

APPENDIX G

The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence

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This chapter discusses how the Hague Convention on International Child Abduction, and its enabling statute ICARA, have been applied in courts in Washington and around the country.

The chapter features an overview of the current law and addresses complex issues courts increasingly face when an abducting parent is also a victim of domestic violence seeking protection from American courts. The chapter includes citations to unpublished Washington cases to demonstrate how Washington courts have considered some of these issues.

As an emerging area of law, we hope this chapter will be useful and we look forward to making meaningful additions to the chapter as case law further develops in Washington.

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APPENDIX A – HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

APPENDIX B - ICARA

INTERNATIONAL CHILD ABDUCTION AND DOMESTIC VIOLENCE

A. Overview

1. Hague Convention and ICARA: General Principles

Hague Convention. The Hague Convention on Civil Aspects of International Child Abduction¹ provides a uniform law signatories may adopt to compel the return of a child wrongfully removed from his or her habitual residence.² The Convention applies to courts within the jurisdiction of a contracting state to which a child has been wrongfully removed. Under the Convention, courts consider only the claim that the child was improperly removed, and not the merits of an underlying custody claim.³

ICARA. The legislation implementing the Convention in the United States is the International Child Abduction Remedies Act (ICARA), enacted by Congress in 1988.⁴ 42 U.S.C. §§ 11601-11610.

Legislative History. According to the commentary accompanying the Convention's drafting, the official Convention reporter explains that the Convention is intended to prevent one parent from gaining an unfair advantage in a custody dispute by taking a child to another country in order to invoke that other country's jurisdiction.⁵

2. Child Custody Jurisdiction in the United States

Custody disputes in U.S. courts may concern orders not implicated in the Hague Convention. In such cases, the court must look to domestic law to determine whether they have jurisdiction and the extent of their authority.⁶ Jurisdiction in United States custody cases is determined by federal and state laws, including the Parental Kidnapping Prevention Act (PKPA) and, in those states which have adopted it, the

¹ Hague Convention on the Civil Aspects of International Child Abduction, Senate Treaty Doc. 11, 99th Cong., 1st Sess. 9 (1980) reprinted in 19 I.L.M. 1501 (1981) (hereinafter Convention). See full text in Appendix A.

² Convention, Article 3a.

³ Convention, Article 19; *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004); *Gonzalez v. Gutierrez*, 311 F.3d 942, 945 (9th Cir. 2002).

⁴ International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (hereinafter ICARA). See full text in Appendix B.

⁵ Elisa Perez-Vera, Explanatory Report § 11, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982); cited in: *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004). Note: The Explanatory Report was never adopted in the Hague Convention.

⁶ For instance, The Convention may not be in effect between the United States and the other nation involved in the dispute; even if proceedings involve nations for which the Convention is in force, domestic law may be relevant. See Jurisdiction in Section C.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).⁷ Along with the Convention and ICARA, the PKPA and UCCJEA suggest returning the child to the place of his or her habitual residence for custody determinations.

Parental Kidnapping Prevention Act. Congress passed the Parental Kidnapping Prevention Act to require states to give full faith and credit to custody determinations made by other states. 28 U.S.C. § 1738A(a). The statute also defers questions regarding prior out-of-state decrees to the courts of the decree-granting state unless the initial state no longer has jurisdiction.⁸

Uniform Child Custody Jurisdiction and Enforcement Act. Washington's UCCJEA requires Washington courts to recognize and enforce foreign child custody determinations made in substantial conformity with Washington's own standards.⁹ RCW 26.27.051. Washington courts are to decline jurisdiction in child custody matters where another state or foreign country has previously exercised jurisdiction, unless certain exceptions apply.¹⁰ RCW 26.27.201. In addition, Washington courts may enforce an order for the return of a child under the Hague Convention as if the order were a child custody determination. RCW 26.27.411. Washington's UCCJEA considers temporary emergency jurisdiction in RCW 26.27.231.

⁷ A Washington Appellate court held that the PKPA preempts the UCCJA (recently replaced by the UCCJEA) when the statutes conflict. *In re Custody of Thorenson*, 46 Wn.App 493, 497 (Wn. App. 1987).

⁸ 28 U.S.C. § 1738A(a)-(h).

⁹ For the purposes of Convention proceedings, Washington courts, in two unpublished opinions, have found custody determinations not to be in substantial conformity with Washington's standards because the respondent did not receive notice of a forthcoming custody determination. See *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003); *In re Parentage of C.A.M.A.*, 103 Wn. App. 1032, WL 1726964 (Wn. App. 2000)

¹⁰ RCW 26.27.051 provides that Washington courts are not required to apply foreign child custody determinations if the child custody law of "a foreign country violates fundamental principles of human rights." The circumstances under which the exception may be used in international cases are difficult to define and not considered by an appellate court in the U.S.; the official Comment to the drafting of the UCCJEA, which was subsequently adopted in Washington state, indicates that the basis for the exception is the same concept found in Article 20 of the Convention (considered in the discussion of the defenses, in Section F) which permits a return order to be denied if it would not be permitted by fundamental principles of the requested state relating to human rights and fundamental freedoms. Marianne Blair. *International Application of the UCCJEA: Scrutinizing the Escape Clause*. 38 Fam. L. Q. 547, 554-66 (2004) (citing UCCJEA § 105 cmt., 9 Part1A U.L.A. at 662.).

B. Applying the Convention

1. Triggering Scenario

The primary purpose of the Convention is to deter international child abductions and to provide a prompt remedy for the return of an abducted child by ensuring custody rights under one Contracting State are respected in other Contracting States.¹¹ Thus, for example, if a parent removes a child from the country of the child's habitual residence into a separate country, acting in breach of the other parent's rights of custody, the left-behind parent may commence an action under the Convention by filing a petition for relief in the jurisdiction to which the child was wrongfully removed or retained (the removed-to state).^{12 13} The petitioning parent must establish that the child was wrongfully removed or retained¹⁴ from the country of the child's habitual residence (the removed-from state), in breach of the petitioning parent's custody rights.¹⁵

The Convention also provides a series of affirmative defenses, exceptions, which, if established by the respondent, may preclude the child's return.¹⁶ If the petitioning parent demonstrates the elements of the prima facie case, and the abducting parent fails to establish excepting circumstances, the Convention requires the prompt return of the child to the country of his or her habitual residence.

2. Domestic Violence and a Child's Return

In some cases, courts have found it inappropriate to return the child based on the threat of abuse to the child or the caregiver. The presence of domestic violence may affect determining the place of a child's habitual residence and, under Convention Article 13(b), determining the gravity of risks a child faces if a return is compelled. For further information see subsequent sections detailing habitual residence and grave risk.

