NEW YORK WOMEN'S BAR ASSOCIATION
MATERIAL AND FAMILY LAW COMMITTEE
THE HAGUE CONVENTION ALMOST TWENTY TWO YEARS
LATER- A LOOK AT THE CONVENTION, IT CHANGES AND
WHERE WE ARE TODAY
WHAT LANGUAGE CAN WE PUT IN OUR STIPULATIONS AND
AGREEMENTS TO PROTECT CLIENTS AND CHILDREN
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Introduction

The Hague Convention of 25 October 1980 on the Civil Aspects of International
Child Abduction is a multilateral treaty, which seeks to protect children from the harmful
effects of abduction and retention across international boundaries by providing a
procedure to bring about their prompt return.

The United States ratified the Hague Convention on the Civil Aspects of International
Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 ("Hague Convention") on July 1,
1988. Congress implemented the Hague Convention by passing the International Child
Abduction Remedies Act ("ICARA"). That Act sets forth the procedures applicable to
handling actions brought in the United States pursuant to the Hague Convention.

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On July 1, 2008, it was the 20th Anniversary of the ratification of the Hague Convention for the United States. When this Convention first began, 23 countries had ratified or acceded to the treaty. As of now, 85 countries have signed on to the treaty. This is a remarkable accomplishment.

The Convention is to be given uniform international interpretation. 42 U.S.C. 11601. The opinion of sister signatories to the Convention are entitled to significant weight. Air France v. Saks, 470 U.S. 392, 404 (1985). Although a court of first instance may not be bound by the decisions of courts in other states or by the manner in which a treaty has been interpreted in other nations, Ex parte Charlton, 185 F. 880, 886 (D.N.J. 1911), aff’d 229 U.S. 447 (1913) [33 S. Ct. 945, 57 L. Ed. 1274], a proper regard for promoting uniformity of approach in addressing a treaty of this kind requires that the views of other courts receive respectful attention. Tahan v. Duquette, 259 N.J. Super. 328 (1992) [613 A. 2d 486]. “Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.” Chocotaw Nation of Indians v. United States, 318 U.S. 423, 431-432 (1943); Air France v. Saks, 470 U.S. 392, 396 (1985); Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) [113 S. Ct. 2549, 2565-67, 125 L.Ed. 2d 128].

In every action brought for the return of a child under the terms of the Convention, the central legal question is whether there has been a wrongful removal or retention of the child. The burden of proof of wrongful retention or removal is on the petitioner and the standard of proof required is by a preponderance of the evidence. If a
wrongful removal or retention is established, the Convention mandates the return of the child subject to a limited number of narrowly defined defenses.

ICARA was designed as a tool for the left-behind parent to obtain assistance from foreign governmental adjudicating authorities to locate the child and quickly determine where the custody hearings should take place. Under ICARA, the adjudicating tribunal does not have the authority to determine custody issues, unless one of the Convention’s Article XIII defenses can be invoked. As such, potential conflicts are less likely because a Country Addressed is not empowered by ICARA to resolve custody disputes.

As our society becomes increasingly globally connected through the ease of international air travel, the advent of the internet, and the strength of international commerce, it is inevitable that family relationships will also enjoy international diversity. However, when parents from diverse national origins decide to dissolve their matrimonial ties, parental preferences concerning where to raise the children of that marriage can result in conflict. In response to the growing problem of international child abduction, approximately 80 countries have now adopted the Hague Convention on the Civil Aspects of International Child Abduction [Hague Convention].\(^2\) Since the Treaty is fairly new in the United States, the attorney's job is often twofold. First, the attorney must, as always, represent his or her client vigorously. Second, the attorney is often

faced with the task of educating both the bench and the bar on the provisions and the proper application of the Convention.

**Abduction of the Child[ren]**

A parent in a Contracting State who discovers that his or her child[ren] has been wrongfully abducted to the United States or is being wrongfully retained in the United States usually contacts the Central Authority in the United States or in the State of the child[ren]'s habitual residence. Either Central Authority will mail the Petitioner a **Request for Return** form which will be filled out and returned to that Central Authority. The United States Central Authority also forwards a pamphlet called "International Parental Child Abduction." If the **Request for Return** has been filed with a foreign Central Authority it will be forwarded to the United States Central Authority.

