

How To Prosecute an International Child Abduction Case Under the Hague Convention

by
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Introduction

The Convention of October 25, 1980 on the Civil Aspects of International Child Abduction (the Hague “Convention”) currently has 97 contracting states.² Globalization has increased the number of relationships between multicultural and multinational partners. As a result, when parents from different nationalities decide to dissolve their familial ties, issues concerning where to raise the children of that marriage can often result in conflict. The Hague Convention has therefore become an indispensable tool for resolving international jurisdictional disputes concerning child custody.³ Although it has been nearly thirty years since the Hague Convention has come into effect in the United States, it is still a novel area of the law for many attorneys and especially judges. Therefore, any attorney, in addition to representing his or her client vigorously, must also be prepared to educate the courts on the provisions and proper application of the Hague Convention.

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² Hague Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (hereinafter Hague Convention), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> (last visited on Mar. 23, 2017).

³ The Hague Convention is not designed to resolve custody disputes, only to resolve issues of jurisdiction.

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I. The Nature of the Hague Convention

A. Role of Central Authority

A left-behind parent in a contracting State who discovers that his or her child[ren] has been wrongfully removed to or retained in the United States typically first contacts the Central Authority in the State of the child[ren]'s habitual residence.⁴ The left-behind parent may also contact the U.S. Central Authority as well.⁵ The Central Authority will mail the petitioner a Request for Return form which should be filled out⁶ and returned to that Central Authority. If the Request for Return form has been filed with a foreign Central Authority, it will be forwarded to the U.S. Central Authority.

Once the U.S. Central Authority has received the Request for Return, either a Central Authority representative from the child[ren]'s state of habitual residence, or a representative from the State Department, will try to put the petitioner in touch with a lawyer in the state in which the child[ren] is most likely being retained.⁷ A case management officer from the State Department will be assigned to oversee any developments of a pending Hague Convention matter within the United States.

⁴ Hague Convention, *supra* note 2, at art. 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.”).

⁵ The U.S. Central Authority is the Office of Children’s Issues, Bureau of Consular Affairs, U.S. Department of State, located at 2100 Pennsylvania Avenue NW, SA-29, 4th floor, Washington, DC 20037.

⁶ Hague Convention, *supra* note 2, at art. 8 (listing all information that must be included on the Request for Return form).

⁷ It is of course preferable to retain an attorney who has experience with the Hague Convention, but this is not always possible. Although the Department of State is in contact with many attorneys who have handled Hague cases throughout the country, there is a shortage of attorneys who are comfortable taking a Hague case. Often attorneys network with each other in order to educate themselves on the Hague Convention.

B. Purpose of the Convention

The International Child Abduction Remedies Act (ICARA)⁸ establishes the procedures for the implementation of the Hague Convention in the United States. The Hague Convention and ICARA are intended as civil remedies. Although the term “wrongful abduction” suggests criminal conduct, the Convention is not designed as a punishment or as an extradition treaty. Unlike the extradition process, where a criminal is returned to the United States to face charges, ICARA was enacted with the goal of facilitating the return of the child to the country of habitual residence.

The purpose of the Convention is to “protect children internationally from the harmful effects of their wrongful removal and retention and to establish procedures to ensure their prompt return to the State of their habitual residence.”⁹ Furthermore, the Convention is designed to “preserve the status quo” in the child’s country of habitual residence and “deter parents from crossing international boundaries in search of a more sympathetic court.”¹⁰

C. Expedited Proceedings and Rules of Evidence

The Convention’s drafters envisioned a streamlined process that would lead to the abducted child’s prompt return to his or her habitual residence. The Convention provides that “[c]ontracting [nation-]States shall act expeditiously in proceedings for the return of children.” The goal of ICARA is to promote a determination on the merits of a Hague Convention proceeding within six weeks. If a determination has not been made in six weeks, then “[t]he applicant or the Central Authority of the requested State . . . shall have the right to request a statement of the reasons for the delay[ed proceedings].”¹¹

⁸ The United States implemented the Hague Convention through the International Child Abduction Remedies Act (“ICARA”), Pub. L. 100-300 100th Congress 102 Stat. 437 (1988)(originally codified at 42 U.S.C. §§ 11601-11611 (1988); recodified at 22 U.S.C. §§ 9001-9011 (2017)).

⁹ Hague Convention, *supra* note 2, at preamble.

¹⁰ *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999)(citing to *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993)). Commonly known as *Blondin II*.

¹¹ Hague Convention, *supra* note 2, at art. 11.

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One of the more useful provisions of ICARA can be found in section 9005 which relaxes the rules of evidence in Hague Convention cases.¹² Section 9005 provides that the authentication of documents is not a requirement for those documents to be admissible into evidence in a Hague case. Therefore, e-mail and the fax machine may be a lawyer's best friends and the most efficient manner by which to receive documentary evidence from the left-behind parent residing abroad. Furthermore, article 14 of the Convention permits courts to take judicial notice of foreign law or decisions "without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."¹³ These provisions are designed to provide a friendly and efficient means by which to pursue a Hague case in foreign jurisdictions.

D. *U.S. Custody Proceedings Stayed*

Article 16 of the Hague Convention prohibits the United States from deciding on the merits of a custody dispute, once it has received a notice of a wrongful removal or retention, until such time as its been determined that the child[ren] should not be returned to the alleged country of habitual residence.¹⁴ When a child is returned to the country of habitual residence following successful Convention proceedings, custody is typically litigated in that nation and the case is not subject to the jurisdiction in U.S. courts.

¹² ICARA § 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.").

¹³ Hague Convention, *supra* note 2, at art. 14; *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005).

¹⁴ Hague Convention, *supra* note 2, at art. 16.

