* (*Holder I*),[1259] the Ninth Circuit reversed the district court's abstention and stayed proceedings in favor of California custody proceedings. The father was in the U.S. Air Force, stationed in Germany. The mother brought the parties' two children to the state of Washington. The father filed for divorce in California, where the parties previously lived. The mother filed for divorce 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 the mother in Washington. The California court did not consider any Hague issues but recognized that those issues might be brought "on a separate track." The father then filed his Hague petition in federal court in Washington, where the children were located. The district court stayed proceedings on the grounds that the father had initiated the custody proceedings in state court in California, even though he had not pursued a Hague claim in that court. The district court reasoned that California's custody determination would likely result in preclusion of the father's Hague claims. The Ninth Circuit reversed, noting that the finality of the California state custody case would not resolve the Hague Convention issues because those issues had not been raised in the California action.[1260]

Colorado River abstention is often invoked when the parallel state proceeding includes a claim under the Hague Convention,[1261] but a federal court may

1255. Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 912 (9th Cir. 1993).

1256. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

1257. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

1258. *Yang I*, 416 F.3d 199, 204 n.5 (3d Cir. 2005); Escaf v. Rodriguez, 52 F. App'x 207 (4th Cir. 2002).

1259. 305 F.3d 854 (9th Cir. 2002).

1260. *Id.* at 868.

1261. *See, e.g.*, Copeland v. Copeland, 134 F.3d 362 (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).

not abstain for other reasons. In *Lops v. Lops*,[1262] 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, expedite hearing the case. Noting that federal courts have the "virtually unflagging obligation . . . to exercise the jurisdiction given them,"[1263] 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.[1264]

In a 2020 case, *Barron v. Kendall*,[1265] the father removed the parties' five-year-old child from Rosarita, Mexico, to San Diego, California. Shortly thereafter, he filed for legal separation and child custody in the San Diego County Superior Court. The mother requested an ex parte order from the state court for custody and visitation. Recognizing that the case involved Hague Convention issues, the state court set the matter for a "Hague status conference."[1266] At the status conference, the court set an evidentiary hearing for April 10, 2020, but it was subsequently continued due to court closures because of the Covid-19 pandemic. The mother filed a petition for return in federal court on April 2, 2020, and requested, inter alia, an expedited hearing and stay of the action in state court. The request for a stay under *Colorado River* was unique because of the Covid-19 closures of state and federal courts.

The district court found that the San Diego state court properly entertained the Hague Convention issues sua sponte. The district court distinguished *Barron* from *Barzilay v. Barzilay* (*Barzilay I*),[1267] where the Eighth Circuit found that *Colorado River* abstention was improper because the father opposed the mother's custody case and informed the state court that he intended to litigate the merits of the Hague issues in federal court. Despite this information, the state court went

1262. 140 F.3d 927 (11th Cir. 1998).

1263. McClelland v. Carland, 217 U.S. 268, 282 (1910).

1264. 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.

Lops, 140 F.3d at 943. *See also* 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).

1265. No. 20-cv-00648-AJB-KSC, 2020 WL 2521915 (S.D. Cal. May 18, 2020).†

1266. *Id.* at *1.†

1267. 536 F.3d 844 (8th Cir. 2008).

on to decide Hague issues sua sponte. However, in *Barron*, though the mother had ample opportunity to object to the San Diego County Superior Court's hearing the Hague issues, she did not do so. She therefore waived her right to choose a federal forum to try those issues. The district court further found that abstention under both *Younger* and *Colorado River* was inappropriate, given (1) the Hague issues were first raised in state court, (2) the petitioner acquiesced in that jurisdiction, (3) the state court had concurrent jurisdiction to hear Hague matters, and (4) it appeared that the petitioner was forum shopping. But for the Covid-19 closures, the state court was prepared to provide a full and fair hearing, and, as such, the Hague issues had been raised but not yet litigated.

VI.E.3

Rooker-Feldman Doctrine

The *Rooker-Feldman*[1268] 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 based on federal law. Such a tactic is tantamount to having the federal court act as a court of appeal to the state court's judgment. Similarly, federal courts must abstain from relitigating issues that are "inextricably intertwined" with the state court's decision.[1269]

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 that the state court decided the case erroneously.[1270] The doctrine also applies when a party files a Hague Convention petition for return of a child as an artifice to collaterally attack a state court's judgment that was fully litigated.[1271]

In *Vale v. Avila*[1272] the court refused to impose the *Rooker-Feldman* doctrine, where the mother fraudulently obtained a dismissal of the father's Hague Convention petition by making an agreement to share custody of the children under

1268. Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Ct. of App. v. Feldman, 460 U.S. 462 (1983).

1269. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282–86 (2005).

1270. *See 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).

1271. *See* White v. White, 556 F. App'x 10 (2d Cir. 2014) (upholding district court's dismissal of parent's petition on the grounds of the *Rooker-Feldman* doctrine, res judicata, and collateral estoppel).

1272. 538 F.3d 581, 585 (7th Cir. 2008).

specified terms, which included making Illinois their habitual residence. She registered the settlement agreement in Illinois state court. The Seventh Circuit ruled that when she refused to comply with the terms of the agreement, the father was entitled to reopen the Hague case in federal district court to seek the children's return. The court set aside the prior dismissal and reinstated the Hague Convention proceeding because the dismissal had been obtained by fraud.

VI.E.4

Removal

Removal has been mentioned in only a few Hague cases, and none of them has analyzed whether the petitioner's selection of forum must be honored.[1273] In the case of *In re Mahmoud*,[1274] the mother filed a Hague petition in state court. On the first day of trial, the father filed a notice of removal to federal court. The mother opposed removal, arguing that she had the right to select the forum. The state court proceeded to hear the case and ordered the child returned to England with the mother. The father moved to vacate the state court's order, primarily to attack the award of attorney fees and costs. The district court vacated the state court's order because it was entered after notice of removal. The removal statute, Title 28 § 1446(d), provides that once notice of removal is given, a state court must proceed no further unless the case is remanded. The entry of any order entered thereafter by a state court is void.[1275]

In *Silverman v. Silverman*,[1276] a lengthy custody dispute involving the parties' two sons, ages seventeen and nineteen, resulted in a Canadian order that granted the parties alternating weeks of visitation. After losing his attempt to modify the Canadian order, the father relocated to southern California with the older son. The younger son joined the father and his brother a few months later. The mother first obtained a modification of the previous Canadian custody order granting her full custody of the younger son. She then moved for the San Diego County Superior Court to register the Canadian custody order in California so that she could enforce the Canadian order. Two weeks later, the father removed the mother's registration proceeding to federal court. He claimed that the federal district court had "arising under" jurisdiction because it was necessary to adjudicate the impact that the Hague Convention had on the Uniform Child-Custody

1273. *Danaipour II*, 386 F.3d 289 (1st Cir. 2004); Morrison v. Dietz, No. 07-1398, 2008 WL 4280030 (W.D. La. Sept. 17, 2008).†

1274. No. CV 96 4165 (RJD), 1997 WL 43524 (E.D.N.Y. Jan. 24, 1997).†

1275. *Id.* at *2 (citing Tarbell v. Jacobs, 856 F. Supp. 101, 104 (N.D.N.Y. 1994)).

1276. No. 15-CV-2108-AJB-BLM, 2016 WL 10894424 (S.D. Cal. Jan. 14, 2016).†

Jurisdiction and Enforcement Act (UCCJEA) provisions for registration and enforcement of the Canadian decree.

The father presented two arguments: (1) that the UCCJEA and the Hague Convention were in conflict, which thereby violated the equal protection rights of the father and child, and (2) that the U.S. Senate's failure to ratify the 1996 Convention of Children[1277] was evidence that foreign child-custody orders should be limited to children under the age of sixteen. The district court rejected both positions, finding that the first was at odds with Article 18 of the Convention permitting a court to order a child returned "at any time"[1278] and the second was speculative and not supported by the language of the 1996 convention.[1279] The court also found that the history of the Hague Convention indicated that state laws (such as the UCCJEA) provide protection for parents and survive undisturbed by the Hague Convention.

Finally, the court considered the impact of the *Text and Legal Analysis* in interpreting the scope of Article 4 of the 1980 Convention:

> The Convention applies only to children under the age of sixteen (16). Even if a child is under sixteen at the time of the wrongful removal or retention as well as when the Convention is invoked, the Convention ceases to apply when the child reaches sixteen. . . . 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. However, it does not bar return of such child by other means.[1280]

VI.F

Comity

In *Hilton v. Guyot*,[1281] the Supreme Court held that comity is neither a matter of absolute obligation nor mere courtesy and goodwill. 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.

1277. 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 35. I.L.M. 1391 (1996) (commonly referred to as the "1996 Convention for Protection of Children"), https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf.

1278. *Silverman*, 2016 WL 10894424, at *7.

1279. Article 50 of the 1996 Convention indicates that it will "not affect the application of the [1980 Convention] as between Parties to both Conventions." *Id.* at *8.