¹¹ Convention, Art. 1.

¹² 42 U.S.C. § 11603(b).

¹³ The Hague Convention also allows the Department of State, appointed as a "Central Authority," to perform the remedy of return through administrative means. 42 U.S.C. § 11606. See Section D.1.

¹⁴ Specifically, the Convention defines wrongful removal or retention as a "breach of rights of custody...under the law of the State in which the child was habitually resident" and "at the time of removal or retention those rights were actually exercised, either jointly or alone..." The Convention, Art. 3(a)-(b).

¹⁵ The petitioner's prima facie case is discussed in detail in Chapter Section E.

¹⁶ The Convention provides a series of defenses to an action for return. See Section F.

C. Jurisdiction

A Hague Convention proceeding is a civil action brought in the country to which a child¹⁷ (under the age of 16) was wrongfully removed or retained. The Convention applies only between Contracting States¹⁸ and only when the wrongful abduction occurs after the Convention is in force between those States.¹⁹ In cases where the Convention is not in effect between the United States and the other nation involved in the dispute, U.S. courts must look to domestic law to determine jurisdiction and the extent of their authority.

ICARA provides both state and federal district courts with original and concurrent jurisdiction over a Convention proceeding.²⁰ To obtain jurisdiction, courts must find a removal was wrongful, which requires determining whether or not the child was taken from his or her habitual residence in violation of custody orders.²¹ Courts within the jurisdiction of the state to which a child is wrongfully removed are to consider only the removal claim, not the merits of an underlying custody claim.²²

1. **International Treaties and the Supremacy Clause**

The U.S. Constitution provides that international treaties, along with the Constitution and federal statute, are the Supreme Law of the Land.²³ If conflict exists between an international treaty and federal statute, the most recent provision applies.²⁴

¹⁷ The Convention ceases to apply when the child attains the age of 16. Convention, Art. 4. Even if the child is under the age of 16 at the time of the wrongful removal or retention, if the child has reached 16 when the return is requested, the Convention does not require the child's return.

¹⁸ An up-to-date list of contracting states to the Convention is maintained at http://www.travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html
Article 38 of the Convention distinguishes between states which have acceded to the Convention and Contracting States. The United States, as a Contracting State, is not required to accept the accession of nations party to the Convention which were not party to the Hague Conference and thus Contracting States; each Contracting State must accept the accession of each nation individually.

¹⁹ Convention, Art. 35.

²⁰ 42 U.S.C. § 11603.

²¹ If the child was not removed from his or her habitual residence, the Convention does not apply. As part of determining a child's habitual residence, domestic violence may factor into a court's interpretation of habitual residence; see the section discussing habitual residence.

²² Convention, Art. 19; *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004); *Gonzalez v. Gutierrez*, 311 F.3d 942, 945 (9th Cir. 2002).

²³ The U.S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." U.S. Const. art. VI, cl. 2.

²⁴ If conflict between a federal law and a treaty is unavoidable, the most recent expression of the "sovereign" controls. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 600, 9 S.Ct. 623 (1889).

Federal courts must have the power to vacate state custody determinations and other state court orders that contravene or frustrate the purposes of the Hague Convention.²⁵

D. Proceedings under the Convention

1. Commencing an Action

By Petition. A judicial proceeding under the Convention is commenced in the United States by the filing of a petition in state or federal court.²⁶ A petitioner's submission to the court has the effect of conferring in personam jurisdiction and results in a bilateral hearing.

Central Authority. The Convention also provides for the designated Central Authority²⁷ to enforce the remedy of return through administrative means, whereby the left-behind parent submits an application for the child's return through the Central Authority of either the child's habitual residence or in the state where the child is found.²⁸ For all practical purposes, the Central Authority's role is largely limited to that of a facilitator, and, when dispute exists between parties, has no power to order a child's return.²⁹

2. Preemptive Stay / Dismissal

Where the court or administrative authority in the requested state has reason to believe the child has been taken out of the removed-to state, it may stay the proceedings or dismiss the application for the return of the child.³⁰

3. Removal to Federal Court

There is no provision in ICARA that prohibits removal of state court Convention proceedings to federal court. Thus, arguably, ICARA allows removal to federal court.³¹

²⁵ *Mozes v. Mozes*, 239 F.3d 1067, 1085 (9th Cir. 2001).

²⁶ 42 U.S.C. § 11603(a)-(b).

²⁷ The United States Department of State is appointed as the Central Authority for the purposes of the Convention in the United States. Exec. Order No. 12648, 53 Fed. Reg. 30637 (1988). Central Authorities coordinate and cooperate with various agencies of the child's habitual residence and the requested state in order to secure the prompt return of a child. Convention, Art. 7.

²⁸ 42 U.S.C. § 11606

²⁹ A Central Authority may help secure the voluntary return of the child or bring about an amicable resolution of the issue. Convention, Art. 7(c); Art. 10; see also *Wojcik v. Wojcik*, 959 F.Supp. 413, 416 (E.D. Mich. 1997) (noting the Central Authority may take measures to obtain the *voluntary* return of the child) (emphasis added).

³⁰ Convention, Art. 12, cl. 3.

³¹ A district court in New York granted a father's request for removal reasoning that, pursuant to the Federal Removal statute, 28 U.S.C. § 1441(a), and based on ICARA's granting state and federal courts

4. Writs of Habeas Corpus

Although the writ of habeas corpus is not mentioned in the language of the Convention or ICARA, it may arguably be used by a petitioner in a Convention proceeding to test the legality of an alleged wrongful removal or retention.³² If the court finds a removal or detention wrongful, it may compel the respondent before the court.³³

5. Expedited Nature of Proceedings

The Convention mandates the prompt disposition of the case. The Convention stipulates that if the judicial or administrative authority has not reached a decision within six weeks from the date of the commencement of the proceedings, the petitioner or the Central Authority of the requested state has the right to seek an explanation of the reasons for delay.³⁴ The Convention's expedited nature has not been construed as a license to conduct hearings *ex parte*.³⁵

E. Petitioner's Prima Facie Case

1. Wrongful Removal

To invoke the Hague Convention's remedy of return, the petitioning parent must establish, by a preponderance of the evidence,³⁶ that the child's abduction was wrongful. Removal or retention of a child is wrongful where the child is taken from the state in which the child is habitually resident, violating the petitioner's custody rights. Article 3 of the Convention describes a removal or retention to be wrongful where:

- 1) It is in breach of rights of custody attributed to a person, an institution, or any other body under the law of the state in which the child was habitually resident immediately before the removal or retention;

and

concurrent original jurisdiction, the matter could have originally been filed in federal court. *In Matter of Mahmoud*, 1997 WL 43524 (E.D.N.Y. 1997).