II. Building a Case

A. Choosing a Forum

Any court of competent jurisdiction can entertain a Hague Convention case. ICARA gives both federal and state courts jurisdiction over Hague Convention cases in “the place where the child is located at the time the petition is filed.”¹⁵ Therefore, the attorney should carefully consider where the petition should be brought. Since the federal courts do not normally hear custody cases, a federal judge may be better suited to look solely at the legal issue of jurisdiction, as required by the Convention, without considering any underlying custody arguments or issues. However, the practitioner may still feel more comfortable in the state courts in which he or she normally practices.

If an attorney chooses to bring the action in state court, he or she should consider different local or state courts that handle family cases. For instance, there may be a perception that a local court or judge would display bias toward an abducting parent who has returned “home.” In that case it may be wiser to bring the action in federal court. Although a case could be brought in either the federal or the state courts, a case brought in the state court may be removed to the federal court under the federal removal statute.¹⁶ Further, a case could be denied a hearing in the federal court under the *Younger* abstention doctrine.¹⁷

B. Prima Facie Case

The attorney representing the left-behind parent must show, by a preponderance of the evidence, that a child under the age of sixteen years¹⁸ was removed from the child’s state of habitual residence,¹⁹ in breach of a right of custody attributable to the petitioner²⁰ which the petitioner had been exercising²¹ at the

¹⁵ ICARA §§ 9003(a), (b).

¹⁶ Petitions filed in state courts may, of course, be removed to federal court, if the respondent files a timely notice of removal; *see* *Gonzalez v. Gutierrez*, 311 F.3d 942, 946 (9th Cir. 2002).

¹⁷ *Grieve v. Tamerin*, 269 F.3d 149, 153 (2d Cir. 2001).

¹⁸ Hague Convention, *supra* note 2, at art. 4. It is important to note that the Convention ceases to apply once the child attains the age of sixteen years regardless of a pending petition.

¹⁹ *Id.* at arts. 3, 4.

²⁰ *Id.* at arts. 3, 5.

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time of the wrongful removal.²² The petitioner's burden of proof is always preponderance of the evidence.²³

During the initial contact, the petitioner will generally relate to the attorney his or her version of the story of the alleged wrongful removal or retention. The attorney should then explain to the petitioner his or her options.²⁴ The abducting spouse often seeks the protection of the courts in his or her "new" home by alleging spousal abuse, child abuse, or fear of re-abduction. Sometimes the abducting parent will have already obtained an *ex parte* order of protection or even a temporary order of custody in the United States.²⁵

To establish a *prima facie* case the attorney must carefully gather all relevant data from the client. This may appear to be an obvious instruction, but it can often prove to be a difficult task. Aside from the common difficulties involved in getting unfavorable details from a client, the Hague attorney may confront cultural and language barriers that may hinder the communication process. Often it is difficult to explain to a client, in his or her second language, that the Hague proceeding is not a custody proceeding at all. The attorney must carefully explain that the Hague hearing will determine only where the custody hearing should take place, not who will have custody of the child[ren]. To avoid certain misunderstandings, the attorney should attempt to collect any and all evidence, such as affidavits from teachers and neighbors, describing how "settled" the family and child[ren] were in the foreign jurisdiction. To accomplish this, it may be

²¹ *Id.* at art. 3.

²² *Id.* at art. 1.

²³ ICARA § 9003(e)(1).

²⁴ Such options may include the following: trying to obtain a voluntary return which can be negotiated by the Central Authority or an attorney; trying to settle out of court, which is easier on the children and less expensive; or filing a formal Petition for Return of Children.

²⁵ Hague Convention, *supra* note 2, at art. 17 (The sole fact that a decision relating to custody has been given or entitled to recognition in the requested state is not grounds for refusing to return the child[ren] under the Convention).

necessary for the client to contact his or her foreign lawyer, if one exists, in order to obtain the pertinent documents.²⁶

C. *Habitual Residence*

The attorney first must prove that the child[ren] was removed from or retained away from their country of “habitual residence.”²⁷ Habitual residence was purposely left undefined by the drafters of the Convention to leave room for judicial interpretation and flexibility and to prevent mechanical application of the term.²⁸ The drafters of the Convention conceived of habitual residence as a question of pure fact, differentiating it from strictly technical terms such as domicile.²⁹ The “habitual residence” of a child is not determined by the child’s nationality, legal domicile, or a specific duration or time frame, but rather is regarded as a factual determination of the place where the child is normally resident, apart from a temporary absence, with a “settled purpose.”³⁰ The Ninth Circuit explained that “‘Habitual residence’ is the central—often outcome determinative—concept on which the entire system is founded.”³¹

As the Convention itself offers no definition of “habitual residence,” the courts have had to give meaning to that phrase. In the United States, there are two main branches of case law, divided among the various federal circuit courts, addressing the issue of habitual residence. Most circuit courts follow the lead of the Ninth Circuit³² and focus on the question of whether the parents had a shared intention to establish a habitual residence for the child[ren]. Other circuits follow the lead of the Sixth Circuit which concluded that an analysis of habitual residence “must fo-

²⁶ If the client does not have an attorney in his or her home country, it may be necessary to have the client obtain foreign counsel in order to make access to proper documentation quicker and simpler.

²⁷ Hague Convention, *supra* note 2, at art. 4 (“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody of access rights.”).

²⁸ *Mozes v. Mozes*, 239 F.3d 1067, 1070-71 (9th Cir. 2001).

²⁹ Elisa Perez-Vera, *Explanatory Report*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 426 (1982) (“Perez-Vera report”).

³⁰ *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003).

³¹ *Mozes*, 239 F.3d at 1070-71.

³² *Id.* at 1072.