1280. *Silverman*, 2016 WL 10894424, at *9.

1281. 159 U.S. 113 (1895).

law.[1282] If a court deems that a decision 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.[1283]

VI.F.1

Hague Convention Orders of Other Nations

The acceptance of treaty partnerships with other nations signifies a certain degree of trust that the courts of other countries will safeguard the interests of children with the same degree of concern as U.S. courts:

> [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." [1284]

In *Trott v. Trott*[1285] the two children were residents of Bermuda until 2013, when their mother took them to New York. The oldest child was not the father's biological child, but she was raised by him and considered him her father. The father did not object when the mother relocated with the children, as he had custody of them each summer in Bermuda and visited them in New York. During the last summer visit, the children told the father that they had been sexually abused in New York. The mother had not informed the father of the abuse and did not send the girls to a counselor. The girls also indicated that the mother had neglected and mistreated them. The father refused to send the children back to New York at the end of their visit, and the mother petitioned the Bermudan courts for their return under the Hague Convention. A Bermudan trial court granted the mother's petition, but the court of appeals reversed, finding that the girls' objections were not properly considered and that returning the girls would amount to a grave risk. The court concluded that the children should remain in Bermuda pending custody hearings there.

The mother petitioned to have the children spend time with her in New York from December 26, 2019, to January 3, 2020. The Bermudan trial court allowed the visit, but the mother failed to return the children to Bermuda as ordered. The

1282. *Id*. at 113.

1283. *Id*.

1284. *Souratgar I*, 720 F.3d 96, 108–09 (2d Cir. 2013) (citing *Blondin II*, 189 F.3d 240, 242, 248–49 (2d Cir. 1999)).

1285. No. 20-CV-1392 (AMD) (CLP), 2020 WL 4926336 (E.D.N.Y. Aug. 21, 2020).†

father's petition to return the children under the Convention was subsequently heard in the Eastern District of New York. The mother filed a motion to dismiss the petition.

The district court granted comity to the order of the Bermudan appellate court and granted the father's petition for return. The court found that the Bermudan appellate decision was based on a "meticulous review of the record and a well-reasoned application of the Hague Convention."[1286] Additionally, the appellate decision had examined the children's objections to return, given their age and maturity, and concluded that it was appropriate to give the children's objections weight, and that doing so served their best interests.[1287] The mother's argument that the older child was not the father's biological daughter was deemed immaterial because the father's custody rights were not in question; only the rights of the mother—the petitioner in the Bermuda case—were. The father had established an exception to return and was not required to possess custody rights.

Notwithstanding the language of *Hilton*, U.S. courts have sometimes scrutinized the substance of foreign rulings on Hague petitions when determining whether to grant comity. In *Asvesta v. Petroutsas*,[1288] the mother abducted the child to Greece. The father's petition for return under the Hague Convention was denied by the Greek court, finding that the father consented to the child's removal, the mother had not wrongfully retained the child, and the child would suffer grave harm if returned to the United States. The father thereafter reabducted the child back to the United States, and the mother filed a petition for return. The district court granted the mother's petition, according comity to the 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,[1289] the court reasoned,

1286. *Id*. at *5.†

1287. *See* discussion re children's objections promoting their best interests, *supra* section IV.G.5.

1288. 580 F.3d 1000 (9th Cir. 2009).

1289. 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 (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.

> 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.[1290]

VI.F.2

Enforcement of Foreign Custody Decisions

Comity has been extended to the custody orders of other nations. In *Navani v. Shahani*[1291] the Tenth Circuit found that comity should be given to a family-court order from England, based on the English court's interpretation of English law.[1292]

In *Smedley v. Smedley*,[1293] the mother removed two children from North Carolina to Germany, where the father was previously posted as a member of the U.S. military. The father petitioned under the Hague Convention for the return of the children to North Carolina, but his petition was denied by the district court in Bamberg, and that decision was affirmed by the Bamberg Regional Court. Later, after the children were in North Carolina for a one-month visit with their father, he retained them contrary to the parties' agreement. The mother petitioned for the children's return to Germany, and the U.S. district court ordered the children

1290. *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").

1291. 496 F.3d 1121 (10th Cir. 2007). *See also* Fernandez v. Bailey, 909 F.3d 353, 365 (11th Cir. 2018) (comity supported returning children to Panama where Panamanian courts had ongoing case involving the parties' custody disputes).

1292. *Navani*, 496 F.3d at 1128. *See also* Trott v. Trott, No. 20-CV-1392 (AMD) (CLP), 2020 WL 4926336 (E.D.N.Y. Aug. 21, 2020), discussed *supra* section VI.F.1; Miller v. Miller, 240 F.3d 392 (4th Cir. 2001) (extending comity to a Canadian custody order that conflicted with a state court's order); Rodriguez Palomo v. Howard, 426 F. Supp. 3d 160 (M.D.N.C. 2019) (Spanish custody decision adopted by district court as a matter of comity); *but see* Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828 (S.D. Tex. 2006) (refusing comity to Belgian custody orders). *Cf.* Custodio v. Samillan, 842 F.3d 1084, 1092 (8th Cir. 2016) (court properly exercised discretion in refusing return of child based upon mature child's objections to return, overcoming considerations of comity for Peruvian custody orders).

1293. 772 F.3d 184 (4th Cir. 2014).

to be returned to Germany, according comity to the German appellate decision and concluding that the German decision finding that the father consented to the children's removal was not "fundamentally unreasonable."[1294] The court cited the Ninth Circuit's decision in *Asvesta* that comity was appropriate where a foreign court's decision neither misinterprets the Convention nor fails to meet a minimum standard of reasonableness.[1295]

However, comity 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. Taveraz*,[1296] the father filed an action for return of the children to the Dominican Republic. However, the Convention had not yet entered into force between the Dominican Republic and the United States. The father argued that comity should be given to an order of the Dominican courts that granted him temporary custody of the children. The district court denied the father's requested relief. The Sixth Circuit affirmed, noting 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."[1297]

VI.G

Petitions for Access Only

Circuits are split[1298] on the issue of whether courts may entertain petitions for enforcement of access or visitation under the Convention.

In *Cantor v. Cohen*,[1299] the mother petitioned for return of and access (visitation) to her two children. The district court dismissed the access claim, and the mother appealed. The Fourth Circuit affirmed the dismissal, finding that Article 21 of the Convention did not create an obligation upon courts to enforce access rights; these rights must be presented to the Central Authorities. ICARA must be read within the context of Article 21; it does not establish a right of action

1294. *Id.* at 188.

1295. *Id.* at 191 ("[T]he German court's decision was at least minimally reasonable.").

1296. 477 F.3d 767 (6th Cir. 2007).

1297. *Id.* at 783 n.12.

1298. Circuit split recognized in Londono v. Gonzalez, 988 F. Supp. 2d 113 (D. Mass. 2013); *see also* Neumann v. Neumann, 310 F. Supp. 3d 823, 844 (E.D. Mich. 2018) (recognizing that Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013), expressly disagrees with *Cantor*).

1299. 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).

that does not exist under the Convention.[1300] U.S. federal courts have limited jurisdiction, and ICARA was not meant to confer upon courts the jurisdiction to hear access claims.[1301]

The Second and Sixth Circuits, however, reached different conclusions. In *Ozaltin v. Ozaltin*,[1302] the Second Circuit emphasized the language in § 9003 of ICARA that points to the existence of a right to enforce access rights[1303] and to provisions relating to burdens of proof specific to such enforcement actions.[1304] 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."[1305]

In *Taveras v. Taveraz*,[1306] the Sixth Circuit affirmed the district court's dismissal of a petition to return a child under the Alien Tort Statute.[1307] In passing, the court observed, "We note that unlike The Hague Convention, the ICARA,

1300. *Cantor*, 442 F.3d at 200. *See* discussion and rejection of contrary interpretations of Katona v. Kovacs, 148 F. App'x 158 (4th Cir. 2005),† and Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000), *in Cantor*, 442 F.3d at 202–06.

1301. *Id.* at 202. *Accord* Wagner v. Wagner, No. RWT 07-1347, 2007 WL 1826891, at *2 (D. Md. June 21, 2007); Done v. Pichardo, No. 1:18-CV-795-RWS, 2018 WL 1930081, at *3 (N.D. Ga. Apr. 24, 2018)† (suggesting that ICARA only gives courts power to enforce foreign access orders, and court lacks jurisdiction to establish, in the first instance, orders regarding parental rights).

1302. 708 F.3d 355 (2d Cir. 2013).

1303. Section 9003(b) (22 U.S.C. § 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.

1304. Section 9003(e) (22 U.S.C. § 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.

1305. *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, 777 n.7 (6th Cir. 2007). *See also* Rehder v. Rehder, No. C14-cv-1242 RAJ, 2014 WL 5324295, at *3 (W.D. Wash. Oct. 17, 2014)† (granting request for visitation orders and citing *Ozaltin*).