³² See *Zajaczkowski v. Zajaczkowska*, 932 F.Supp.128, 130-31 (D.Md.1996).

³³ *Zajaczkowski*, 932 F.Supp. at 131.

³⁴ Convention, Art. 11.

³⁵ See *Wanninger v. Wanninger*, 850 F.Supp. 78 (D.Mass 1994) (court denied a request to issue an *ex parte* order in place of a writ of habeas corpus, instead issuing an order compelling attendance).

³⁶ 42 U.S.C. § 11603(e)(1)(A).

- 2) 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.³⁷

2. Habitual Residence

As part of determining whether a removal or retention is wrongful, courts must determine the child's habitual residence. Neither the Convention nor ICARA define habitual residence. Courts interpret the phrase according to its ordinary meaning and analyze habitual residence as a mixed question of fact and law, based on the circumstances of the particular case.³⁸ Courts must carefully consider the unique circumstances of each case when determining a child's habitual residence, particularly in situations involving military families.³⁹

a. Determining Habitual Residence

Most courts hold that a person can have only one habitual residence at a time.⁴⁰ If a child is born where parents have their habitual residence, the child normally should be regarded as a habitual resident of that country.⁴¹ However, the place of birth is not automatically the child's habitual residence,⁴² because there *must be a settled purpose* to create a habitual residence.⁴³ The absence of a more defined baseline requires close attention to the subjective intent of the parents when evaluating *settled purpose*.⁴⁴ While the intent of the child may also be considered, parental intent acts as a surrogate for children who are not yet capable of making an autonomous decision.⁴⁵ As a general rule, military families do not settle where they are assigned overseas. A Ninth Circuit court held

³⁷ Convention, Art. 3(a)-(b).

³⁸ *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004); *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1048 (E.D.Wash 2001); *Feder v. Evans*, 63 F.3d 217, 222 (3rd Cir. 1995).

³⁹ *Holder* 392 F.3d at 1015.

⁴⁰ *Mozes* 239 F.3d at 1076 (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1069); *Freier v. Freier*, 969 F.Supp 436, 440 (E.D. Mich. 1996)). A cited exception may exist upon the rare occurrence of a child consistently splitting time between two locations so as to have an alternating habitual residence. *Mozes* 239 F.3d at 1076 (citing *Johnson v. Johnson*, 26 Va.App. 135, 493 S.E.2d 668, 669 (1997)).

⁴¹ *Holder* 392 F.3d at 1020.

⁴² *Holder*, 392 F.3d at 1020 (9th Circuit 2004) (citing *Delvoye v. Lee*, 329 F. 3d 330, 334 (3rd Cir. 2003).

⁴³ Emphasis added. Courts require a settled purpose; see *Holder*, 392 F.3d, 1020; *Mozes* 239 F.3d at 1074.

⁴⁴ *Holder* 392 F.3d at 1016 (citing *Mozes*, 239 F.3d at 1076-78).

⁴⁵ *Holder* 392 F.3d at 1017; *Mozes*, 239 F.3d at 1076.

that the focus when military families relocate should center on the details of each case.⁴⁶

Permanent Relocation. If a petitioner permanently moves to the same country as the abductor, the court cannot grant relief under the Hague Convention and the petition becomes moot.⁴⁷ Domicile has been considered by the Ninth Circuit as an appropriate measure to determine whether one has moved permanently to a new jurisdiction.⁴⁸

b. Changing Habitual Residence

Habitual residence may be changed when the family has manifested a settled intention to abandon a prior habitual residence, even if one parent had qualms about the move.⁴⁹ However, where a court finds verbal and physical abuse of a spouse, the conduct of the victimized spouse asserted to manifest consent must be carefully scrutinized because there is a chance that the victim's residence was coerced.⁵⁰ The Ninth Circuit has held that the intent to change habitual residence must be manifest by: an actual change in geography, the passage of an appreciable period of time which is sufficient for acclimatization.⁵¹ When parents no longer agree on where the children's habitual residence has been fixed, courts must look beyond the representations of the parties and consider all available evidence.⁵²

Even where it is determined that parents do not share a settled intention to adopt a new habitual residence, courts consider whether the child has grown accustomed, or "acclimatized,"⁵³ to life in a new country. In determining whether a child has acclimatized to a new environment, courts should be slow to infer from a child's new contacts that an earlier habitual residence has been abandoned.⁵⁴ The child must become settled insofar as the new residence supplants the old as the

⁴⁶ *Holder* 392 F.3d at 1016 (despite sister circuits finding a settled intent to acquire a new habitual residence based in part on the shipment of family possessions to a new location coupled with failure to maintain a residence in the former location, the court held that the parties lacked a settled intent to abandon the U.S. as the children's habitual residence and shift it to Germany, where the father petitioner was stationed).

⁴⁷ *Gaudin v. Remis*, 282 F.3d 1178, 1183 (9th Circuit 2002).

⁴⁸ *Gaudin v. Remis*, 379 F.3d 631, 637 (9th Circuit 2004).

⁴⁹ *Mozes*, 239 F.3d at 1076.

⁵⁰ *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1056 (E.D.Wash 2001).

⁵¹ *Mozes*, 239 F.3d at 1078.

⁵² *Holder*, 392 F.3d at 1017 (citing *Mozes*, 239 F.3d at 1076).

⁵³ *Holder*, 392 F.3d at 1019; *Mozes*, 239 F.3d at 1079.

⁵⁴ *Holder*, 392 F.3d at 1019; *Mozes*, 239 F.3d at 1079.

locus of the children's family and social development.⁵⁵ While physical presence is itself insufficient, acclimatization should not be confused with requiring acculturation.⁵⁶ Courts have also recognized it to be practically impossible for a very young child to acclimatize independent of the immediate home environment of the parents.⁵⁷

Consent to Change of Limited Duration. Where a child's translocation from an established habitual residence is intended for a limited duration, courts generally refuse to find a change in the child's habitual residence.⁵⁸ In cases where the petitioning parent consented to a stay abroad for an indefinite period of time, great deference is given to the fact-findings of the district court.⁵⁹

c. Habitual Residence and the Presence of Domestic Violence

Some courts have considered the presence of domestic violence as a factor in determining the place of a child's habitual residence, particularly in the way domestic violence affects the interpretation of "settled intent." A district court in Washington held that petitioning father's abuse of the respondent mother precluded the family from making Greece the country of the child's habitual residence, concluding that the parties lacked any mutual intent to change the child's habitual residence from the United States to Greece.⁶⁰ The court further found the respondent's behavior adversely impacted any potential acclimatization to Greece.⁶¹ A district court in Utah ruled that habitual residence necessarily entails an element of voluntariness in "settled purpose."⁶² The court found that the respondent and her child were detained in Germany by means of verbal, emotional and physical abuse and that such coercion "removed any element of choice and

⁵⁵ *Mozes*, 239 F.3d at 1080; see also *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D.Wash 2001) (although children attended school and began learning language, facts not sufficient to find change in habitual residence; children rarely socialized outside the family and remained with respondent virtually all day every day for 27 months until subsequent departure from Greece).