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cus on the child, not the parents, and examine past experience, not future intentions.”³³ The Seventh Circuit has acknowledged that all circuits “consider *both* parental intent *and* the child’s acclimatization, differing only in their emphasis.”³⁴ The Ninth Circuit approach has been largely adopted by the majority of the circuit courts, specifically by courts in the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits³⁵ and has been largely rejected by the Third, Sixth, and Eighth Circuits.³⁶

The Ninth Circuit found that a child’s habitual residence must be based on a “settled mutual intent” by the parents to abandon their previous residence and an “actual change in geography” and a period of time “sufficient for acclimatization.”³⁷ In *Gitter v. Gitter*, the Second Circuit approved and adopted the reasoning and approach of *Mozes v. Mozes*, recognizing the importance of intentions (normally the shared intentions of the parents or others entitled to fix the child’s residence) in determining a child’s habitual residence. The court stated that “focusing on intentions gives contour to the objective, factual circumstances surrounding the child’s presence in a given location. This approach allows an observer to determine whether the child’s presence at a given location is intended to be temporary, rather than permanent.”³⁸ Thus, where parents differ as to where the habitual residence of a child is, “[i]t then becomes the court’s task to determine *the intentions of the parties as of the last time that their intentions were shared.*”³⁹

³³ *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

³⁴ *Redmond v. Redmond*, 724 F.3d 729, 745-46 (7th Cir. 2013).

³⁵ See *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013); *Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1455 (Feb. 25, 2013); *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252-53 (11th Cir. 2004) (*per curiam*).

³⁶ See *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 271 (3d Cir. 2007); *Simcox v. Simcox*, 511 F.3d 594, 602 (6th Cir. 2007); *Whiting v. Krassner*, 391 F.3d 540, 550-51 (3d Cir. 2004); *Silverman*, 338 F.3d at 898 (*en banc*).

³⁷ *Mozes*, 239 F.3d at 1076-78.

³⁸ *Gitter*, 396 F.3d at 131-32.

³⁹ *Id.* at 133 (*emphasis added*).

Courts that focus their analysis on shared parental intentions do not ignore the more child-centered factors, particularly if the child[ren] have been physically present in a new location for a significant period of time. The Second Circuit, in *Guzzo v. Cristofano*, stated that “courts must not forget that the core concern of ‘habitual residence’ is where a child normally or usually lives. Once a court ‘can say with confidence’ that the child has become settled into a new environment, habitual residence in that country is established.”⁴⁰ The court further stated that “a child’s habitual residence changes when the child becomes settled in another country, even if one or both of the parents intend for the child to return to the original country of habitual residence.”⁴¹

The case of *Ruiz v. Tenorio*⁴² demonstrates how a focus on parental intention can impact a court’s determination of a child’s habitual residence. The parents in *Ruiz* had moved from the United States to Mexico with their children and most of their possessions. They resided in Mexico for almost three years before the mother relocated to Florida with the children. The federal district court found that despite evidence of the children’s acclimatization to their environment in Mexico, the parents did not share an intention to abandon the United States as the children’s habitual residence,⁴³ and the Eleventh Circuit affirmed. Evidence of the children’s acclimatization included attending school, various social engagements, and extracurricular activities. Other factors included the father’s relationship with his extended family and the mother’s and children’s immigration status in Mexico.

D. Rights of Custody

The petitioner must next demonstrate that he or she had rights of custody pursuant to the laws of the habitual residence⁴⁴ and was exercising those rights. A parent does not need to have physical custody, and the right to make decisions regarding the child’s well-being, including the right to determine the place of

⁴⁰ *Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013).

⁴¹ *Id.* at 108, quoting *Gitter*, 396 F.3d at 133-34.

⁴² *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004).

⁴³ *Id.* at 1256 (the district court found that the parties had agreed that the move to Mexico would be for a trial period).

⁴⁴ Hague Convention, *supra* note 2, at art. 3.

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residence of the child[ren], are considered rights of custody.⁴⁵ A right of custody and/or a right of access “may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”⁴⁶ Usually, if sole custody has already been awarded by the courts to one parent, then that parent alone has a right of custody. If the other parent (non-custodial parent) has been granted only visitation rights, then that parent has only a right of access. A right of access, however, is not adequate, in and of itself, to qualify as a right of custody sufficient to order a return under the Convention.⁴⁷

There are times, however, when the notion of who has a right of custody becomes clouded.⁴⁸ If parents are married and have not begun any divorce or custody proceedings, and thus have joint custody by default, the United States views them both as having an equal right of custody of the child[ren]. However, this may not be true in other countries. In a situation where the child was born out of wedlock, many countries will give a superior right of custody to the mother. Custody rights are defined by the laws of the country of the child’s habitual residence,⁴⁹ so the attorney may have to do some research into rights of custody in the foreign jurisdiction prior to filing the petition.

The first Hague Convention case to go before the U.S. Supreme Court addressed the issue of custody rights⁵⁰ and provided for a broad definition of custody rights in favor of left-behind parents. The parents in *Abbott v. Abbott* were living together in Chile at the time of their separation in 2003 when a Chilean court granted the mother daily care and control of their son, with visitation rights to the father. Though this seemed to be a clear-cut case where the father was without custody rights, under Chilean law, the father was in possession of a *ne exeat* right. This *ne exeat* right (a restraining order forbidding the recipient to leave the jurisdiction) restricted the mother from removing the child from

⁴⁵ *Id.* at art. 5.

⁴⁶ *Id.* at art. 3.

⁴⁷ *Radu v. Toader*, 463 F. App’x 29, 30 (2d Cir. 2012).

⁴⁸ It, therefore, becomes the job of the attorney to explain to the judge that the right of custody can be defined in many different ways.

⁴⁹ *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991).