1306. 477 F.3d 767 (6th Cir. 2007).

1307. 28 U.S.C. § 1350.

22 U.S.C. § 9003, does provide for judicial remedies for non-custodial parents, namely for rights of access claims (e.g., visitation)."[1308]

The passage of the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (Goldman Act)[1309] sheds little light on the question of 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,"[1310] 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."[1311] However, the Act does define rights of access:

> 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.

VI.G.1

Access Orders

No court has offered guidance on how to "organize" or "secure" the exercise of access rights.[1312] State courts are equipped to handle a wide spectrum of child-custody disputes, including requests to establish visitation rights, or to enforce

1308. *Taveras*, 477 F.3d at 777 n.7.

1309. Pub. L. No. 113-150, 128 Stat. 1807 (codified as amended at 22 U.S.C. §§ 9101–9141). The Act was signed by President Obama on August 8, 2014. 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 noncompliant; (3) imposes significant new reporting requirements on the State Department for abduction and access cases; and (4) establishes an inter-agency working group consisting of officials from the Department of State, Homeland Security, and the Department of Justice.

1310. *Id*. at § 2(c)(4) (codified as a note under 22 U.S.C. § 9101).

1311. *Id*. at § 3(4) (codified at 22 U.S.C. § 9101).

1312. 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 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.

those that have already been ordered. State courts regularly hearing custody cases have at their disposal 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, by 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.[1313]

A party seeking to enforce an order that was previously issued has recourse in federal court. In *Cantor v. Cohen*, the dissenting opinion noted that

> contrary 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.[1314]

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. In the context of the 1980 Convention, *organize* is understood to mean "establish."[1315] Federal courts may be called upon to (1) enforce existing access orders, and (2) establish and/or enforce access orders.

VI.G.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

1313. *See, e.g.*, *Souratgar I*, 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).

1314. 442 F.3d 196, 212 (4th Cir. 2006).

1315. Pérez-Vera Report, *supra* note 18, at 465, ¶ 126:

> 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.

the application for return. Nevertheless, courts have exercised their discretion in ordering such visits pending a trial on the merits.[1316]

The Goldman Act states that one of its purposes is to "assist left-behind parents in . . . maintaining safe and predictable contact with their child while an abduction case is pending."[1317] 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."[1318] 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 while an abduction case is pending, under the laws of the country in which the child is located . . . ."

There are no reported or unreported decisions that seek to interpret or apply the Act.[1319]

VI.H

Contacting Judges in Foreign Jurisdictions

The 1980 Convention has enjoyed unparalleled acceptance within the international community—over one hundred countries are now signatories. Broad acceptance of the Convention brings with it a corresponding diversity of legal systems. Notions of judicial independence will vary widely between countries. In the United States, discussions among state judges dealing with the same parties in a custody case are usually mandatory.[1320] 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. This may be the case even though there is no discussion concerning the facts or merits of the proceedings.

1316. *See In re* S.E.O., 873 F. Supp. 2d 536 (S.D.N.Y. 2012) (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).

1317. Goldman Act, Pub. L. No. 113-150, § 2(c)(2), 128 Stat. 1809 (codified as a note under 22 U.S.C. § 9101).

1318. *Id*. § 3(14) (codified at 22 U.S.C. § 9101).

1319. *But see* Peter J. Messitte, *Getting Tough on International Child Abduction*, 58 Fam. Ct. Rev. 195 (2020) (urging application of escalating sanctions provided by the act where appropriate).

1320. 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.

Although there are few reported examples of U.S. courts communicating directly with courts in other countries,[1321] it is well known that these communications take place.[1322] Direct communication with a judge in another country may be helpful to resolve issues surrounding the logistics of the return of a child or to answer questions relating to foreign law.[1323] A judge may request contact with a U.S. Hague Network Judge by emailing the U.S. Central Authority at judgesnetwork@state.gov. 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) foreign law and procedure,[1324] (2) best practices for expediting proceedings, and (3) jurisdictional matters.[1325]

1321. *See, e.g.*, Innes v. Carrascosa, 918 A.2d 686 (N.J. 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. Oct. 6, 2003)† (discussing details of mirror-image order between U.S. judge and Canadian judges).

1322. *Special Focus: Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks*, Judges' Newsletter on International Child Protection (Hague Conf. on Private Int'l L.), Autumn 2009, https://assets.hcch.net/docs/541d9b6a-39cb-414c-a68e-07e8681228c9.pdf.

1323. Gonzalez v. Preston, 107 F. Supp. 3d 1226, 1240 (M.D. Ala. 2015) (Hague Network Judges available for consultation); Seaman v. Peterson, 762 F. Supp. 2d 1363, 1382 (M.D. Ga. 2011), *aff'd*, 766 F.3d 1252 (11th Cir. 2014) (contact made with Mexican Hague Network Judge); Saada v. Golan, No. 1:18-CV-5292 (AMD) (SMG), 2020 WL 2128867, at *1 (E.D.N.Y. May 5, 2020)† (contact with Hague Network Judge); Castellanos Monzón v. De La Roca, No. 16-0058 (FLW)(LHG), 2016 WL 1337261, at *10 (D.N.J. Apr. 5, 2016),† *rev'd and remanded*, 731 F. App'x 117 (3d Cir. 2018), *reh'g granted and opinion vacated*, 736 F. App'x 350 (3d Cir. 2018), *on reh'g*, 910 F.3d 92 (3d Cir. 2018), *aff'd*, 910 F.3d 92 (3d Cir. 2018) (Hague Network Judges assisted interpretation of patria potestas rights); Fernandez-Trejo v. Alvarez-Hernandez, No. 8:12-cv-02634-EAK-TBM, 2012 WL 6106418, at *3 (M.D. Fla. Dec. 10, 2012)† (noted assistance from "U.S. Network Judges who have compiled substantive resources to assist the Court in the timely and efficient resolution of these disputes").

1324. 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.

1325. 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.

Upon the recommendation of the Special Commission held in 2011, the Hague Permanent Bureau created a report on dealing with direct judicial communication.[1326] 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 concerning the exercise of child-custody jurisdiction. The principles recommended by the Permanent Bureau's report on judicial communications span a wide range of subjects including communication safeguards, initiating communications, the form of communications, language difficulties, and keeping the Central Authority informed of the judicial communications.[1327]

In order to facilitate communication between judges in different countries, the Hague Permanent Bureau has created a network of judges—the International Hague Network of Judges (IHNJ)—that is available to assist and advise judges on communication with foreign counterparts. Under the leadership of the Permanent Bureau, the state parties to the Convention and the members of the IHNJ adopted a set of general principles for judicial communications that serve as a model of best practices for direct judicial communications.[1328] This network currently includes more than 125 judges from 86 different nations, including 3 U.S. network judges recommended to the Permanent Bureau for membership in the IHNJ by the U.S. Department of State.[1329] These judges are available to facilitate contacts with foreign judges and to provide logistical information and assistance to judges handling Hague cases. The website of the Hague Permanent Bureau provides a list of the International Hague Network of Judges.[1330]

1326. Direct Judicial Communications, *supra* note 1322.

1327. *Id*. For principles regarding the conduct of direct judicial communication, see Judge Mary W. Sheffield & Matthew D. Rowland, *International Hague Network of Judges: Significance in Implementation of the 1980 and 1996 Hague Conventions on the Civil Aspects of International Child Abduction*, 57 Fam. Ct. R. 175 (2019).

1328. Direct Judicial Communications, *supra* note 1322, provides an excellent background in the development of the IHNJ and the principles suggested in parts 6, 7, and 8 that deal with communication safeguards, initiating communications, and dealing with the form of communication and language difficulties.

1329. Hague Conf. on Private Int'l L., International Hague Network of Judges (IHJN), https://assets.hcch.net/docs/665b2d56-6236-4125-9352-c22bb65bc375.pdf.

1330. *Id.*

VI.I

Attorney Fees and Costs

VI.I.1

Authority for Awards

Article 26 of the Convention contains a discretionary fee-shifting provision that permits a court to award 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.[1331]

ICARA strengthens the Convention's fee-shifting provision by providing a rebuttable presumption in favor of an award of fees and costs to the successful petitioner:

> 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.[1332]

The fee-shifting provisions of the Convention and ICARA are a one-way street. There is no comparable provision for the award of fees and costs to a respondent who successfully opposes the petition for return.[1333]

The *Text and Legal Analysis*[1334] describes the purposes for Article 26 as (1) restoring the petitioner to the position that the petitioner would have been in had there been no wrongful removal, and (2) deterring abductions in the first

1331. Convention, art. 26.

1332. 22 U.S.C. § 9007(b)(3).