Once the United States Central Authority has received the **Request for Return**, a Central Authority representative who handles cases from the child[ren]'s state of habitual residence, will try to put the Petitioner in touch with a lawyer in the state in which the child[ren] is most likely being retained.

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3 Hague Convention, *supra* note 1, 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.").

4 Hague Convention, *supra* note 1, Art. 8 (Lists all information that must be included on the **Request for Return** form).

5 Alternatively, the Petitioner may apply for return directly to the United States Central Authority, the United States Department of State Bureau of Consular Affairs in Washington, D.C. or contact an attorney in the United States directly to assist in filing a **Request for Return** in the United States.

6 Available from the U.S. Department of State.

7 The term "habitual residence" will be discussed in depth under the heading "Building the Case."

8 It is of course preferable to retain an attorney who has experience with the Hague
During the initial phone contact, the Petitioner will generally relate to the attorney his or her version of the story of the abduction or retention. The attorney should then explain the Petitioner's options.\(^9\) Often the abducting parent has obtained an *ex parte* Order of Protection, Restraint or even Temporary Custody in the United States.\(^10\) Such *ex parte* Orders are common in Hague Cases.\(^11\) The abducting spouse often seeks the protection of the courts in his or her "new" country by alleging spousal abuse, child abuse or fear of re-abduction.\(^12\) These Orders and proceedings may be stayed by the court entertaining the Hague Petition upon the bringing of an Order to Show Cause (discussed later). Such a stay is permitted, but not required. See *Mahoney v. Mahoney*, supra.

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\(^9\) Such options may include the following: trying to obtain a voluntary return which can be negotiated by the Central Authority or an attorney; trying to settle out of court, which is easier on the children and less expensive; or filing a formal **Notice of Petition Under the Hague Convention** and **Petition for Return of Children to Petitioner Under the Hague Convention**.

\(^10\) Hague Convention, *supra* note 1, Article 17 (The sole fact that a decision relating to custody has been given or entitled to recognition in the requested state, is not grounds for refusing to return the child[ren] under the Convention.); *Meredith v. Meredith*, 759 F.Supp. 1432 (D.Ariz1991), *Mahoney v. Mahoney* 02 CIV 981 (So. Dist NY Briant J. 2002)

\(^11\) Oftentimes the Petitioner has not been served with these *ex parte* orders, so the attorney should make a diligent effort to determine what procedural moves the abducting parent has taken in the United States. This will be most important if the left-behind parent comes to the United States and attempts to see the child[ren]. If there is an order keeping the Petitioner away from the abductor and/or the child[ren], the police may become involved and thereby complicate matters even further.

\(^12\) One judge sitting on a Hague case said he would be surprised to find a case involving children and parents where there was no accusation of abuse.
Role of the Fax Machine

The International Child Abduction Remedies Act (ICARA)\textsuperscript{13} establishes the procedures for the implementation of the Hague Convention in the United States. One of the more useful provisions of ICARA can be found in §6 whereby the rules of evidence are relaxed for Hague Convention cases.\textsuperscript{14} §6 provides that documents need not be authenticated in order to be admitted into evidence in a Hague case,\textsuperscript{15} therefore, the fax machine may be the lawyer’s best friend in one of these cases. Due to distance problems and speed requirements\textsuperscript{16} in Hague Convention cases, the United States courts have permitted documents with copies of signatures to be entered into evidence. The attorney may also fax his or her retainer agreement to the potential client and receive a signature within minutes. The client and the attorney can then make

\textsuperscript{13} International Child Abduction Remedies Act, 42 U.S.C. 11601 et. seq. Public Law 100-300 100th Congress [H.R. 3971, 29 April 1988].

\textsuperscript{14} Id., 42 U.S.C. 11605, §6 (“With respect to any application to the United States Central Authority, or any petition to a court under section 4, 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.”).

\textsuperscript{15} Id.