⁵⁶ *Holder*, 392 F.3d at 1019.

⁵⁷ *Holder*, 392 F.3d at 1020.

⁵⁸ *Mozes*, 239 F.3d at 1077; see also *Holder v. Holder*, 392 F.3d 1009, 1017 (9th Cir. 2004) (despite commitment to four-year tour of duty in Germany, move was conditional and family did not definitively leave old residence and reestablish residence in new location).

⁵⁹ *Mozes*, 239 F.3d at 1078; see also *Levesque v. Levesque*, 816 F.Supp. 662, 667 (D. Kan. 1993) (holding Germany became the child's habitual residence based on mutual intent to remain there for an "indefinite" period of time).

⁶⁰ *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D. Wash. 2001).

⁶¹ *Tsarbopoulos*, 176 F.Supp.2d at 1055.

⁶² *In re Ponath*, 829 F.Supp. 363 (D. Utah 1993).

settled purpose” which may be present in the family’s decision to visit Germany.⁶³

Other courts, however, have construed habitual residence more narrowly, and in at least one case from the Eighth Circuit, rejected the argument that the petitioner’s abuse of the respondent, in itself, should factor into a court’s assessment of intent for the purposes of habitual residence.⁶⁴

3. Custody Rights and Rights of Access

Custody Rights. Custody rights are defined as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”⁶⁵ If the petitioning parent does not possess custody rights and was not exercising those rights at the time of the child’s removal, the removal was not wrongful within the meaning of the Convention.⁶⁶

Custody rights have been broadly interpreted. One court explained, nothing in the Convention suggests the drafter intended anything other than the ordinary meaning of custody rights, generally defined as rights relating to the care of the person of the child, and in particular, the right to determine the child’s place of residence.⁶⁷

The exercise of custody rights has also been broadly construed. In the absence of a ruling from a court in the child’s habitual residence, a court may find the statutory language requiring “exercise” whenever a parent with custody rights keeps, or seeks to keep, any sort of regular contact with the child.⁶⁸

In an unpublished opinion, a Washington appellate court held that a guardian order confers rights of custody for the purposes of the Convention.⁶⁹

⁶³ *In re Ponath*, 829 F.Supp. at 367.

⁶⁴ *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995) (the court rejected the respondent’s argument that she because she was coerced, her residence was not voluntary, and concluded that courts should focus on the child in determining habitual residence, not the parent).

⁶⁵ Convention, Art. 5.

⁶⁶ *Gonzalez v. Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133 (2nd Cir. 2000). If no custody decree has been issued in the jurisdiction of the child’s habitual residence, a U.S. court must look to domestic law to determine whether it has authority to issue a custody order or whether it must defer to proceedings and the rule of law in another nation.

⁶⁷ *Croll v. Croll*, 229 F.3d 133, 139 (2nd Circuit 2000).

⁶⁸ *Friedrich v. Friederich*, 78 F.3d 1060, 1065 (6th Cir. 1996).

⁶⁹ *In re Parentage of C.A.M.A.*, 103 Wn. App. 1032, WL 1726964 (Wn. App. 2000) (the court ruled, however, although Germany was the child’s habitual residence, a German custodial decree awarding custody to a German youth office, did not confer rights to the exclusion of the parents; thus, the parent’s retention of the child in America was not wrongful).

Rights of Access. Courts distinguish between rights of custody and rights of access.⁷⁰ U.S. courts, including the Ninth Circuit, have found that access, or visitation rights to children do not confer custodial rights upon a parent and thus do not invoke return under the terms of the Convention;⁷¹ some of those courts have ruled similarly with reference to a *ne exeat* clause in a divorce agreement.⁷² However, a New York state court, in *David S. v. Zamira*,⁷³ upheld a Canadian court's finding that the violation of visitation rights may constitute a wrongful removal for the purposes of the Convention.⁷⁴ International courts have also held visitation rights, insofar as they confer rights to influence the child's actual residence, satisfy the Convention's definition of custody rights.⁷⁵

In an unpublished opinion, a Washington appellate court held that visitation rights do not trigger the Convention's return remedy, and found the *Zamira* case distinguishable, noting a restriction clause in the parties' separation agreement.⁷⁶ By contrast, the Washington court ruled, the custody order at issue in the Washington case contained no provision restricting the respondent's residence.⁷⁷

F. Exceptions to Ordering a Return under the Hague Convention

Two factors limit application of the Convention's defenses to a child's return. First, exceptions under the Convention are to be narrowly construed.⁷⁸ Second, even if the conditions for one of the exceptions are met, the

⁷⁰ The distinction is based on the notion of rights of custody and rights of access as identified in the Convention, Art. 5. The Convention further stipulates that "only a parent with rights of custody may petition a court for an order of return." Convention, Art. 12.

⁷¹ *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Circuit 2002).

⁷² See *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Circuit 2002); *Croll v. Croll*, 229 F.3d 133, 140 (2nd Circuit 2000). To vindicate breach of access rights, Article 21 of the Convention authorizes a parent who holds only access rights to submit an application to the Central Authority of the State to make arrangements for securing the exercise of rights of access. *Gonzalez*, 311 F.3d at 948.

⁷³ *In the Matter of David S. v. Zamira*, 151 Misc.2d 630, 574 N.Y.S.2d 429 (1991).

⁷⁴ *In the Matter of David S. v. Zamira*, 151 Misc.2d 630, 632-33, 574 N.Y.S.2d 429 (1991).

⁷⁵ *C. v. C.*, 2 All E.R. 465 (Eng. C.A. 1989). The court's larger conclusion has been followed by courts elsewhere, which held that if the custodial parent needs permission from the court or non-custodial parent before removing the child from the country, a removal without permission is wrongful. See *Thomson v. Thomson*, S.C.R. 551 (Can. 1994); *B. v. B.*, Fam. 32 (Eng. C.A. 1992). For a law review article considering the subject, see Merle H. Weiner. *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*. 33 Colum. Hum. Rts. L. Rev. 275 (2002).

⁷⁶ *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003).