1333. White v. White, 893 F. Supp. 2d 755, 758 (E.D. Va. 2012); Stone v. Stone, No. 19-17962 (MAS) (ZNQ), 2020 WL 491194, at *1 (D.N.J. Jan. 30, 2020);† Carvajal Vasquez v. Gamba Acevedo, No. 3:18-cv-0137, 2018 WL 10374690, at *2 (M.D. Tenn. July 5, 2018).† *Cf.* Slagenweit v. Slagenweit, 64 F.3d 719 (8th Cir. 1995) (costs of depositions and translations awarded to prevailing party defending against return).

1334. Text & Legal Analysis, *supra* note 45, at 10,511.

place.[1335] Congress included the fee-shifting provision in ICARA in an effort to deter international child abductions.[1336]

ICARA's provisions relating to fees and costs differ from the language contained in Article 26 of the Convention. The Convention makes an award of fees and costs discretionary, but ICARA states that the court "shall" make the award. ICARA's language contemplates 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."[1337] In *Rath v. Marcoski*,[1338] the Eleventh Circuit ruled that courts do not have broad discretion to determine whether successful petitioners are entitled to fees since ICARA provides presumptively that they are.[1339] The burden to establish an appropriate award is on the petitioner, and the burden to demonstrate inappropriateness is on the abducting parent.[1340]

Settlement of a Hague case may trigger application of the fees-and-costs provision if that settlement provides for the court to order the return of the child. In *Salazar v. Maimon*,[1341] the parties reached a settlement providing that the father would voluntarily return the child. After entry of the return order, the mother requested an award of fees. The father opposed the request, arguing that because the parties had settled the case, there was no basis for an award. The Fifth Circuit disagreed, holding that

> the 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

1335. *See id.*; Roszkowski v. Roszkowska, 644 A.2d 1150, 1160 (N.J. Super. Ct. Ch. Div. 1993), *abrogated on other grounds*, Ivaldi v. Ivaldi, 685 A.2d 1319 (N.J. 1996) (referring to provisions of ICARA relating to fees as a "sanction").

1336. The House Judiciary Committee reported:

> Section 8(b)(3), reflecting the provisions of the last paragraph of Article 26 of the Convention, provides that a court ordering the return of a child shall order the respondent to pay specified necessary expenses incurred by or on behalf of the petitioner unless the respondent establishes that to do so would be clearly inappropriate. This provision of the Act, and the provision of Article 26 that it reflects, were intended to provide an additional deterrent to wrongful international child removals and retentions.

H.R. Rep. No. 100-525, at 14 (1988).

1337. Salazar v. Maimon, 750 F.3d 514, 519 (5th Cir. 2014); *accord* Rath v. Marcoski, 898 F.3d 1306, 1310 (11th Cir. 2018); Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004).

1338. 898 F.3d 1306, 1310 (11th Cir. 2018) (citing *Salazar*, 750 F.3d at 519).

1339. *Id.* at 1311 (citing Chafin v. Chafin, 568 U.S. 165, 169 (2013) ("courts ordering children returned generally must require defendants to pay various expenses incurred by plaintiffs . . . .")).

1340. 22 U.S.C. § 9007(b)(3); *see also* Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 346 (5th Cir. 2004).

1341. 750 F.3d 514 (5th Cir. 2014).

> 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.[1342]

ICARA limits the award of fees and costs to those incurred as part of the return proceedings. A successful petitioner may not be awarded fees and costs incurred in other court proceedings. In *Adkins v. Adkins*,[1343] the mother successfully petitioned in the federal district court for the return of her daughter to Switzerland. Her motion for reimbursement of necessary expenses included attorney fees and costs that she incurred obtaining a dismissal of the custody action the father brought in California state courts, as well as fees and costs for her own post-abduction child-custody action in Swiss courts. The mother maintained that she would not have incurred these fees and costs but for the father's wrongful removal of the child from Switzerland. The district court denied her claim for the expenses incurred in the Swiss and Californian courts, pointing to the language of U.S.C. § 9007(b)(3) that limits awards to actions "brought under section 9003," and held that ICARA does not authorize award of fees and costs incurred in ancillary actions maintained in other courts.[1344]

Fees and costs are recoverable for appellate proceedings. In *Haimdas v. Haimdas*, the district court held that after appeal, the petitioner might be entitled to additional fees.[1345] In *Sundberg v. Bailey*, the district court found that the respondent initiated an unsuccessful appeal and that the petitioner's opposition involved "necessary expenses."[1346] The district court granted petitioner's motion for fees and costs on appeal.[1347]

In *Bordelais v. Bordelais*,[1348] the Seventh Circuit found on appeal that awarding fees and costs as sanctions was warranted because of the father's vexatious conduct as a litigant. The father had filed fifteen actions since 2016 against the mother, her family, her employer, her lawyers, and the child's therapist. Because of the father's litigious behavior, he was designated a "restricted filer," and the

1342. *Id.* at 518.

1343. No. 19-cv-05535-HSG, 2020 WL 6508616 (N.D. Cal. Nov. 5, 2020).†

1344. *Id.* at *2.

1345. 720 F. Supp. 2d 183, 212 (E.D.N.Y.), *aff'd*, 401 F. App'x 567 (2d Cir. 2010) ("[I]f respondent's appeal is ultimately unsuccessful, petitioner may be entitled to recover additional fees and costs.").

1346. No. 1:17-CV-00300-MR-DLH, 2019 WL 2550541, at *2 (W.D.N.C. June 19, 2019).†

1347. *Id*. Note that the respondent did not file a timely objection to the motion.

1348. 844 F. App'x 910 (7th Cir. 2021).†

Seventh Circuit issued an order to show cause under Federal Rule of Appellate Procedure 38[1349] why reasonable attorney fees and costs should not be awarded.

Three circuits have raised the issue of whether appellate courts are permitted to enter orders for reimbursement of fees and costs. In *Pliego v. Hayes*, the Sixth Circuit held that the provision in ICARA for reimbursement of fees and costs does not apply to the appellate courts, referencing the language in § 9007(b)(3) that "[a]ny court ordering the return of a child pursuant to an action brought under [ICARA] shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner."[1350] However, the holding was limited to appellate courts entering orders for fees and costs themselves. The *Pliego* court did grant authority to the district court to entertain a separate motion for an award of fees and costs for the appeal. Similarly, in *Hollis v. O'Driscoll*, the Second Circuit remanded the issue to the district court, noting: "The District Court, as the court ordering the return of the child, is responsible in the first instance for determining what costs, if any, should be assessed against O'Driscoll, with respect to both the District Court and Court of Appeals proceedings."[1351] In *West v. Dobrev*,[1352] the court raised the question whether fees and costs on appeal are appropriate under ICARA: "Are we 'a court ordering the return of a child?' Petitioner makes no attempt to provide us with an answer to this question and we are not inclined to answer it for ourselves."[1353]

Handling the issue differently, in *Cuellar v. Joyce* (*Cuellar II*),[1354] the Ninth Circuit found that an award of fees and costs incurred on appeal was appropriate and referred the matter of the award amount to the appellate commissioner.[1355] Other courts have found it appropriate to allocate costs on appeal.[1356]

1349. Rule 38 provides, "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

1350. 843 F.3d 226, 238 (6th Cir. 2016).

1351. 739 F.3d 108, 113 (2d Cir. 2014).

1352. 735 F.3d 921 (10th Cir. 2013).

1353. *Id.* at 933.

1354. 603 F.3d 1142 (9th Cir. 2010).

1355. *Id*. at 1144.

1356. *See, e.g.*, Gaudin v. Remis, 415 F.3d 1028, 1038 (9th Cir. 2005) (each party bears own costs); *In re* Marriage of Forrest & Eaddy, 51 Cal. Rptr. 3d 172, 181 (2006) (petitioner awarded her costs of appeal); Diorinou v. Mezitis, 237 F.3d 133, 147 (2d Cir. 2001) (successful petitioner awarded her costs on appeal).

VI.I.2

Amount of Awards

VI.I.2.a

Pro Bono Services

Legal services provided to parents seeking the return of their children are frequently provided pro bono or on a reduced-fee basis. Courts may still award fees to the petitioning parent in such cases;[1357] this serves to deter future abductions and encourages pro bono services.[1358] However, some courts are less inclined to award fees where the rendered legal services were pro bono[1359] or to award a reduced fee.[1360]

VI.I.2.b

Lodestar Method

Federal courts typically apply the lodestar method for 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.[1361] After making a lodestar determination, courts may examine whether

1357. *Cuellar II*, 603 F.3d 1142, 1143 (9th Cir. 2010); Larrategui v. Laborde, No. 2:13-cv-01175 JAM-EFB, 2014 WL 2154477 (E.D. Cal. May 22, 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).

1358. Duran-Peralta v. Luna, No. 16 Civ. 7939 (JSR), 2018 WL 1801297, at *2 (S.D.N.Y. Apr. 2, 2018)† (citing *In re* JR, No. 16 CV 3863 (VB), 2017 WL 74739, at *3–4 (S.D.N.Y. Jan. 5, 2017);† *Cuellar I*, 596 F.3d 505, 511 (8th Cir. 2010)).