\textsuperscript{16} Hague Convention, supra note 1, Article 1 (It is the purpose of the Convention to secure a prompt return of abducted children.); see also, Hague Convention, supra note 1, Article 11 (“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.”); see also, Hague Convention, supra note 1, Article 11 (A Hague Convention case should not exceed a six (6) week period from the date of commencement of the action until the proper authority has decided the case.).
arrangements for the retainer fee to be deposited directly into the attorney’s trust account by wire deposit. Representation can then start within a short period time.

**Expedited Proceedings.**

The Convention’s drafters envisioned a streamlined process that would lead to the abducted child’s prompt return to his or her habitual residence. The Convention provides that “[c]ontracting [nation-]States shall act expeditiously in proceedings for the return of children. The goal of ICARA is that the Country Addressed will reach a decision as to where the custody hearings will take place within six weeks. If a determination has not been made in six weeks, then “[t]he applicant or the Central Authority of the requested State . . . shall have the right to request a statement of the reasons for the delay[ed proceedings].” Moreover, a reply from the Country Addressed shall be provided as to the reason for the delayed proceedings.

In a case involving the return of children to a parent in Mexico, the *March* court interpreted the term “prompt” to apply to the nature of the court proceedings. This ruling was confirmed by the appellate court. The *March* court stated that “[ICARA] provides a generous authentication rule.” “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.” The *March* court clarified that, “the provision served to expedite rulings on petitions for the return of children wrongfully removed or retained. Expeditious rulings are critical to ensure that the purpose of the treaty—prompt return of wrongfully removed or retained children—is fulfilled.”
**Civil and Nonexclusive Remedy.**

ICARA is intended as a civil remedy. Although the term “wrongful abduction” suggests criminal conduct, ICARA is not designed as an extradition treaty. Unlike the extradition process, where the criminal is returned to the United States to face charges, ICARA was enacted to facilitate return of the child to the nation of habitual residence. Upon the child’s arrival at the location of habitual residence, the courts of the habitual residence may further resolve custody disputes.

In addition, ICARA is a nonexclusive remedy. The Convention provides the Central Authority with “the power… to order the return of the child at any time.” For instance, in *Zajaczkowski*, the court ordered the prompt return of the child, adopting the writ of habeas corpus as a procedural device to be used in conjunction with ICARA remedies.

**Elements of a Cause of Action under the Convention**

In order to have a cause of action for return it must first be determined that the Convention is applicable to the particular case. Certain elements must first be met in order for the Convention to apply; i.e. the child[ren] sought must be under sixteen years of age and have been wrongfully removed or retained away from the habitual residence of the child[ren]. The Convention does not apply if either the country of

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18 Hague Convention, *supra* note 1 Article 4

19 Hague Convention, *supra* note 1 Article 3.
habitual residence of the child[ren] or where the child[ren] is being retained is not a signatory to the Convention.\textsuperscript{20}

**Building the Case**

The attorney representing the left-behind parent must show, by a preponderance of the evidence,\textsuperscript{21} that a child[ren] under the age of sixteen (16) years\textsuperscript{22} was removed from the child[ren]'s state of habitual residence,\textsuperscript{23} in breach of a right of custody attributable to the Petitioner\textsuperscript{24} which the Petitioner had been exercising\textsuperscript{25} at the time of the wrongful removal.\textsuperscript{26} Note that Article 12\textsuperscript{27} permits the authority, hearing the case, to refuse to return a child[ren] who was wrongfully removed or retained if the Petitioner waited more than one year after the removal or retention to file the **Petition**\textsuperscript{28} and the child[ren] is settled in its new environment. The court, however, may still order a return,  


\textsuperscript{21} ICARA, *supra* note 12, 42 U.S.C. 11603(e), §4.

\textsuperscript{22} Hague Convention, *supra* note 1, Article 4.

\textsuperscript{23} Hague Convention, *supra* note 1, Article 1.

\textsuperscript{24} Hague Convention, *supra* note 1, Articles 3 and 5.

\textsuperscript{25} Hague Convention, *supra* note 1, Article 3.

\textsuperscript{26} Hague Convention, *supra* note 1, Article 1.

\textsuperscript{27} Hague Convention, *supra* note 1, Article 12.