⁵⁰ *Abbott v. Abbott*, 560 U.S. 1 (2010).

Chile without the father's permission. However, the mother took the child to the United States in 2005 without the father's approval.

The issue in *Abbott* was whether the *ne exeat* right under Chilean law constituted a "right of custody" as defined by articles 3 and 5 of the Hague Convention. Although most of the circuit courts had concluded that *ne exeat* rights were not rights of custody pursuant to the Convention, the Supreme Court ruled that parents with *ne exeat* rights have rights of custody as defined by the Convention. Specifically, article 5 of the Convention defines rights of custody to include "the right to determine the child's place of residence." Therefore, the Supreme Court construed the Chilean *ne exeat* provision as giving rise to a joint right to determine the child's country of residence.⁵¹

Finally, the petitioner must prove that the custody rights were being exercised by the left-behind parent at the time of the alleged wrongful removal or retention.⁵² The Sixth Circuit held that courts should "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" and that a person "cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child."⁵³

Under article 15, the Treaty provides that the judicial or administrative authorities, prior to issuing an order for the return of the child[ren], can request that the authorities of the state of habitual residence of the child[ren] issue a decision stating that the removal or retention was wrongful under their laws.⁵⁴ It is very helpful to have the Central Authority or the court of the foreign country issue such a determination prior to bringing the petition for return, if possible. It can be argued that this determination, though not binding, is certainly persuasive evidence on the issue of wrongful removal. If this has not been done in advance and the judge requests it, this could further unduly delay the return of the child[ren] until such a determination is rendered.

⁵¹ *Id.* at 8-9.

⁵² Hague Convention, *supra* note 2, at art. 3.

⁵³ *Friedrich*, 78 F.3d at 1065-66.

⁵⁴ Hague Convention, *supra* note 2, at art. 15.

III. Drafting the Pleadings

A. *Drafting the Hague Convention Papers*

It is important to stress that time is of the essence in a Hague Convention case.⁵⁵ The lawyer may and should begin drafting the petitioning papers immediately. The actual Hague Petition generally requires only a small amount of case specific information and therefore may be drafted before even meeting with the client. For these purposes, the information in the Request for Return is often sufficient. The petitioner may wish to come to the United States as soon as possible to see the child[ren]. In such a case, it is necessary to obtain a stay of any orders of restraint or protection quickly.⁵⁶ Note that immediate contact with the abducting parent may not be advisable if the petitioner believes the abductor may again flee with the child[ren]. Furthermore, one should be careful to avoid service of any further legal proceedings while the petitioner is present in the United States. The attorney should use his or her best judgment.

B. *Warrant in Lieu of a Writ of Habeas Corpus*

If the client has an idea of where the abducting parent and child[ren] are, but is concerned that the abductor may flee again, an Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus may be prepared and filed early in the proceeding. Such a Writ, once signed by a judge, permits the proper authorities (U.S. Marshall service) to take the child[ren] into custody to be presented to the court for the Hague Convention hearing.

⁵⁵ *Id.* at art. 11 (requiring that Hague cases proceed promptly and expeditiously); *Id.* at art. 12 (creating an additional defense if an action is not brought within one year between the abduction and the date of filing the Petition for Return.). Also, the more swiftly the attorney acts, the less time there is for the abducting parent to learn of the proceedings and re-abduct or secrete the child[ren].

⁵⁶ The petitioner should avoid any direct contact with the respondent as well to avoid any situations whereby the respondent could make a claim of violence.

C. *Petition for the Return of the Child[ren] Under the Hague Convention*

Finally, the attorney must prepare, file, and serve the Petition for Return of the Child[ren] to the petitioner. This document is generally broken down into sections.⁵⁷ The *Preamble* informs the court that the petitioner is moving under the Hague Convention and that the text of the Hague Convention and ICARA are annexed with the papers. The objectives of the Hague Convention, which are to secure a prompt return of the abducted child[ren]⁵⁸ and to ensure that the rights of the petitioner in one Contracting State are respected by other Contracting States,⁵⁹ should also be clearly stated.

Under the heading *Jurisdiction*, the attorney should simply state that ICARA gives the U.S. courts jurisdiction over the case.⁶⁰ The third heading is the *Status of Petitioner and Child*. Here the attorney sets forth the elements of the cause of action. The Hague Convention applies to cases in which a child under the age of sixteen (16) years⁶¹ has been removed from his or her state of habitual residence,⁶² in breach of the right of custody of the petitioner⁶³ which the petitioner had been exercising⁶⁴ at the time of the wrongful removal or retention.⁶⁵ The attorney should annex a copy of the original [Request for Return] form with the Petition.

The section entitled *Removal and/or Retention of Child[ren] by Respondent* sets forth, generally, the approximate date of the alleged abduction and states that the abduction was wrongful

⁵⁷ Such sections include: Preamble; Jurisdiction; Status of Petitioner and Child[ren]; Removal and/or Retention of Child[ren] By Respondent; Relief Requested; Notice of Hearing; Attorneys' Fees and Costs. Hague Convention, *supra* note 2, at art. 26; 22 U.S.C. § 9007.

⁵⁸ Hague Convention, *supra* note 2, at art. 1(a)

⁵⁹ *Id.* at art. 1(b).

⁶⁰ ICARA § 9003(a) ("JURISDICTION OF THE COURTS. The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.").

⁶¹ Hague Convention, *supra* note 2, at art. 4.

⁶² *Id.* at art. 1.

⁶³ *Id.* at arts. 3, 5.

⁶⁴ *Id.* at art. 3.

⁶⁵ *Id.* at art. 1.