1359. *Duran-Peralta*, 2018 WL 1801297. *See also* Mendoza v. Silva, 987 F. Supp. 2d 910, 915 (N.D. Iowa 2014) ("Without pro bono representation, petitioners with limited financial means might not be able to prosecute legitimate claims—claims that unquestionably relate to one of the most important parts of their lives, their children."). Djeric v. Djeric, No. 2:18-cv-1780, 2019 WL 2374070, at *2 (S.D. Ohio June 5, 2019)† (fee requests reduced to zero); De Lucia v. Marina Castillo, No. 3:19-CV-7 (CDL), 2019 WL 1905158, at *10 (M.D. Ga. Apr. 29, 2019).†

1360. *In re JR*, 2017 WL 74739, at *3 ("Although the fact that the firm appeared pro bono does not preclude an award of fees and costs, it does warrant a reduction in the amount awarded.").

1361. Nissim v. Kirsh, No. 1:18-cv-11520 (ALC), 2020 WL 3496988, at *2 (S.D.N.Y. June 29, 2020);† 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, No. 2:13-cv-01175 JAM-EFB, 2014 WL 2154477 (E.D. Cal. May 22, 2014).†

it is necessary to adjust the lodestar figure based on other factors, usually the *Johnson* factors:[1362]

1. The time and labor required
2. The novelty and difficulty of the questions involved
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

VI.I.3

Where Award Is Clearly Inappropriate

ICARA gives courts discretion to reduce or to eliminate[1363] attorney fees and costs where such awards would be "clearly inappropriate."[1364] The respondent or

1362. *See* Johnson v. Ga. Highway Exp. Inc., 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds*, Blanchard v. Bergeron, 489 U.S. 87 (1989); *see, e.g.*, Norinder v. Fuentes, 657 F.3d 526, 536 (7th Cir. 2011); Soonhee Kim v. Ferdinand, No. 17-16180, 2018 WL 1635795, at *3 (E.D. La. Apr. 5, 2018);† Quintero v. Loera Barba, No. 5:19-148, 2019 WL 3604615, at *2 (W.D. Tex. Aug. 6, 2019);† *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). Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999).

1363. Mendoza v. Silva, 987 F. Supp. 2d 910 (N.D. Iowa 2014) (considering father's mistaken but good-faith belief; award would impair father's ability to provide support to children); E. Sussex Child. Servs. v. Morris, 919 F. Supp. 2d 721, 734 (N.D. W. Va. 2013).

1364. Salazar v. Maimon, 750 F.3d 514, 519–20 (5th Cir. 2014); Distler v. Distler, 26 F. Supp. 2d 723, 729 (D.N.J. 1998).

abducting parent bears the burden to prove that the award is clearly inappropriate.[1365] As with other Convention issues, this is fact-dependent.[1366] Some courts have focused on two factors, (1) whether the abducting party had a good faith belief that their actions in wrongfully removing the child were either legal or justified; and (2) whether the abducting parent lacked the ability to pay and thus the award of necessary expenses would impair that parent's ability to care for the child.[1367]

Other circuits have considered additional factors such as "forum shopping,"[1368] deliberately misleading the left-behind parent about the child's location,[1369] repeated abductions,[1370] the petitioner's responsibility for the expenditure of fees and costs, [1371] needless repetitive motions, "scorched-earth" litigation,[1372] absence of financial resources,[1373] disparity between parties' financial resources,[1374] representation by multiple law firms,[1375] unclean hands, failure to provide adequate financial support for the child,[1376] potential to deter future

1365. Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004) ("[I]t is clear from the statute that the respondent has the burden to establish that a fee/expense order would be clearly inappropriate."); *Salazar*, 750 F.3d at 520; Darín v. Olivero-Huffman, 746 F.3d 1, 19 (1st Cir. 2014); West v. Dobrev, 735 F.3d 921, 932 (10th Cir. 2013); Ozaltin v. Ozaltin, 708 F.3d 355, 375 (2d Cir. 2013).

1366. Rath v. Marcoski, 898 F.3d 1306, 1311 (11th Cir. 2018).

1367. Norinder v. Fuentes, 657 F.3d 526, 536–37 (7th Cir. 2011); *Rath*, 898 F.3d at 1311 (11th Cir. 2018) (citing *Ozaltin*, 708 F.3d at 375–76).

1368. *Ozaltin*, 708 F.3d at 375.

1369. Malmgren v. Malmgren, No. 5:18-CV-287-BO, 2019 WL 5092447, at *2 (E.D.N.C. Apr. 1, 2019).†

1370. Pliego v. Hayes, No. 5:15-CV-00146, 2015 WL 5570093, at *2 (W.D. Ky. Sept. 22, 2015)† (award of full request for fees serves purpose of deterring future removal).

1371. Souratgar v. Lee Jen Fair (*Souratgar II*), 818 F.3d 72, 81 (2d Cir. 2016) (multiple acts of domestic violence).

1372. Quintero v. Loera Barba, No. 5:19-148, 2019 WL 3604615, at *2–3 (W.D. Tex. Aug. 6, 2019);† *see also* Rath v. Marcoski, 898 F.3d 1306, 1311 (11th Cir. 2018) (litigation tactics); Albani v. Albani, No. 15cv1980, 2016 WL 3074407, at *3 (S.D. Cal. May 31, 2016)† (state-court filings were designed to manipulate the judicial system and prolong time with the child).

1373. Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995); Saldivar v. Rodela, 894 F. Supp. 2d 916, 942–43 (W.D. Tex. 2012). *But see* Kufner v. Kufner, No. 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.

1374. *In re* Polson, 578 F. Supp. 2d 1064 (S.D. Ill. 2008).

1375. Aldinger v. Segler, 338 F. Supp. 2d 296 (D.P.R. 2004).

1376. Silverman v. Silverman, No. Civ.00-2274 JRT, 2004 WL 2066778 (D. Minn. Aug. 26, 2004);† Aguilera v. De Lara, No. CV-14-01209-PHX-DGC, 2014 WL 4204947 (D. Ariz. Aug. 24, 2014)† (denying award of fees, but awarding $790 in out-of-pocket costs).

removals,[1377] and whether the case is one that "falls squarely within the heartland of the Hague Convention" and does not involve complex legal issues.[1378]

In *Souratgar v. Lee* (*Souratgar I*), the Second Circuit affirmed an order granting the father's petition for the return of the child to Singapore.[1379] On remand to the district court, the father was awarded $283,066 in fees and costs.[1380] In *Souratgar v. Lee Jen Fair* (*Souratgar II*),[1381] the Second Circuit reversed the district court's award of necessary expenses. The parents lived in Singapore, and when the mother became pregnant with their child, the father began physically abusing her. This ongoing abuse[1382] continued for approximately three years, until the mother removed herself and the child from Singapore to New York. The district court found against her grave-risk defense because the child himself was not abused and the psychological harm attributable to the violence was unlikely to reoccur since the parties would not live together again.[1383]

The Second Circuit found that the intimate partner violence that the father committed against the mother was related to her removal of the child. The court concluded that the father bore some of the responsibility for the circumstances surrounding the child's removal. Noting that other courts had found that family violence was an appropriate consideration when awarding fees for "necessary

1377. Text & Legal Analysis, *supra* note 45, at 10,511.

1378. *Cuellar II,* 603 F.3d 1142 (9th Cir. 2010).

1379. 720 F.3d 96 (2d Cir. 2013).

1380. Souratgar v. Lee, No. 12 Civ. 7797(PKC), 2014 WL 704037, at *9–12 (S.D.N.Y. Feb. 20, 2014).†

1381. 818 F.3d 72 (2d Cir. 2016).

1382. According to the *Souratgar II* court,

> [T]he district court considered Lee's allegations that Souratgar: (1) on May 31, 2008, when Lee was pregnant, hit and kicked her on her head and body; (2) in March 2009, struck her multiple times on her right shoulder while the child was breastfeeding in her arms; (3) during an argument in late 2009 or early 2010, took the child out of her arms and started to beat her on the head and back; (4) on January 5, 2010, followed Lee to a neighbor's house and pulled her back into the marital home, where Souratgar continued to beat her causing scratches and redness on her arms where he had grabbed her, (5) on August 15, 2011, when Lee met Souratgar at his office to pick up packages that belonged to her, pulled [Lee's] hands and also pushed her, from which she suffered some bruises and scratches on her chest and hands; (6) on November 22, 2011, chased Lee by car, attempting to overtake her vehicle in a reckless and dangerous manner; and (7) forced [Lee] to engage in certain sexual acts. The district court discredited some of these allegations, including the allegation of sexual assault, but found most of them to be credible. In short, the district court made a factual finding that Souratgar perpetrated repeated acts of intimate partner violence against Lee.

Souratgar II, 818 F.3d at 76 (internal quotation marks, punctuation, and citations omitted).

1383. *Id*.

expenses,"[1384] the Second Circuit reversed the district court's award, and vacated the judgment awarding costs and fees.