⁷⁷ *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003).

⁷⁸ 42 U.S.C. § 11601(a)(4); Hague Convention on International Child Abduction, Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (1986); accord *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995).

Convention gives courts discretion to return the child to the country of habitual residence if return furthers the aim of the Convention.⁷⁹

1. Petitioner Consent or Acquiescence

The judicial authority of the requested State is not bound to order the return of the child if the person, institution or other body having the care of the person of the child had consented to or subsequently acquiesced in the removal or retention.⁸⁰

ICARA requires the respondent to demonstrate, by a preponderance of the evidence,⁸¹ that the petitioner consented to or subsequently acquiesced in the removal or retention.

Some courts, including one in the Ninth Circuit, distinguish between consent prior to removal and subsequent acquiescence, either of which may extinguish the right of return.⁸²

To establish acquiescence or consent, courts have required acts or statements with requisite formality, such as testimony in a judicial proceeding, a convincing written renunciation or rights, or a consistent attitude over a significant period of time.⁸³ The absence of any meaningful effort to obtain return of the child has been found by some courts to be sufficient to establish the exception.⁸⁴

A petitioner's repeated actions to locate the child, however, are inconsistent with any claim of acquiescence.⁸⁵ A respondent's act of concealing removal is inconsistent with any claim of consent.⁸⁶ Additionally, any allegation of prior consent is undermined by filing a petition pursuant to the Convention.⁸⁷ A petitioner's failure to

⁷⁹ Convention, Art. 18; Hague Convention on International Child Abduction, Text and Legal Analysis, 51 Fed. Reg. 10494, 10509 (1986); *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996).

⁸⁰ Convention, Art. 13(a).

⁸¹ 42 USC § 11603(e)(2)(B).

⁸² *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001) (appellate court found that the petitioning mother consented to removal and trial court did not err by not addressing the petitioner's argument that she did not subsequently acquiesce or that she revoked her consent after removal occurred). The distinction is also made in *Tabacchi v. Harrison*, 2000 WL 190576 (N.D. Ill 2000); *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) and *Levesque v. Levesque*, 816 F. Supp. 662, (D. Kan. 1993). The *Gonzales-Caballero* Court rejected the conflation of consent and subsequent acquiescence implied in *Currier v. Currier*, 845 F.Supp. 916 (D.N.H. 1994).

⁸³ *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996).

⁸⁴ *In re Ponath*, 829 F.Supp. 363, 368 (D. Utah 1993).

⁸⁵ *Furnes v. Reeves*, 362 F.3d 702, 724 (11th Cir. 2004); *accord Wanninger v. Wanninger*, 850 F.Supp. 78 (D. Mass. 1994).

⁸⁶ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).

⁸⁷ See *Tabacchi v. Harrison*, 2000 WL 190576 (N.D. Ill 2000); *Croll v. Croll*, 66 F.Supp.2d 554, 561 (S.D.N.Y. 1999).

exercise obligations under a custody agreement does not constitute consent where the agreement giving custody was rescinded before removal and the petitioner's subsequent action fails to show consent to removal.⁸⁸

2. Child Attains an Age of Maturity

The judicial authority of the requested State may 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 his or her views.⁸⁹

ICARA requires the respondent to prove by a preponderance of the evidence⁹⁰ the child has attained an age of maturity.

An opinion from the Ninth Circuit instructing a district court on remand noted the importance of a court ensuring a child's statements reflect his or her "own, considered views."⁹¹ Courts are given broad discretion in determining the sufficiency of the child's age and maturity and the extent to which a child's preference is viewed conclusively.⁹² Some courts, however, have narrowly construed the defense.⁹³ In a Ninth Circuit holding, the defense was not sustained when the child had not yet completed kindergarten.⁹⁴

In an unpublished opinion, a Washington appellate court found that the record of evidence was insufficient to overturn a trial court's finding that an 11 year-old was of sufficient age and maturity.⁹⁵

⁸⁸ *Currier v. Currier*, 845 F.Supp. 916, 922 (D.N.H. 1994); see also *Levesque v. Levesque*, 816 F.Supp. 662, 667 (D. Kan. 1993) (court failed to find acquiescence where petitioning parent revoked and rescinded a custody agreement prior to respondent's signature, and petitioner's subsequent action failed to show acquiescence).

⁸⁹ Convention, Art. 13. Note also that the Convention ceases to apply when the child attains the age of 16 years. Convention, Art. 4.

⁹⁰ 42 U.S.C. § 11603(e)(2)(B).

⁹¹ *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005).

⁹² *Blondin v. Dubois*, 238 F.3d 153, 166 (2nd Cir. 2001) (an eight-year old's views were properly considered as part of the analysis under the grave-risk exception; the court rejected drawing arbitrary lines due to age and that each child's circumstances should be considered individually).

⁹³ See *England v. England* 234 F.3d 268, 272 (5th Cir. 2000) (court held, given facts of the case, a 13-year was not sufficiently mature); *Tahan v. Duquette*, 259 N.J. Super. 328, 613 A.2d 486 (N.J. 1992) (court held that the standard simply does not apply to a nine year old).

⁹⁴ *Holder v. Holder*, 392 F. 3d 1009, 1017 (9th Cir. 2004).

⁹⁵ *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003).

3. Passage of One Year / Child Settled

A child who has been wrongfully removed or retained is presumed to be a habitual resident of the state from which the child is removed if, at the commencement of proceedings, a period of less than one year has elapsed from the date of the wrongful removal or retention. Even where the proceedings are commenced after the expiration of the period of one year, the court shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment.⁹⁶

ICARA requires the respondent to prove by a preponderance of the evidence⁹⁷ that the petitioner has delayed filing a petition for more than one year.

Generally, there must be no good reason for a delayed filing. For instance, the respondent must not conceal the child's whereabouts.⁹⁸ One circuit court ruled that the one year limit may be equitably tolled when a child is concealed.⁹⁹ In finding a child to be well-settled, courts cite children consistently attending school, establishing a social life, and the parent maintaining stable employment.¹⁰⁰ In an unpublished opinion, a Washington appellate court held that the exception applied, finding that a year had passed, the child's whereabouts were not concealed from the petitioner, and the child was well-settled.¹⁰¹

4. Petitioner Not Exercising Custodial Rights

The judicial 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 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.¹⁰²

⁹⁶ Convention, Art. 12.

⁹⁷ 42 U.S.C. § 11603(e)(2)(B).

⁹⁸ *Wojcik v. Wojcik*, 959 F.Supp. 413, 420 (E. D. Mich. 1997) (exception was established with court concluding: one-year time period elapsed between wrongful retention and commencement of action, child settled in environment, and respondent did not conceal whereabouts of child).