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under article 3 of the Hague Convention.⁶⁶ This section of the Petition may be written very generally by merely asserting the existence of a right of custody, but the issue will become more complicated at the Hague hearing where opposing counsel may defend against the Petition by alleging that the petitioner never had any rights of custody.⁶⁷ Finally, this section should state as specifically as possible where the petitioner believes the child[ren] are being held in the United States and that the child[ren]'s habitual residence is the foreign jurisdiction.

Provisional Remedies refers to requests such as the warrant in lieu of habeas corpus, which is based upon the belief that the abducting parent will again remove and secrete the child[ren], as well as temporary access orders to permit some contact between the petitioner and the child[ren]. The section called *Relief Requested* can be drafted like any court order. For instance, the attorney may choose to respectfully request the following: (a) an order directing a prompt return; (b) the issuance of a warrant; (c) the direction of notice; (d) an order staying other proceedings; (e) an order directing the respondent to pay the petitioner's costs and fees; and (f) any other and further relief. The attorney should, under the heading *Notice of Hearing*, state the law under which notice is being given. For example, "pursuant to 22 U.S.C. section 9003(c)⁶⁸ the Respondent shall be given notice according to" and then state the appropriate law.

The Hague Convention makes a provision for attorney fees.⁶⁹ The attorney may want to ask for fees under the heading *Attorney's Fees and Costs [Including Transportation Expenses] Pursuant to Convention Article 26 and/or 22 U.S.C. § 9007* and

⁶⁶ Hague Convention, *supra* note 2, at art. 3 (This is the client's cause of action. A removal or retention is considered wrongful where: "(a) it is in breach of rights of custody attributed to a person . . . 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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.").

⁶⁷ *Id.* at art. 13(a).

⁶⁸ ICARA § 9003(c) ("NOTICE. Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.).

⁶⁹ Hague Convention, *supra* note 2, at art. 26.

submit a bill for fees incurred to date in the case.⁷⁰ If this strategy is taken, a request should also be made for the court to reserve judgment over any further fees. The above documents can be verified by the client electronically, and therefore, the papers may be drafted, filed, and served without the client having to be present in the United States.

IV. Affirmative Defenses

Articles 12, 13, and 20 of the Hague Convention provide the defenses available to the respondent in a Hague case. Such defenses include alleging that: the petitioner consented or acquiesced to the removal or retention⁷¹; there is grave risk that a return would expose the child[ren] to harm or an intolerable situation⁷²; the child[ren] is of appropriate age and degree of maturity and objects to the return⁷³; the child[ren] is settled in the new environment⁷⁴; and/or a return would not be permitted by “the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.”⁷⁵

The respondent’s burden of proof is to prove either by clear and convincing evidence⁷⁶ that the article 13(b)⁷⁷ or article 20⁷⁸

⁷⁰ ICARA § 9007(b)(3) (When an Order for Return is granted, the court is required to order the person who removed or retained the child[ren] to pay the necessary expenses incurred by and on behalf of the petitioner “including court costs, legal fees, foster home or other care during the course of the 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”).

⁷¹ Hague Convention, *supra* note 2, at art. 13(a).

⁷² *Id.* at art. 13(b).

⁷³ *Id.* at art. 13.

⁷⁴ *Id.* at art. 12.

⁷⁵ *Id.* at art. 20.

⁷⁶ ICARA § 9003(e)(2)(A).

⁷⁷ Hague Convention, *supra* note 2, at art. 13(b) (Even if a removal or retention has been determined to have been wrongful, an authority may deny a return 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.”).

⁷⁸ *Id.* at art. 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.”).

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exceptions apply or by a preponderance of the evidence⁷⁹ that the article 12⁸⁰ or the other article 13⁸¹ exceptions apply. All the affirmative defenses are to be construed narrowly lest they “frustrate the core purpose of the Hague Convention.”⁸²

A. *The Child[ren] Is Settled in the New Environment (One Year Elapsed)*

Article 12 of the Hague Convention permits courts to refuse to return a child who was wrongfully removed or retained if the petitioner waited more than one year after the removal or retention to file the Petition and the child is settled in his or her new environment.⁸³ The court, however, may still order a return, if it finds it appropriate, even if the child[ren] is settled in the new environment and more than one year has passed. This exception provides an additional defense to an abducting parent only in cases where the proceedings were not started within one year after the abduction. However, if the time elapsed is less than one year, even if the child is settled in this new environment, the court *must* order the return of the child to the state of habitual residence, unless the child comes under one of the other exceptions of the Convention.

There are circumstances when the petitioner may not know the whereabouts of the respondent or the child due to the respondent’s actions to deliberately hide their location. In such situations, the circuit courts were once split as to whether the one-year clock should start to run only when the petitioner discov-

⁷⁹ ICARA § 9003(e)(2)(B).

⁸⁰ Hague Convention, *supra* note 2, at art. 12 (The Hague Convention provides that an authority *may* refuse to return a child[ren] who has been wrongfully removed or retained if: the petitioner waited longer than one (1) year after the wrongful removal or retention to file the Petition; the respondent can demonstrate that the child[ren] is settled in the new environment; or where the authority has reason to believe the child[ren] has been taken to another State.).

⁸¹ *Id.*, *supra* note 2, at art. 13 (excluding 13(b)) (Even if a removal or retention is been determined to have been wrongful, an authority may deny a return if: the petitioner was not exercising his or her right of custody at the time of the removal; or, depending on the degree of maturity and age of the child[ren], the child[ren] objects to being returned.).

⁸² *Choi v. Kim (In re Kim)*, 404 F. Supp. 2d 495, 512 (S.D.N.Y. 2005).