In its ruling, the court in *Souratgar II* underscored the significance of domestic violence to awards for fees and costs and noted that inability to pay is a relevant equitable factor for courts to consider.

> [T]his relevant equitable factor can never be a *countervailing* factor to intimate partner violence in a case like the one before us—it would remain clearly inappropriate to order a victim of intimate partner violence to pay an expenses award to the perpetrator, absent countervailing equitable factors, even where the victim is wealthy.
>
> * * * * *
>
> Here, after assessing all relevant equitable factors, because of the clarity of the factual record, the nature of the multiple, unilateral acts of violence, and the absence of countervailing equitable factors in favor of petitioner, we conclude that an award of expenses to Souratgar is clearly inappropriate. In the ordinary course, we would remand the case to the district court to assess the petitioner's request for fees and costs consistent with our opinion. However, given the record in this case, we cannot envision any scenario where an award of expenses would not be clearly inappropriate. Accordingly, a remand would serve no useful purpose.[1385]

1384. *Id*. at 79 (citing Guaragno v. Guaragno, No. 7:09-CV-00187-O, 2010 WL 5564628, at *2 (N.D. Tex. 2010);† Aly v. Aden, No. 12-1960 (JRT/FLN), 2013 WL 593420, at *20 (D. Minn. Feb. 14, 2013);† Silverman v. Silverman, No. Civ.00-2274 JRT, 2004 WL 2066778, at *4 (D. Minn. Aug. 26, 2004)†).

1385. *Souratgar II*, 818 F.3d at 81–82. Cases following *Souratgar II*'s rationale: Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 428357, at *3 (E.D. Mich. Jan. 28, 2020)† ("the Court finds the above reasoning persuasive and follows its logic here"); Asumadu v. Baffoe, No. CV-18-01418-PHX-DLR, 2019 WL 1531793, at *1 (D. Ariz. Apr. 9, 2019).†

VII
Case Management

Effective case management of Hague Convention cases can greatly facilitate adjudication of these time-sensitive matters.[1386] As soon as a court determines that a Hague Convention case for return has been filed or assigned, it should consider

- convening a pretrial conference[1387] to set a timetable for motions
- scheduling motions, expediting or limiting discovery
- setting dates for a trial on an expedited basis
- addressing other pretrial considerations[1388]

In *Farr v. Kendrick*, the court observed that the Convention's requirement for expedited disposition—ideally within six weeks—"creates an array of case-management challenges that aren't present in a typical civil case."[1389] Noting the Ninth Circuit's admonition to "'use the most speedy procedures' available" when handling Hague Convention cases,[1390] the *Farr* court concluded that strict compliance with the Federal Rules of Civil Procedure and Evidence might not be required, and that the court could adopt procedures "best suited to achieve a fair, expeditious, and just outcome."[1391]

Federal Rule of Civil Procedure 16 provides plenary authority to manage the hearing and disposition of Hague Convention matters, including expediting the case, establishing a schedule for pleading amendments, setting the timing and extent of discovery, issuing orders for expert witness disclosure, scheduling additional pretrial conferences, and setting a trial date. Pretrial conferences can be

1386. *See, e.g.*, Glagola v. Glagola, No. 03-10106-BC, 2003 WL 22992591 (E.D. Mich. Dec. 15, 2003);† Pesin v. Rodriguez, 244 F.3d 1250 (11th Cir. 2001).

1387. *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.

1388. *See* Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. Sept. 8, 2010)† (covering numerous issues by conference and scheduling order).

1389. No. CV-19-08127-PCT-DWL, 2019 WL 2568843, at *1 (D. Ariz. June 21, 2019).†

1390. *Id.* (quoting *Holder II*, 392 F.3d 1009, 1023 (9th Cir. 2004)).†

1391. *Farr*, 2019 WL 2568843, at *1.†

used to discuss admissions and stipulations, identify witnesses and documents, address pending or forthcoming motions, discuss proof problems, establish reasonable time limits for presenting evidence, and otherwise confer on issues particular to Hague Convention cases.[1392]

VII.A

Preventing Child's Removal or Concealment

A threshold issue that the court should address is how to ensure that the child is safe and not in danger of being reabducted or concealed. Courts commonly issue orders, often ex parte, that restrain any party from removing the child or children from the jurisdiction of the court. The International Child Abduction Remedies Act (ICARA) vests courts with the power to use provisional remedies available under state or federal law to secure the child.[1393] These potential remedies are discussed in this section. The circumstances of the child's removal from the supposed habitual residence should be considered, as well as any history of threats of concealment or abduction.

VII.A.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."[1394] This is the only situation in a Hague case where state law controls procedures used in federal courts. When a court is asked to issue an

1392. *See, e.g.*, Anderung v Anderung, No. 4:13-cv-00080-JEG-CFB, 2013 WL 12142385 (S.D. Iowa May 22, 2013)† (court set scheduling and status conference, rendered an order prohibiting the removal of the child from the jurisdiction, obtained surrender of the child's passport, expedited scheduling order, set discovery deadlines and trial).

1393. 22 U.S.C. § 9004(a) 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.

1394. 22 U.S.C. § 9004(b); *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. Mar. 19, 2002).†

order removing a child from a parent who has physical custody of the child pending a hearing on the Hague petition, the court must abide by the relevant state laws governing removal of the child in a state action.

In *Alcala v. Hernandez* the court determined that to issue a warrant to take physical custody of the child required a prior custody order under South Carolina law.[1395] Since there was no such order, the court denied the petitioner's ex parte request for the warrant to transfer physical custody of the children.

In *In re McCullough*,[1396] the mother abducted the children from Canada and took them to Pennsylvania. Her ultimate plan was to bring the children to Petra, Jordan, in anticipation of the Apocalypse. Citing her religious beliefs, the mother explained that she and the children would be safe there. The court granted the father's ex parte application for a warrant of arrest of the children and an order to transfer the children to the 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 as follows:

- there was a reasonable probability of eventual success in the litigation
- there was evidence of irreparable injury
- there was the possibility of harm to other disinterested persons
- doing so was in the public interest[1397]

In the case of *In re AAUM*,[1398] the father was a dual citizen of the United States and the Dominican Republic, and the mother was a citizen of the Dominican Republic. The father wanted the family to relocate to New York, but the mother could not obtain a visa. When the children went to visit the father, he retained them in New York and ultimately filed for divorce and custody. The mother was not able to appear in the custody action, so the father obtained a default judgment. The mother filed a petition for return of the parties' two children to the Dominican Republic. During a case conference on the Hague petition, the parties stipulated that the courts of the Dominican Republic should determine custody, and, if necessary for the custody adjudication, the children would return to the Dominican Republic.

1395. No. 4:14-cv-4176-RBH, 2014 WL 5506739, at *8 (D.S.C. Oct. 30, 2014).†

1396. 4 F. Supp. 2d 411 (W.D. Pa. 1998).

1397. *Id.* at 415 (citing Acierno v. New Castle Cnty., 40 F.3d 645, 653 (3d Cir. 1994) (citations omitted)).

1398. No. 16-CV-6126 (BMC), 2018 WL 2451199 (E.D.N.Y. May 31, 2018).†

In addition to contesting the stipulation, the father raised substantive objections to the underlying Hague claim. The district court found the father's legal arguments to be unpersuasive and ruled that he was bound by the parties' stipulation to return the children to the Dominican Republic for the custody proceeding. In its ruling, the court noted that 22 U.S.C. § 9004(b) limits a court's authority to return a child unless applicable state-law requirements are met. To satisfy this provision, the court issued an order requiring the father to return the children to the Dominican Republic and permitting him to designate the mother or a temporary guardian to carry out the return.[1399]

In *Muwakil-Zakuri v. Zakuri*,[1400] the mother petitioned for the return of her two children to Trinidad and Tobago. She filed a motion for a temporary restraining order to remove the children from the father through the U.S. Marshal. Consulting Connecticut law, the court determined that "an immediate and present risk of physical danger or psychological harm" required by Connecticut law had been established.[1401] The court granted the temporary restraining order, finding that the petitioner was likely to succeed on the merits, irreparable harm would likely occur absent relief, the balance of equities favored granting the relief, and doing so was in the public interest.[1402]

VII.A.2

Foster Care

In cases where there is evidence that the child is in danger of being concealed or reabducted and no other suitable arrangements can be made, it may be necessary to temporarily place the child in foster care or in the care of a third party.[1403] In

1399. *Id.* at *4.

1400. Muwakil-Zakuri v. Zakuri, No. 17-CV-2062 (JCH), 2017 U.S. Dist. LEXIS 205373 (D. Conn. Dec. 11, 2017).†

1401. *Id.* at *4.†

1402. *Id*. at *3 (citing Glossip v. Gross, 576 U.S. 863, 876–77 (2015)).† *See also* Castaneda v. Gallegos, No. 2:15-cv-0847 JCH/CG, 2015 WL 13650155, at *5 (D.N.M. Nov. 10, 2015)† (district court found that an order requiring the respondent to produce the child before the court and have the child transferred to a relative living nearby was in violation of §9004(b)'s requirements as petitioner made no showing as to the requirements of the state law of New Mexico).