\textsuperscript{28} This one year time period does not bar a Petitioner from bringing a case, but instead adds to the Respondent's defense that the child[ren] is well settled in his or her new state. This will be discussed further.
if it finds it appropriate, even if the child[ren] is settled in its new environment and more than one year has passed.

Analyzing a Case

The primary thing to remember when dealing with alleged international child abduction cases is that a proceeding under the Hague Convention and ICARA is not a custody proceeding; it is a proceeding to compel the return of the child to his country of habitual residence so that the courts of that country can determine questions relating to custody of that child. Article 3 of the Hague Convention provides that, in order to prevail on a claim, a petitioner must show: 1) That the child was habitually resident in one nation and has been removed to or retained in a different country; 2) That the removal or retention was in breach of the petitioner’s custody rights under the law of the country of habitual residence; and 3) That the petitioner was exercising those rights at the time of the removal or retention. The petitioner must establish these requirements by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1)(A).

Once wrongful removal is shown, return of the child is “required” unless the respondent establishes one of four defenses: 1) The proceeding was commenced in the responding state more than one year after the wrongful removal or retention, and “the child is now settled in its new environment” (Article 12); 2) The party now seeking return of the child was not actually exercising custodial rights at the time of the wrongful removal or retention of the child; or there was consent to the removal; or there was acquiescence
to the retention (Article 13 (a)); 3) The return of the child would expose him or her to physical or psychological harm “or otherwise place the child in an intolerable situation” (Article 13(b)); or the child objects to being returned and is of such age and maturity that it is appropriate to take account of his views (Article 13 (b)); and/or 4) That human rights and fundamental freedom would be abridged if the return were permitted (Article 20).

**Habitual Residence: Circuits Disagree**

Article 35 of the Convention states that a petitioner cannot invoke the protection of the Hague Convention unless the child to whom the petition relates is “habitually resident” in a State signatory to the Convention and has been removed to or retained in a different signatory State. Once this is established, the petitioner must then show that the removal or retention was “wrongful.” (Note: Article 4 of the Convention limits its application only to children less than 16 years old who have been “habitually residing” in a contracting state immediately before the breach of custody or access rights, and ceases to apply on the day when the child attains the age of 16.)

This article might at first seem clear enough, but because interpretation of the term “habitual residence” was left to the courts and not defined by the Convention, there has been a constant flow of litigation over its definition. A number of U.S. Circuit Courts have held that it should not be confused with domicile. See, e.g., Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993); Mozes v. Mozes, 239 F.3d 1067 (9th Cir., 2001). Several foreign courts have even held that the subject children in cases brought before them did not have a habitual residence. W and B v. H (2002) 1 FLR 1008 (United Kingdom - Family Division - 2002); see also Robertson v. Robertson (1997) 1998 SLT 468, 1997
A look at the developing case law in the U.S. is necessary because the Circuits have not agreed on a test for defining a child’s “habitual residence.”

**A Child-Centered Inquiry**

In *Friedrich v. Friedrich*, 983 F.2d 1396, 1401-1402 (6th Cir. 1993), the Sixth Circuit opined that the British courts had provided the most complete analysis of “habitual residence,” in absence of guidance in the Convention. The *Friedrich* court was referring to *In Re Bates*, High Court of Justice, Family Division, Royal Courts of London, No. CA.122/89, in which Great Britain’s High Court of Justice concluded that there is no real distinction between “ordinary residence” and “habitual residence.” That court offered a word of caution with regard to decisions as to habitual residence: “It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common-law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.” Of course, this offers the attorney representing a party to a Hague Convention proceeding little guidance.

The Sixth Circuit in *Friedrich* agreed with the *Bates* court that habitual residence must not be confused with domicile. It concluded that to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions. On its face, habitual residence pertains to customary residence prior to the
removal, so the court must look back in time, not forward. The child’s habitual residence can be “altered” only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal. Friedrich has been followed by the Fourth (see Miller v. Miller, 240 F.3d 392, (4th Cir., 2001)) and Eighth Circuits; (Rydder v. Rydder, 49 F.3d 369 (8th Cir., 1995)).

In Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995), the Third Circuit took note of the Friedrich and Bates decisions, pointing out that in Friedrich the court focused on the child, “look[ing] back in time, not forward.” It also considered and found In re Bates instructive for the principle that there must be “a degree of settled purpose.” The purpose may be one or there may be several and might include education, business or profession, employment, health, family or merely love of the place. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as “settled.” The Third Circuit established the rule in Feder that a child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a “degree of settled purpose” from the child’s perspective. A determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there. See also Delvoye v. Lee, 329 F.3d 330 (3d Cir. 2003), cert. denied, 124 S. Ct. 436 (U.S. 2003); Whiting v Krassner, 391 F3d 540 (3rd Cir, 2004); Application of Adan, 437 F.3d 381 (3rd Cir. 2006).

A Parent-Centered Inquiry
In *Mozes v Mozes*, 239 F.3d 1067 (9th Cir., 2001), the Ninth Circuit engaged in a detailed analysis of the problem. It held that the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind. One need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad that was originally intended to be temporary. Nor need the intention be expressly declared, if it is manifest from one’s actions; indeed, one’s actions may belie any declaration that no abandonment was intended. If you’ve lived continuously in the same place for several years on end, for example, the court would be hard-pressed to conclude that you had not abandoned any prior habitual residence. On the other hand, one may effectively abandon a prior habitual residence without intending to occupy the next one for more than a limited period. Whether there is a settled intention to abandon a prior habitual residence is a question of fact. In those cases where it is necessary to decide whether an absence is intended to be temporary only, the *Mozes* court found that the intention that has to be taken into account is that of the person or persons entitled to fix the place of the child’s residence — in most cases, the parents or parent with custody. Although the Hague Convention is interested in the habitual residence of only the child, the Ninth Circuit recognized in *Mozes* that it would seem illogical to focus on the child’s intentions, as, “[c]hildren ... normally lack the material and psychological wherewithal to decide where they will reside.” When the persons entitled to fix the child’s residence no longer agree on where it has been fixed, the representations of the parties cannot be accepted at face value, and courts must determine from all available evidence whether the parent petitioning for return of a child has already agreed to the child’s taking up habitual residence where it is. The Seventh
and Eleventh Circuits have adopted the reasoning of the Ninth Circuit in *Mozes v. Mozes*. See *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir., 2004); *Koch v. Koch*, 450 F.3d 703 (7th Cir., 2006).

Despite a willingness to determine “habitual residence” by the parents’ intent, the Second Circuit took the inquiry a step further to find that evidence of acclimatization may suffice to establish a child’s habitual residence, despite uncertain or contrary parental intent; If the child’s life has become so firmly embedded in the new country as to make the child habitually resident there, that finding will trump even lingering parental intentions to the contrary. *Gitter v. Gitter*, 396 F.3d 124 (2d Cir., 2005). The *Gitter* court held that in determining a child’s habitual residence, a court should first inquire into the shared intent of those entitled to fix the child’s residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, however, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents’ last shared intent.

While the shared intent of the parents normally controls the habitual residence of the child, courts must also inquire whether the available evidence “unequivocally points to the conclusion that the child has acclimatized to [a] new location and thus has acquired a new habitual residence” notwithstanding the parents’ intentions. *Id*. To determine if a child has acclimatized to her new location, courts “must consider if requiring return to the original forum would now be tantamount to taking the
child out of the family and social environment in which its life has developed. Only in relatively rare circumstances will the child’s acclimatization to a new location be so complete that serious harm to the child can be expected to result from compelling [her] return to the family’s intended residence.” Daunis v. Daunis, 222 Fed. Appx. 32, 34 (2d Cir. 2007) (internal citations and quotation marks omitted). Therefore, “courts should be ‘slow to infer’ that the child’s acclimatization trumps the parents’ shared intent.” Gitter, 396 F.3d at 134 (citing Mozes v. Mozes, 239 F.3d 1067, 1079 (9th Cir. 2001)).