⁸³ Hague Convention, *supra* note 2, at art. 12.

ered the location of the respondent and the child. The U.S. Supreme Court held in *Lozano v. Montoya Alvarez*⁸⁴ that the principle of equitable tolling,⁸⁵ which has been applied to federal statutes of limitations in the United States, was not appropriate to Hague abduction cases because the Convention is a treaty rather than a statute⁸⁶ and because article 12 was not a limitations period.⁸⁷ The Supreme Court, in a concurring opinion, did note however, that articles 12 and 18 of the Convention provided the courts with discretion to return the child even when the petition was not filed within one year,⁸⁸ obviating the need for equitable tolling.

To determine whether the child is now well-settled in the new environment, the U.S. Department of State has stated that “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.”⁸⁹ The well settled test is a multi-factor test designed to determine if the child is well settled in her environment.⁹⁰ This goal of this test is to address the understanding that “there could come a point at which a child would become so settled in a new environment that repatriation might not be in its best interest.”⁹¹ There is no dispositive factor used to decide whether a child is well settled. Instead, courts have explored a variety of factors including: (1) the age of the child, (2) the stability of their environment, (3) their school experience, (4) any extracurricular activities, (5) the respondent’s financial stability, (6) the child’s relationships with friends and relatives, and (7) the immigration status of the child.⁹²

⁸⁴ *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235-36 (2014).

⁸⁵ Equitable tolling would mean that the one-year clock would start to run when the petitioner found out where the respondent and the child were residing.

⁸⁶ *Lozano*, 134 S. Ct. at 1232-34.

⁸⁷ *Id.* at 1234-35.

⁸⁸ *Id.* at 1237 (concurring opinion).

⁸⁹ The U.S. State Dept. Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986).

⁹⁰ *Broca v. Giron*, 530 F. App’x 46, 47 (2d Cir. 2013) (citing *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012)).

⁹¹ *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) (Commonly known as *Blondin IV*).

⁹² *Broca*, 530 F. App’x at 47.

B. *Consent and Acquiescence*

Article 13(a) of the Convention provides for the non-return of the child in a situation where a parent “was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced after the removal or retention.”⁹³ Consent is given prior to the removal or retention while acquiescence is provided afterwards and typically requires more formality.⁹⁴ Respondents claiming after-the-fact acquiescence are held to a higher standard than those claiming before-the-fact consent, and acquiescence requires “either 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.”⁹⁵

Courts are unwilling to apply this defense in situations where the parties’ actions and surrounding circumstances contradict a claim of consent or acquiescence. Several courts have identified the left-behind parent’s filing of a Hague Convention petition in and of itself as evidence that the parent did not consent or acquiesce to the child’s removal and retention.⁹⁶

Furthermore, courts frequently warn that “[e]ach of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights”⁹⁷ and “isolated statements to third parties are not sufficient to establish consent or acquiescence.”⁹⁸ Another factor courts may consider is whether the abducting parent removed the child in a secretive fashion – for example, during the night, while the other parent is away, or without informing the other parent. In such situations, it is less likely that the other parent consented to or acquiesced to the child’s removal.⁹⁹ However, in *Pignoloni v. Gallagher*, the

⁹³ Hague Convention, *supra* note 2, at art 13(a).

⁹⁴ *Nicolson v. Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010); *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005); *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001).

⁹⁵ *Baxter*, 423 F.3d at 371; *Friedrich*, 78 F.3d at 1070.

⁹⁶ *Moreno v. Martin*, 2008 WL 4716958 (S.D. Fla. Oct. 23, 2008); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1350 (S.D. Fla. 2002).

⁹⁷ *Friedrich*, 78 F.3d at 1070.

⁹⁸ *Moreno*, 2008 WL 4716958 at *15.

⁹⁹ *Simcox*, 511 F.3d at 603; *Friedrich*, 78 F.3d at 1069.

Second Circuit held that a provision in the parties' divorce agreement that permitted the mother to relocate to the United States from Italy if the father defaulted in support payments amounted to consent.¹⁰⁰

C. A Return Would Place the Child[ren] in Grave Risk of Danger

Under article 13(b) of the Hague Convention, the court is not obligated to return the child if the respondent establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."¹⁰¹ A grave risk of harm exists "in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."¹⁰² While the "grave risk" defense must be proven by clear and convincing evidence, "subsidiary facts . . . need only be proven by a preponderance of the evidence" and can be aggregated to create clear and convincing evidence of a grave risk of harm.¹⁰³

The article 13(b) exception should be "interpreted narrowly, lest it swallow the rule."¹⁰⁴ The exception "is not license for a court in the abducted-to country to speculate on where the child would be happiest."¹⁰⁵ It is also not a license for the court to engage in a best-interests-of-the-child analysis.¹⁰⁶ This defense depends on both the probability of the harm and the magnitude

¹⁰⁰ Pignoloni v. Gallagher, 555 F. App'x 112, 113-114 (2d Cir. 2014).

¹⁰¹ Hague Convention, *supra* note 2, at art. 13(b).

¹⁰² *Friedrich*, 78 F.3d at 1069.

¹⁰³ *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 404 (E.D.N.Y. 2005) (quoting *Danaipour v. McLarey*, 183 F. Supp. 2d 311, 315 (D. Mass. 2002)).

¹⁰⁴ *Souratgar v. Fair*, 720 F.3d 96, 103 (2d Cir. 2013) (citing *Simcox*, 511 F.3d at 604); *Blondin II*, 189 F.3d at 246 (warning that permissive invocation of the affirmative defenses "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" (quotation marks and citation omitted)).

¹⁰⁵ *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) (quoting *Friedrich*, 78 F.3d at 1068).

¹⁰⁶ Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986).