1403. *See, e.g.*, Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); David S. v. Zamira S., 574 N.Y.S.2d 429, 430 n.1 (N.Y. Fam. Ct. 1991) (Children returned to the court on a warrant. The court commented that when "this Court was faced with the very real issue of how to protect the children and assure they would not be removed from New York, either by the father or the mother, the only resource immediately available to this Court was the Commissioner of Social Services."); Velez v. Mitsak, 89 S.W.3d 73 (Tex. App. 2002).

Velez v. Mitsak,[1404] each parent alleged that the other parent posed a flight risk were the child placed with that parent during the pendency of the Hague petition. For this reason, the court placed the child in temporary foster care pending a hearing on the merits of the case.

In *Sanchez v. R.G.L.*,[1405] three Mexican children were abducted by their aunt from Ciudad Juárez, Mexico, to El Paso, Texas. When the aunt attempted to return the children to their mother by bringing them to the Texas-Mexico border, the children voiced objections 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 the hearing on the mother's petition for return of the children.

VII.A.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 "[n]o 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*,[1406] the First Circuit vacated the district court's order requiring a "non-resident" bond and a guarantee that the petitioner would be responsible for damages in the event that he did not prevail in his Hague petition. The First Circuit noted the existence of cases where bonds were ordered,[1407] but observed that none of those cases questioned whether it was within the court's power to require such a bond.

Although rarely encountered in Convention cases, Rule 65(c) of the Federal Rules of Civil Procedure does allow the court to order a litigant seeking restraining orders (usually the left-behind parent) to post a bond to pay for costs and

1404. 89 S.W.3d 73.

1405. 743 F.3d 945 (5th Cir. 2014).

1406. 708 F.3d 15 (1st Cir. 2013).

1407. Whiting v. Krassner, 391 F.3d 540 (3d Cir. 2004); Bekier v. Bekier, 248 F.3d 1051 (11th Cir. 2001); *Lops*, 140 F.3d 927. *See also* Lawrence v. Lewis, No. 1:15-cv-191, 2015 WL 1299285, at *4 (S.D. Ohio Mar. 23, 2015) (petitioner requested restraining order preventing child's removal from jurisdiction, and posting of $20,000 bond—court allowed restraining order, declined to order a bond, and declined to impose a bond upon petitioner pursuant to Fed. R. Civ. P. 65(c)).

damages incurred by any party wrongfully enjoined or restrained.[1408] The court has discretion whether to require such a bond, and the amount thereof.[1409]

It has yet to be determined whether a bond required to deter subsequent concealment or reabduction of a child is proscribed by 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.[1410] The bond provides 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 the child and file new litigation. For example, in *Lops v. Lops* a South Carolina state court allowed the abducted children to be placed in the custody of the paternal grandmother subject to an "adequate security bond."[1411]

VII.A.4

Deposit of Passports

It has become commonplace in Convention cases for courts to order parents to deposit or surrender their passports and the children's passports to the court, the clerk of the court, or another agency.[1412] These measures are used to deter any threat of removal of a child across the U.S. border.[1413] This measure is one of

1408. "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security." Fed. R. Civ. P. 65(c).

1409. Cocom v. Timofeev, No. 2:18-cv-002247, 2018 WL 3958129 (D.S.C. Aug. 17, 2018)† (mother sought restraining orders prohibiting removing child from jurisdiction; court granted restraining order but declined to order mother to post a bond). *Accord* Hernandez v. Montes, No. 5:18-CV-5-D, 2018 WL 405977, at *2 (E.D.N.C. Jan. 12, 2018);† Mauvais v. Herisse, No. 13-13032-GAO, 2013 WL 6383930, at *1 (D. Mass. Dec. 4, 2013)† (court declined to require plaintiff to post a bond as a condition of obtaining order restraining child's removal from Massachusetts); *cf.* Mendoza v. Pascual, No. CV 615-40, 2015 WL 2152837, at *7 (S.D. Ga. May 7, 2015)† (court issues preliminary injunction restraining respondent from removing child from jurisdiction, orders petitioner to post $5,000 bond).

1410. Greene v. Greene, C.A. 89-392-II, 1990 WL 56197 (Tenn. Ct. App. May 4, 1990);† David S. v. Zamira S., 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 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, 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 (Ill. App. Ct. 2007); Samman v. Steber, No. 1577-04-4, 2005 WL 588313 (Va. Ct. App. Mar. 15, 2005).†

1411. 140 F.3d 927, 948 (11th Cir. 1998).

1412. The instances of this occurring in Hague Convention cases are too numerous to cite here.

1413. *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. July 10, 2009).†

the least invasive available and is an effective method of securing the child. But this measure is less effective for those who hold passports from other countries because U.S. authorities cannot prevent a foreign national from requesting a local embassy or consulate to reissue a passport.

The court may also inform the parties or attorneys about the Children's Passport Issuance Alert Program.[1414] The Office of Children's Issues in the Department of State provides notice to parents when an application for a minor's passport is made. Children who are U.S. citizens or who qualify for U.S. citizenship are eligible to be enrolled in the program.

VII.B

Establishing Timelines

There is an expectation that a case for return will be resolved within six weeks. With effective case management, many cases, if not most, can be concluded within this time frame. Of course there will be some cases with complex issues of law or fact that require additional time to resolve. But even if complex issues arise, the case should be expedited. Time frames for discovery, the submission of briefs, and other processes should be shortened to enable efficient and expeditious preparation for trial.

This will impact the discovery process. Some courts have held that there is no right to conduct discovery in a Hague Convention case.[1415] Where discovery is permitted, judges have frequently limited the scope or ordered discovery to be expedited.[1416]

1414. *See* U.S. Dep't of State, Bureau of Consular Affairs, Children's Passport Issuance Alert Program, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/prevention/passport-issuance-alert-program.html. 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.

1415. *See* West v. Dobrev, 735 F.3d 921, 929 (10th Cir. 2013) (citing March v. Levine, 249 F.3d 462, 474 (6th Cir. 2001)). *See also* Ovalle v. Perez, 681 F. App'x 777, 786 (11th Cir. 2017) (following the approach in *West*).

1416. *See, e.g.*, Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012) (limited discovery permitted); *Danaipour I*, 286 F.3d 1 (1st Cir. 2002) (date set for completing discovery on a shortened time basis); Taveras v. Morales, 22 F. Supp. 3d 219 (S.D.N.Y. 2014) (limited discovery); Skolnick v. Wainer, No. CV 2013-4694(WFK)(MDG), 2013 WL 5329112 (E.D.N.Y. Sept. 20, 2013)† (expedited discovery); Headifen v. Harker, No. A-13-CA-340-SS, 2013 WL 2538897 (W.D. Tex. June 7, 2013),† *aff'd*, 549 F. App'x 300 (5th Cir. 2013) (same); Walker v. Walker, No. 11 C 2967, 2013 WL 1110876 (N.D. Ill. Mar. 16, 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).

VII.C

Legal Representation

Parties are responsible for their own 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.[1417] As a result of taking the reservation to Article 26, the U.S. government does not provide any funds for the payment or reimbursement of legal costs incurred by the parties, and ICARA makes no provision for funding court-appointed counsel. A limited exception to this rule applies if parties are covered by a legal-aid program, such as the Legal Services Corporation. If not apparent, the court should find out whether the parties intend to seek representation and, if so, how much time will be needed to secure counsel.

As the Central Authority for the United States, the U.S. Department of State's Office of Children's Issues provides information about securing legal representation to financially eligible applicants who are seeking the return of their children. Counsel may be available on a pro bono, reduced-fee, or full-fee basis. Legal representation options and procedures are described on the Department of State website.[1418]

Under some circumstances, courts will appoint an attorney pro bono to represent the parent who allegedly abducted the children.[1419] Courts have also appointed counsel for the children.[1420]

VII.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 trial issues. In many cases, petitioners will

1417. 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."

1418. U.S. Dep't of State, Hague Abduction Convention—Legal Representation Options and Procedures in the United States, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/laws/hague-abduction-convention-legal-representation-options.html.

1419. *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. May 7, 2008).†

1420. *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 Fed. R. Civ. P. 17(c)).

include with their moving papers for return of the child the standard form they submitted to the Central Authority to initiate the case.[1421] This form sets forth the facts surrounding the alleged abduction, providing the court with notice of the issues likely to be raised.[1422] If the parties can reach an agreement concerning the facts of the case or the issues deemed established, the court can develop a more streamlined trial plan, saving time by focusing on the issues in contention.[1423]

VII.E

Mediation

The parties may participate in mediation after a petition for return has been filed.[1424] Parties have been referred to mediation by both appellate[1425] and trial courts.[1426]

A court may inquire at a pretrial or case-management conference whether the parties have considered or would be amenable to mediation.[1427] Some cases

1421. The form can be found on the U.S. Department of State's website at https://travel.state.gov/content/dam/childabduction/forms/Hague%20Applicaiton%20English%20ds3013.pdf.