⁹⁹ *Lops v. Lops*, 140 F.3d 927, 945 (11th Cir. 1998) (court cited concealment as one of the factors in equitably tolling the one year provision).

¹⁰⁰ *Wojcik v. Wojcik*, 959 F.Supp. 413, 420 (E. D. Mich. 1997). Where the defense was not established, one court concluded a three-year old and one-year old were too young to forge friendships and were not yet involved in school, community, or social activities. *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 433 (N.Y.Fam.Ct.1991).

¹⁰¹ *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003) (the court held that no evidence established the child was not well-settled, as he adjusted to life and school in Washington and spends time with the family of his mother, the respondent.)

¹⁰² Convention, Art. 13(a).

ICARA requires the respondent to prove by a preponderance of the evidence¹⁰³ that the petitioner was not actually exercising custodial rights at the time of removal or retention.

Exercising custodial rights has been broadly construed. Under the Convention, 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 short of acts that constitute clear and unequivocal abandonment of the child. Once a court determines that the parent exercised custody rights in any manner the court should avoid the question of whether those rights were exercised well or badly.¹⁰⁴

5. Grave Risk

The judicial authority of the requested State is not bound to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.¹⁰⁵

ICARA requires the respondent to demonstrate, by clear and convincing evidence,¹⁰⁶ that the return of the child would expose the child to a grave risk. Considerable inconsistency exists between the way state, district, and federal appellate courts have interpreted the grave risk defense.

The defense is narrowly construed. Courts have indicated that the defense was not intended to be used as a vehicle to litigate the child's best interests or place the child where he or she would be happiest.¹⁰⁷ Rather, it is a question of whether, if returned, the child will suffer serious abuse.¹⁰⁸ While the defense is often cited in situations where the respondent alleges abuse by the petitioner, some courts may not consider the defense if a separate defense is raised and established.¹⁰⁹ A number of courts have refused to apply the defense, even if evidence

¹⁰³ 42 USC § 11603(e)(2)(B).

¹⁰⁴ *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996).

¹⁰⁵ Convention, Art. 13(b).

¹⁰⁶ 42 USC § 11603(e)(2)(A).

¹⁰⁷ Hague Convention on International Child Abduction, Text and Legal Analysis, 51 Fed.Reg. 10494, 10510 (1986); *Gaudin v. Remis*, 415 3d. 1028 (9th Cir. 2005); *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (ruling the exception is not license to speculate on where the child would be happiest).

¹⁰⁸ *Gaudin v. Remis*, 415 3d. 1028, 1034 (9th Cir. 2005) (citing *Blondin v. Dubois*, 238 F.3d 153, 163 (2nd Cir 2001)).

¹⁰⁹ See *Wojcik v. Wojcik*, 959 F.Supp. 413, 421 (E.D. Mich. 1997).

demonstrates the return would risk physical harm to the petitioner, concluding the harm must be directed at the child.¹¹⁰

In remanding a case to the district court, the Ninth Circuit opined that the grave risk inquiry should be concerned only with the degree of harm which could occur in the immediate future.¹¹¹

a. Domestic Violence and the Risk of Return

Some courts have held that the existence of domestic violence would constitute a sufficiently grave risk of physical or psychological harm if the child was returned. Courts routinely consider evidence of past physical and/or psychological abuse to the child, and to some extent, the parent, as well as the likelihood of harm to the child upon return. However, in finding the defense established, determinations have not been made from uniform fact patterns.¹¹² A district court in Washington State, finding the defense established, held that spousal abuse is a factor to consider in determining whether grave risk applies because of the potential that the abuser will also abuse the child.¹¹³

Additionally, even where a child is found to face a grave risk if returned, courts require a comprehensive analysis of alternative care arrangements and legal safeguards that would facilitate safe repatriation, as well as the abilities of the authorities in the

¹¹⁰ A district court in Puerto Rico held that there was no grave risk because abuse was not directed at the child and did not have the intensity of the petitioner in *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (see footnote 113). *Aldinger v. Segler*, 263 F. Supp.2d 284. A district court in Illinois held that while the return would pose physical risk to the petitioning mother, physical and psychological risks to the child were not conclusively established. *Tabacchi v. Harrison*, 2000 WL 190576 (N.D. Ill 2000);

¹¹¹ *Gaudin v. Remis*, 415 3d. 1028, 1036 (9th Cir. 2005) (the court further noted that 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).

¹¹² Courts finding the defense established include: *Blondin v. Dubois*, 238 F.3d 153 (2nd Cir. 2001) (if returned, children would face a recurrence of traumatic stress disorder considering petitioning father's past physical abuse of spouse was also directed at the child; court also found that France unable to provide necessary protection); *Walsh v. Walsh*, 221 F.3d 204 (1st Circuit 2000) (even though Ireland would issue appropriate protective orders, the appellate court noted the father's history of violating court orders and repeated abuse of the respondent found a return would pose a grave risk to the children; the court also noted that the district court inappropriately discounted the psychological harm to children in spousal abuse); *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456 (D. Md. 1999) (petitioning father had considerable history of physical and psychological abuse of child).

¹¹³ *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057 (E.D. Wash. 2001) (sufficient evidence suggested petitioning father's past abuse of children would pose grave risk of physical and psychological harm; court found resources in Greece insufficient to ensure child safety).

child's habitual residence to enforce any such arrangement.¹¹⁴ The Ninth Circuit has suggested the question to be resolved, in examining the totality of circumstances, is whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction while avoiding the grave risk of harm that would otherwise result from living with the petitioner.¹¹⁵

Also, international courts considering the petitioner's abuse of the mother have held that the child's return would present a grave risk to the child, and subsequently denied requesting petitions.¹¹⁶

b. Social Context: Domestic Violence and the Convention

1) Focus on Left-Behind Parent

The Convention drafters focused on the rights of the left-behind parent, based on a view that the abducting parent is generally the non-custodial father.¹¹⁷ This construction has produced an inaccurate picture of child abduction by ignoring the situations where either abduction does not harm the child or the harm experienced from abduction is significantly less than that which would result if the abduction had not taken place.¹¹⁸

2) Level of Domestic Violence in International Abductions

While existing studies suggest the presence of domestic violence in cases of international abduction, few studies have provided detailed information regarding the full

¹¹⁴ Analysis of the available protections in the child's habitual residence is considered in cases considering grave risk. However, the extent of the required analysis is not uniform; courts engaging in or requiring a more thorough analysis include: *Gaudin v. Remis*, 415 3d. 1028,1035 (9th Cir. 2005); *Blondin v. Dubois*, 238 F.3d 153 (2nd Cir. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D. Wash. 2001); *Turner v. Frowein*, 253 Conn. 312, 752 A.2d 955 (Conn. 2000); *Tahan v. Duquette*, 259 N.J. Super. 328, 613 A.2d 486 (N.J. 1992).