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of the harm if the risk materializes¹⁰⁷ and “the level of risk and danger required to trigger this exception has consistently been held to be very high.”¹⁰⁸ Although “[t]he text of [article 13(b)] requires only that the harm be ‘physical or psychological,’ the context makes it clear that the harm must be a great deal more than minimal.”¹⁰⁹

The Second Circuit in *Souratgar v. Fair*, stated that “a grave risk of harm from repatriation arises in two situations: ‘(1) where returning the child means sending him to a zone of war, famine, or disease; or (2) in cases of serious abuse or neglect, or extraordinary emotional dependence, *when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.*’”¹¹⁰

In *Simcox v. Simcox*, the Sixth Circuit illustrated the distinction between grave and serious risk of harm by articulating three broad categories into which an abusive situation might fall.¹¹¹ On the one end of the spectrum, the court noted situations where “the abuse is relatively minor.”¹¹² For example, in *Whallon v. Lynn*, the First Circuit held that a husband’s verbal abuse and an incident of shoving directed towards his wife, “while regrettable, was insufficient to establish a grave risk of harm to the child.”¹¹³ An abusive situation is less likely to be considered “grave” where the allegations of abuse concern “isolated or sporadic incidents.”¹¹⁴

On the opposite end of the spectrum 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.”¹¹⁵ In *Van De Sande v. Van De Sande*, the Seventh Circuit reversed an order to

¹⁰⁷ *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

¹⁰⁸ *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000).

¹⁰⁹ *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000) (citing *Nunez-Escudero v. Tice-Menly*, 58 F.3d 374, 377 (8th Cir. 1995)).

¹¹⁰ *Souratgar v. Fair*, 720 F.3d 96 (2d Cir. 2013), citing *Blondin IV*, 238 F.3d at 162.

¹¹¹ *Simcox*, 511 F.3d at 594.

¹¹² *Id.* at 607.

¹¹³ *Id.* at 609 (citing *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000)).

¹¹⁴ *Id.* at 608.

¹¹⁵ *Id.* at 607-08.

return children to a petitioner who had “beat[en] his wife severely and repeatedly in [the children’s] presence” and threatened to kill them.¹¹⁶ Similarly, in *Walsh v. Walsh*, the court reversed an order of return after finding that the father was “psychologically abusive” and had severely beaten the children’s mother in their presence.¹¹⁷

The third category of cases described by the Sixth Circuit concerned those that “fall somewhere in the middle,” where the abuse is “substantially more than minor, but is less obviously intolerable.”¹¹⁸ Applying the grave risk of harm analysis to such situations 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.”¹¹⁹

The Second Circuit in *Souratgar v. Fair* noted that

many cases . . . arise from a backdrop of domestic strife. Spousal abuse, however, is only relevant . . . if it seriously endangers the child. The . . . inquiry is not whether repatriation would place the respondent parent’s safety at grave risk, but whether so doing would subject the child to a grave risk of physical psychological harm.¹²⁰

The Second Circuit went on to state that “[s]poradic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk.”¹²¹ The court also determined

to hold evidence of spousal conflict alone, without a clear and convincing showing of grave risk of harm to the child, to be sufficient to decline repatriation, would unduly broaden the Article 13(b) defense

¹¹⁶ *Van De Sande*, 431 F.3d at 570.

¹¹⁷ *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000). *See also* *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (The court refused return where child had been belt-whipped, punched, and kicked, and where the child’s mother had been subjected to serious attacks resulting in a broken nose and choking).

¹¹⁸ *Simcox*, 511 F.3d at 608.

¹¹⁹ *Id.*

¹²⁰ *Souratgar*, 720 F.3d at 104, citing *Charalambous v. Charalambous*, 627 F.3d 462, 468 (1st Cir. 2010).

¹²¹ *Id.*

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and undermine the central premise of the Convention: that wrongfully removed children be repatriated so that questions over their custody can be decided by courts in the country where they habitually reside.¹²²

A majority of courts have further declined to find grave risk when the abducting parent claims that an order of return will cause a separation between the child and the abductor that will result in psychological damage to the child.¹²³

Even if the respondent can prove allegations of abuse by clear and convincing evidence, he or she must also establish that “the court[s] in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”¹²⁴ The court must first “determine whether there are any ameliorative measures that could be taken to mitigate this risk and enable a child to return to his home country.”¹²⁵

Respondents will often attempt to use the article 13(b) defense to litigate the merits of a custody case and the best interests of the child, which should be litigated in the country of habitual residence. Attorneys should be prepared to aggressively head off such tactics and limit the scope of any grave risk inquiry. In *Friedrich v. Friedrich*, the Sixth Circuit characterized “grave risk” as placing the child in imminent danger before the custody dispute was resolved in the country of habitual residence.¹²⁶ In *Gaudin v Remis*, the Ninth Circuit held that

because psychological harm is often cumulative, especially in the absence of physical abuse or extreme maltreatment, even a living situation capable of causing grave psychological harm over the full course of a child’s development is not necessarily likely to do so during the period necessary to obtain a custody determination.¹²⁷

¹²² *Souratgar*, 720 F.3d at 104, citing *Simcox*, 511 F.3d at 604.

¹²³ See, e.g., *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376 (8th Cir. 1995); *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995); *Carranco v. Muñoz*, 2013 U.S. Dist. LEXIS 5142, at * 27 (D.N.J. Jan. 14, 2013); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000).

¹²⁴ *In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006) (citing *Blondin*, 189 F.3d at 246 and *Friedrich*, 78 F.3d at 1069).

¹²⁵ *Olguin v. Cruz Santana*, No. 03-CV-6299, 2005 WL 67094 at * 6 (E.D.N.Y. Jan. 13, 2005) (citing *Blondin*, 238 F.3d at 157).

¹²⁶ *Friedrich*, 78 F.3d at 1060.

¹²⁷ *Gaudin v Remis*, 379 F.3d 631 (9th Cir. 2002).