1422. 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 should be used. The Permanent Bureau of the Hague Conference also provides a form for requesting return, https://assets.hcch.net/upload/recomm28e.pdf.

1423. *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).

1424. Gatica v. Martinez, No. 10-21750-CIV, 2011 WL 2110291 (S.D. Fla. May 25, 2011)† (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 filing of a petition for return of the child); *Blondin III*, 78 F. Supp. 2d 283 (S.D.N.Y. 2000) (court appointed a mediator to assist parties in working out their custody dispute).

1425. Blackledge v. Blackledge, 866 F.3d 169, 175 n. 2 (3d Cir. 2017) (postargument mediation); *Cuellar II*, 603 F.3d 1142, 1144 (9th Cir. 2010) (same).

1426. *See* Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2020 WL 38932 (E.D. Mich. Jan. 3, 2020)† (mediation after trial); *Holder I*, 305 F.3d 854, 861 (9th Cir. 2002) (California trial court ordered parties to mediation); Vite-Cruz v. Sanchez, 360 F. Supp. 3d 346, 350 (D.S.C. 2018); Campomanes Flores v. Elias-Arata, No. 3:18-cv-160-J-34JBT, 2018 WL 3495865, at *1 (M.D. Fla. July 20, 2018);† Salizzoni v. Ferrer, No. 16-60685-CIV-UNGARO/O'SULLIVAN, 2017 WL 7792557, at *3 (S.D. Fla. June 30, 2017),† *report and recommendation adopted*, 2017 WL 7793873 (S.D. Fla. July 19, 2017)† (mediated agreement intended to be a mirror order); Alvarez v. Alvarez, No. PX-17-1010, 2017 WL 2472219, at *1 (D. Md. June 8, 2017)† (court referred case to magistrate judge for confidential mediation); Flores-Aldape v. Kamash, 202 F. Supp. 3d 793, 805 (N.D. Ohio 2016) (court attempted mediation without success).

1427. *See generally* Hague Conf. on Private Int'l L., Guide to Good Practice, Child Abduction Convention: Part V – Mediation (2012), https://www.hcch.net/en/publications-and-studies/details4/?pid=6475.

are not suitable for mediation because of domestic violence or because of an imbalance of power in the relationship between the parties.[1428] As an initial step, courts considering mediation might refer the parties to an experienced mediator to determine whether mediation is appropriate. Mediation in the context of a pending Hague case can be challenging, given the high levels of anxiety of the parties, the necessity of dealing with different legal systems, the geographic limitations that frustrate frequent contact and visits, and the potential impact of different languages and cultural values.

Parties will sometimes agree to a continuance of the case so that they may pursue mediation.[1429] But it is essential that a court does not allow any significant delay from attempts to mediate.[1430] Any delay benefits the abducting parent: the more time that passes, the greater the difficulty the left-behind parent has in restoring the relationship with the child.[1431] Additionally, one party may attempt to manipulate the other by feigning good faith in the mediation process, only to resist an eventual agreement or to fail to comply with it.[1432]

If a mediated agreement is reached, it is best if the agreement can be structured such as to be enforceable in both U.S. courts and the courts of the other country.

1428. *Id.* at ¶ 261.

1429. Garza-Castillo v. Guajardo-Ochoa, No. 2:10-cv-00359-LDG (VGF), 2012 WL 523696, at *5 (D. Nev. Feb. 15, 2012)† (parties stipulated to continue proceedings to attempt to resolve case through mediation); Robert v. Tesson, No. Civ.A. 1:04-CV-333, 2005 WL 1652620, at *1 (S.D. Ohio June 29, 2005),† *report and recommendation adopted*, 2006 WL 1401651 (S.D. Ohio May 19, 2006), *aff'd*, 507 F.3d 981 (6th Cir. 2007) (parties agreed to pursue mediation that would result in a delay of the trial).

1430. *See, e.g.*, *Flores-Aldape*, 202 F. Supp. 3d 793 (court opted to decide the case rather than continue with assisting the parties to resolve their dispute).

1431. *E.g.*, Guide to Good Practice, Mediation, *supra* note 1427, at ¶ 54.

1432. *See, e.g.*, Van de Sande v. Van de Sande, No. 05 CV 1182, 2008 WL 239150 (N.D. Ill. Jan. 29, 2008)† (father engaged in protracted mediation negotiations, and eventually breached an interim mediated agreement to return the children to the United States); *Cuellar II*, 603 F.3d 1142, 1144 (9th Cir. 2010) (denying an award of fees or costs incurred during mediation would encourage abducting parents to engage in bad-faith settlement negotiations for purposes of delay and would undermine the Convention's interest in prompt resolution of disputes).

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 cooperation 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 be taken 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.

§ 9009. 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.

§ 9010. 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.

§ 9011. 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.

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
  - ○ 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 remote means—telephone, video?
- ☐ Are interpreters needed?
- ☐ Do the parties wish to engage in mediation?
  - ○ Is the case appropriate for mediation? (e.g., is there a history of domestic violence?)
  - ○ If so, can mediation take place without resulting in a significant delay of the trial?
- ☐ Legal representation
  - ○ Is the petitioning parent represented by counsel? If not, consider referring that parent to the State Department's 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?
  - ○ Has the treaty "entered into force" between the United States 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?
  - ○ Does the left-behind parent have rights of custody?
    - ▪ By operation of law
    - ▪ By court or administrative decision
    - ▪ By legally binding agreement
  - ○ Was the child removed from the habitual residence when a ne exeat clause or restraining order prohibited removal?
- ☐ Was the left-behind parent exercising the parent's 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 the new environment?
- ☐ Did the left-behind parent consent or acquiesce in the removal or retention of the child?
- ☐ Does the child object to return?
  - ○ 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?
  - ○ If so, consider undertakings, or mirror-image orders, or other ameliorative 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

Hague Convention Country or Territory

(Current to April 2023)

Country/Territory	Date of EIF	Country/Territory	Date of EIF
Andorra	1/1/2017	Cyprus	3/1/1995
Argentina	6/1/1991	Czech Republic	3/1/1998
Armenia	3/1/2018	Denmark	7/1/1991
Australia	7/1/1988	Dominican Republic	6/1/2007
Austria	10/1/1988	Ecuador	4/1/1992
Bahamas	1/1/1994	El Salvador	6/1/2007
Belgium	5/1/1999	Estonia	5/1/2007
Belize	11/1/1989	Fiji	5/1/2017
Bosnia and Herzegovina	12/1/1991	Finland	8/1/1994
Brazil	12/1/2003	France	7/1/1988
Bulgaria	1/1/2005	Germany	12/1/1990
Burkina Faso	11/1/1992	Greece	6/1/1993
Canada	7/1/1988	Guatemala	1/1/2008
Chile	7/1/1994	Honduras	6/1/1994
China (Hong Kong and Macau only)		Hungary	7/1/1988
Hong Kong	9/1/1997	Iceland	12/1/1996
Macau	3/1/1999	Ireland	10/1/1991
Colombia	6/1/1996	Israel	12/1/1991
Costa Rica	1/1/2008	Italy	5/1/1995
Croatia	12/1/1991	Jamaica	4/1/2019

Country/Territory	Date of EIF
Japan	4/1/2014
Korea, Republic of	11/1/2013
Latvia	5/1/2007
Lithuania	5/1/2007
Luxembourg	7/1/1988
Malta	2/1/2003
Mauritius	10/1/1993
Mexico	10/1/1991
Monaco	6/1/1993
Montenegro	12/1/1991
Morocco	12/1/2012
Netherlands	9/1/1990
New Zealand	10/1/1991
North Macedonia, Republic of	12/1/1991
Norway	4/1/1989
Pakistan	10/1/2020
Panama	6/1/1994
Paraguay	1/1/2008
Peru	6/1/2007
Poland	11/1/1992
Portugal	7/1/1988
Romania	6/1/1993
Saint Kitts and Nevis	6/1/1995
San Marino	1/1/2008
Serbia	12/1/1991
Seychelles	9/1/2021
Singapore	5/1/2012
Slovakia	2/1/2001
Slovenia	4/1/1995
South Africa	11/1/1997
Spain	7/1/1988
Sri Lanka	1/1/2008
Sweden	6/1/1989
Switzerland	7/1/1988
Thailand	4/1/2016
Trinidad and Tobago	8/1/2013
Turkey	8/1/2000
Ukraine	9/1/2007
United Kingdom	7/1/1988
Anguilla	6/1/2008
Bermuda	3/1/1999
Cayman Islands	8/1/1988
Falkland Islands	6/1/1998
Isle of Man	9/1/1991
Montserrat	3/1/1999
Uruguay	9/1/2004
Venezuela	1/1/1997
Zimbabwe	8/1/1995

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The Federal Judicial Center

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