¹¹⁵ *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005) (citing *Blondin v. Dubois*, 189 F.3d 240, 249 (2nd Cir. 1999)).

¹¹⁶ See *Pollastro v. Pollastro*, [1999] D.L.R. 848 (Ontario, Canada 1999) (an Ontario appellate court held that the child's interests are inextricably tied to the mother's psychological and physical security; moreover, the court cited a series of risks resulting from the child's exposure to domestic violence).

¹¹⁷ Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*. 69 Fordham L. Rev. 593. (2000); see also Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*. Violence Against Women. Vol. 11 No. 1. 115-138. (2005).

¹¹⁸ Weiner, 69 Fordham L. Rev. at 617-18.

extent to which international abductors are actually victims escaping domestic violence.

Recent research indicates that approximately one third of all published and unpublished Convention cases (identified using online legal databases) include a reference to family violence, and 70% of those include details of adult domestic violence.¹¹⁹ According to a frequently cited study conducted in the United States, in cases of abduction, the majority (54%) involved parent-to-parent domestic violence.¹²⁰ 30% of the left-behind parents admitted to either being violent toward other family members or had been accused of it.¹²¹ A separate domestic study revealed that mothers who abducted were more likely to take the children when they or the children were victims of abuse, and fathers who abducted were more likely to take the children when they were the abusers.¹²²

3) Impact of Domestic Violence on a Child

When a child is a victim of an assault or battery by a family member, the child abuse is obvious. However, recent research and social science suggests that a child's exposure to domestic violence may also have short and long-term consequences which may constitute a grave risk to the child's development. In particular, two areas of emerging social science research point to the risks a child faces in circumstances where domestic violence occurs: the increased risk of physical harm and the impact of exposure on the child's development. At least one American court has recognized the exposure to domestic violence as a sufficient risk to preclude the child's return under the Convention.¹²³

While exposure to domestic violence can negatively impact children, arguments are made that domestic violence can be addressed in the country of the child's

¹¹⁹ Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*. Violence Against Women. Vol. 11 No. 1. 115-138, 120 (2005).

¹²⁰ *Id.* at 121(citing G.L. Grief & R.L. Hegar, *When Parents Kidnap: The Families Behind the Headlines*. New York: Free Press (1993).

¹²¹ *Id.* (citing *Grief and Hegar* at 268-269).

¹²² J.R. Johnston, I. Sagutun-Edwards, M. E. Bloomquist, and L.K. Girdner, *Prevention of Family Abduction Through Early Identification of Risk Factors*. Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Washington, D.C. (2000).

¹²³ *See Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).

habitual residence. However, many countries signatory to the Convention have inadequate domestic violence laws or ineffective law enforcement.¹²⁴

a) Grave Risk to the Child: Risk of Physical Harm

Evidence suggests that children who are exposed to adult domestic violence are at a greater risk of physical harm than children who are not. Reviews of the co-occurrence of documented child maltreatment in families where adult domestic violence is also occurring have found a 41% median co-occurrence of child maltreatment and adult domestic violence in families.¹²⁵ The majority of studies found a co-occurrence of 30% to 60%.¹²⁶

b) Grave Risk to the Child: Impact on Development

Nearly 100 published studies report associations between exposure to domestic violence and current child problems or later adult problems even where the child is not directly abused.¹²⁷ For instance, several studies report that children exposed to adult domestic violence exhibit more aggressive and antisocial behaviors as well as fearful and inhibited behaviors.¹²⁸ Exposed

¹²⁴ Weiner, 69 Fordham L. Rev at 624 (citing Bureau of Democracy, Human Rights, and Labor, U.S. Department of State. *Country Reports on Human Rights*. (1999)). Victims may not be able to ensure safety because the victim has no place to go in the interim, does not speak the local language, may not have access to transportation or social service resources, may have no support, or may believe accessing legal redress will increase the immediate danger to herself and to her child. *Id.*

¹²⁵ A. E. Appel & G.W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*. *Journal of Family Psychology*. 12. 578-599 (1998).

¹²⁶ Jeffrey L. Edleson. *The Overlap Between Child Maltreatment and Woman Battering*. *Violence Against Women*. Vol. 5. 134-54 (1999).

¹²⁷ See Jeffrey L. Edleson. *Children's Witnessing of Adult Domestic Violence*. *Journal of Interpersonal Violence*. 14. 839-870 (1999); J. W. Fantuzzo, J.W. & W.K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*. *The Future of Children*, 9. 21-32 (1999); G. Margolin, *Effects of Witnessing Violence on Children*. In P.K. Trickett and C.J. Schellenbach (Eds.), *Violence Against Children in the Family and the Community*. American Psychological Association, Washington, D.C. 57-101 (1998).

¹²⁸ Sudha Shetty & Jeffrey L. Edleson. *Adult Domestic Violence in Cases of International Parental Child Abduction*. *Violence Against Women*, Vol. 11 No.1, 115-138, 126 (2005) (citing Fantuzzo, J.W., Depaola, L.M., Lambert, L., Martino, T., Anderson, G., and Sutton, S. *Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children*. *Journal of Consulting and Clinical*

children showed lower social competence¹²⁹ and were found to show higher than average anxiety, depression, trauma symptoms, and temperament problems than children not exposed.¹³⁰ These impacts have been shown to vary depending on the degree of violence, exposure, the presence of additional risk factors, such as substance abuse by caregivers, and protective factors, such as a protective parent or other adult.

6. Return Would Violate Human Rights

The return of the child may be refused if not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.¹³¹

ICARA requires the respondent to demonstrate, by clear and convincing evidence,¹³² that the return of the child would violate fundamental principles of human rights.

No courts in the United States have used this defense as a justification for denying a return under the Convention. Internationally, however, a Spanish court refused a return on the basis of violating human rights and freedoms where it determined a fleeing mother would be deprived of due process in the courts of the child's habitual residence.¹³³ Also, two Australian courts have endorsed the defense in dicta.¹³⁴

An analysis performed by the United States State Department claims that Article 20 was meant to be "restrictively interpreted and applied ... on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."¹³⁵ Courts which have ruled against application of the Article 20 defense

Psychology, 59 (1991). 258-265; Hughes, H.M. *Psychological and Behavioral Correlates of Family Violence in Child Witness and Victims*. American Journal of Orthopsychiatry, 58 (1988) 77-90.