D. *A Return Conflicts with the Fundamental Freedoms of the Requested State*

Another exception, provided under article 20, allows the court to refuse to order the return of the child[ren] “if this would not be permitted by the fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms.”¹²⁸ This article functions as a safety valve for a member country to not return a child[ren] to a country where the fundamental rights of freedom have been abridged. This defense has never successfully been argued in the United States.

E. *The Child[ren] Objects to the Return*

An additional provision of article 13 (unlettered) allows the judicial or administrative authority to consider the child’s wishes not to return to his or her country of habitual residence. This, however, depends upon the child’s age and degree of maturity.¹²⁹ The drafters of the Hague Convention purposefully declined to set a minimum age that a child must attain before a court may find him or her sufficiently mature and may refuse repatriation based solely on the child’s objection.¹³⁰

The State Department cautions, however, that “[a] child’s objection to being returned may be accorded little if any weight if the court believes that the child’s preference is the product of the abductor parent’s undue influence over the child.”¹³¹ This defense is “fact-intensive” and there is no one-size-fits-all rule to apply here. In *Reyes Olguin v. Cruz Santana*, the federal district court considered the views of an eight-year old child in denying the Petition for return¹³² but in another case a court determined that a fourteen-year old was not sufficiently mature.¹³³

¹²⁸ Hague Convention, *supra* note 2, at art. 20.

¹²⁹ *Id.* at art. 13.

¹³⁰ *Blondin*, 238 F.3d at 166.

¹³¹ U.S. State Dept. Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986).

¹³² *Olguin*, 2005 WL 67094 at 10.

¹³³ *England v. England*, 234 F.3d 268, 272-73 (5th Cir. 2000).

V. After a Successful Return Order

A. Payment of Costs and Fees

Of major interest to attorneys handling cases under the Hague Convention is ICARA section 9007, which provides for the award of cost and fees under the Convention and ICARA.¹³⁴ ICARA provides that upon a successful return order the court

shall order the respondent to pay necessary expenses incurred by or on behalf of petitioner, including court costs, legal fees, foster home or other care during the course of the proceedings in this action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.¹³⁵

Article 26 of the Convention states that

[u]pon ordering the return of a child . . . the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child . . . 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.¹³⁶

An award of fees and costs serves two purposes: (1) “to restore the applicant to the financial position he or she would have been in had there been no removal or retention” and (2) “to deter such removal or retention.”¹³⁷ The respondent bears the burden of establishing that an award of fees and costs would be clearly inappropriate under the circumstances.¹³⁸

B. Stays

The U.S. Supreme Court, in *Chafin v. Chafin*,¹³⁹ addressed the issue of whether an appeal was moot once a return order had been carried out. For instance, if a return order was reversed on appeal, courts might find it difficult to enforce an order directing a party in another country to return the child to the United States. In *Chafin*, the Supreme Court ruled unanimously that the

¹³⁴ 22 U.S.C. § 9007(b).

¹³⁵ 22 U.S.C. § 9007(b)(3).

¹³⁶ Hague Convention, *supra* note 2, at art. 26.

¹³⁷ U.S. State Dept. Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,511 (Mar. 26, 1986).

¹³⁸ Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004).

¹³⁹ 568 U.S. 165, 172 (2013).

child's return does not moot an appeal, because the parties continue to have a concrete interest in the outcome of the litigation. The Court found that there was a possibility that the foreign jurisdiction would enforce a return order or that the original left-behind parent would voluntarily return to the United States.¹⁴⁰

The *Chafin* case should make it more difficult to procure a stay once a trial court has issued a return order. As the Supreme Court illustrated, to determine an appeal moot once a child was returned would serve to increase the number of stays granted pending appeal. This would “conflict with the Convention’s mandate of prompt return to a child’s country of habitual residence,” and likely also generate more appeals in Convention cases, with the goal of delaying the child’s return as long as possible.

VI. Conclusion

It is a good idea to review as much of the case law from around the country and around the world as possible as the case law is still developing rapidly. Each new case has the chance to highlight a unique set of facts against the backdrop of the Convention’s language and purpose. This in turn helps to clarify the law in the United States.

As more countries accede to the Convention and become treaty partners, it will continue to become more important that attorneys and judges learn how to apply the Convention in order to achieve its stated goals. Courts should not take these cases as an opportunity to adjudicate the merits of an underlying custody case. Rather they should have faith that the judicial systems in the child’s habitual residence will be able to make those ultimate decisions. Otherwise, the Convention will merely provide license for abducting parents to engage in forum shopping. It is necessary to recognize that the act of abducting a child can have a devastating effect on a child¹⁴¹ and it is the responsibility of the

¹⁴⁰ *Id.* at 175-76.

¹⁴¹ The Supreme Court in the case of *Abbott v. Abbott*, 560 U.S. 1 (2010), wrote that “[s]ome child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse.” H. R. Rep. No. 103-390, at 2 (1993); See Nancy Faulkner, *Parental Child Abduction Is Child Abuse*, CAN. CHILDREN’S RIGHTS COUNCIL, http://canadiancrc.com/Nancy_Faulkner_Parental_abduction_is_child_abuse_1999.aspx (last visited Nov. 17,

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courts to ensure that these abductions are not countenanced except in those most extreme cases.

2017). A child abducted by one parent is separated from the second parent and the child's support system. Studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues.); *See also* DOROTHY S. HUNTINGTON, PARENTAL KIDNAPPING: A NEW FORM OF CHILD ABUSE 21-22 (American Prosecutor's Research Institute's National Center For Prosecution of Child Abuse 1995) (1982) (A child abducted at an early age can experience loss of community and stability, leading to loneliness, anger, and fear of abandonment).