¹²⁹ *Id.* at 126 (citing J.L. Adamson and R.A. Thompson, *Coping With Interparental Verbal Conflict by Children Exposed to Spouse Abuse and Children from Nonviolent Homes*. Journal of Family Violence, 13 213-232 (1998).

¹³⁰ *Id.*

¹³¹ Convention, Art. 20.

¹³² 42 USC § 11603(e)(2)(A).

¹³³ *In Re S.*, Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a.

¹³⁴ Dep't Families Youth & Cmty. *Care v. Bennett* 26 Fam. L. R. 71 (Fam. Ct. Austrl. 2000); *State Cent. Auth. v. Ardito* (Fam. Ct. Austrl. 1997) (No. ML 1481/97)

¹³⁵ Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed.Reg. 10,494, 10,510 (1986).

have cited the State Department's analysis to support a strict reading of Article 20.¹³⁶

Advocates have discouraged a strict interpretation of Article 20, arguing that the State Department's analysis extends the text of Article 20 and in fact, conflicts with the drafter's intent to include violations of parent's rights as well.¹³⁷ They argue that the phrase, "fundamental principles relating to the protection of human rights and fundamental freedoms," is ambiguous because the "fundamental principles" are undefined by Article 20.¹³⁸ However, these principles of the requested state can be established through an observation of other domestic and international laws, treaties, and constitutions concerning human rights and domestic violence.¹³⁹ As provided by the phrase "would not be permitted" a court can refuse return where there is a violation of any basic human right protected by these legal instruments.¹⁴⁰

G. Recognition and Enforcement

1. Full Faith and Credit

Courts must accord full faith and credit to the judgment of any other U.S. court with jurisdiction that orders or denies the return of a child pursuant to the Convention.¹⁴¹

*Common Law Doctrine of International Comity.*¹⁴² ICARA appears to limit full faith and credit to judgments of courts within the United States;¹⁴³ however, nothing in ICARA or its legislative history indicates that Congress intended to bar United States courts from giving foreign judgments deference under principles of international

¹³⁶ *Hazbun Escaf v. Rodriquez*, 200 F.Supp.2d 603 (E.D.Va.2002); *Aldinger v. Segler*, 263 F.Supp.2d 284, 290 (D.P.R. 2003).

¹³⁷ Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 707-9 (2005).

¹³⁸ *Id.* at 711-14.

¹³⁹ Merle H. Weiner, *Using Article 20*, 38 Fam. L.Q. 583, 590 (2005).

¹⁴⁰ Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 711-12 (2005).

¹⁴¹ 42 USC § 11603(g). Although ICARA calls for "full faith and credit" to the judgments of "any other such court...in an action brought under this chapter," judgments rendered by a foreign court are not entitled to full faith and credit as a general matter. American courts will nevertheless accord "considerable deference to foreign adjudications as a matter of comity." *Velez v. Mitsak*, 89.S.W.3d 73, 82-83 (Tex.App. 2002).

¹⁴² International comity is described as neither a "matter of absolute obligation...nor of mere courtesy and good will"... but as "the recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). See also *Restatement (Third) of the Foreign Relations Law of the United States* § 481 (1987).

¹⁴³ 42 USC § 11603(g).

comity.¹⁴⁴ Moreover, ICARA specifically recognizes the need for uniform international interpretation of the Convention.¹⁴⁵

2. Res Judicata and Collateral Estoppel

A federal appellate court has held that ordinary principles of claim and issue preclusion do not apply to claims under ICARA and the Convention.¹⁴⁶ Federal courts adjudicating Hague Convention petitions must accord full faith and credit only to the judgments of those state or federal courts that actually adjudicated a Hague Convention claim.¹⁴⁷ For instance, the Ninth Circuit rejected a petitioner's argument that a Convention proceeding should be precluded by a custody determination in the removed-to country which preceded the Hague petition.¹⁴⁸

H. Fees and Costs

The Convention and its enabling legislation require a court to order the respondent to pay the petitioner's necessary expenses if the court orders the return of the child¹⁴⁹ unless such an award would be "clearly inappropriate."¹⁵⁰

Reimbursable expenses must be reasonably necessary, not clearly inappropriate, and have been incurred during the course of the proceedings in the action.¹⁵¹

No provision in the Convention or ICARA awards fees to a prevailing respondent.

¹⁴⁴ *Diorinous v. Mezitis*, 237 F.3d 133, 142 (2nd Circuit 2001). However, a long-recognized exception is that comity will not be afforded when it would be contrary to the public policy of the forum. This was a position taken in *Malik v. Malik*, 638 A.2d 1184 (Md. Ct. Spec. App. 1994), which involved a custody proceeding. Relying upon the decision in *Malik*, a Washington state appellate court concluded that even if a foreign court had jurisdiction to enter a custody decree, the Washington court could deny enforcement if it determined the foreign proceedings were conducted in a manner that offended Washington law and public policy. *Noordin v. Abdulla*, 947 P.2d 745, 759-62 (Wn App. 1997).

¹⁴⁵ 42 USC § 11601(b)(3)(B).

¹⁴⁶ *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir. 2002).

¹⁴⁷ *Holder* at 864 (applying 42 U.S.C. § 11603(g)).

¹⁴⁸ *Holder v. Holder* at 863-64 (9th Cir. 2002).

¹⁴⁹ The Convention, Article 26; 42 U.S.C. § 11067

¹⁵⁰ 42 U.S.C. § 11607(b)(3).

¹⁵¹ 42 U.S.C. § 11607(b)(3); *Lebiedzinski v. Crane*, 2005 WL 906368 (D. Alaska).

APPENDIX A

Convention on the Civil Aspects of International Child Abduction

(Concluded October 25, 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 organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State 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 organizing 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 recognized 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 organizing 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 organizing 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 legalization 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 authorization 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 organizing 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 authorized 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 (ICARA)

Sec. 11601. 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.

References in Text

This chapter, referred to in subsec. (b), was in the original 'this Act' meaning Pub. L. 100-300, Apr. 29, 1988, 102 Stat. 437, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

Short Title

Section 1 of Pub. L. 100-300 provided that: "This Act (enacting this chapter and amending section 663 of this title) may be cited as the 'International Child Abduction Remedies Act'."

Sec. 11602. 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 11606(a) of this title.

Sec. 11603. 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.

Sec. 11604. 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 11603(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 11603(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.

Sec. 11605. Admissibility of Documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 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.

Sec. 11606. 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.

Sec. 11607. 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 11603 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 11603 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.

Sec. 11608. 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.

Sec. 11609. 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.

Sec. 11610. 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.

42 USC §§ 11601-11610