Conclusion

In sum, Friedrich and Feder, and the circuits that follow them, engage primarily in a fact-based analysis, focusing on the customary residence of the child prior to his removal. In these circuits, the court’s analysis focuses on the child. The Eighth Circuit followed this reasoning in Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003), in which it held that habitual residence is to be determined by focusing on the settled purpose from the child’s perspective immediately before the removal or retention, although parental intent is also taken into account.

In contrast, the Second and Ninth Circuits, and the circuits that follow them, do not equate habitual residence with customary residence. Instead, they focus on the importance of intentions (normally the shared intentions of the parents or others entitled to fix the child’s residence) in determining a child’s habitual residence. When the persons entitled to fix the child’s residence no longer agree on where it has been fixed, courts must determine from all available evidence whether the parent petitioning for
return of a child has already agreed to the child’s taking up habitual residence where it is.

While the decision to alter a child’s habitual residence depends on the settled intention of the parents, it requires an actual change in geography, and requires the passage of an appreciable period of time, one that is sufficient for acclimatization. The Second Circuit takes this further by holding that courts should inquire into the shared intent of those entitled to fix the child’s residence at the latest time that their intent was shared, but although this should normally control, courts should also inquire as to whether the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents’ latest shared intent.

**Habitual Residence**

The attorney has to prove that the child[ren] was removed from or retained away from the country of habitual residence

Of the child[ren]. Habitual residence was purposely left undefined by the drafters of the Convention in order to leave room for judicial interpretation and flexibility and in order to prevent mechanical application of the term.  

Friedrich v. Friedrich 78 F3d 1060 (6th Cir. 1996) held that a person having valid custody rights to a child under the law of the country of the child’s habitual

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29 Hague Convention, *supra* note 1, Article 4 (“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody of access rights.”).

residence cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once it determines that the parent exercised custody rights in any manner, the court should stop - completely avoiding whether the parent exercised the custody rights well or badly. 

In Sealed Appellant v Sealed Appellee --- F.3d —, 2004 WL 2915345 (5th Cir.(Tex.)) the Fifth Circuit Court of Appeals adopted the reasoning from Friedrich II and held that in the absence of a ruling from a court in the child's country of habitual residence, when a parent has custody rights under the laws of that country, even occasional contact with the child constitutes "exercise" of those rights. To show failure to exercise custody rights, the removing parent must show the other parent has abandoned the child. It held that under the law of Australia, the children's country of habitual residence, the father was "exercising" his rights of custody when the mother removed the children. It also held that no custody suit need be pending for the mother's removal to be wrongful under the Convention.

In Croll v Croll, 229 F.3d 133 (2d Cir.2000), Mrs. Croll removed her daughter from Hong Kong to the United States in violation of her custody agreement with Mr. Croll. Mr. Croll filed an ICARA petition seeking her return to Hong Kong. Under their agreement, Mrs. Croll maintained sole "custody, care, and control" of the child, and Mr. Croll had a right of "reasonable access." The agreement also provided that the child "not be removed from Hong Kong until she attains the age of 18 years" without leave of court or consent of the other parent. The district court concluded that this non-exeat clause created rights of custody under the Convention and granted Mr. Croll's petition. In reversing, the Croll majority relied on three main conclusions: (1) that Mr.
Croll's ne exeat right was not a right to determine the child's place of residence, but only a limitation on Mrs. Croll's right to determine the child's place of residence; (2) that his ne exeat right could not be exercised absent removal; and (3) that the history and drafters' intent of the Hague Convention supported the view that a ne exeat right was not custodial. The Second circuit held that a ne exeat right is not custodial. In reaching its view that the ne exeat right was only a limitation, the Court relied in part on how the particular agreement gave Mrs. Croll the sole "custody, care, and control" of the child, and thus the sole right to determine her place of residence within Hong Kong. Justice Sonya Sotomayor wrote an extensive dissent in this matter and later it was reversed in the Recent United States Supreme Court in the case of *Abbott v. Abbott* 130 S.Ct. 1983, 176 L.Ed.2d 789, 78 USLW 4373, 10 Cal. Daily Op. Serv. 5983, 2010 Daily Journal D.A.R. 7161, 22 Fla. L. Weekly Fed. S 317. The Fourth and Ninth Circuits had agreed with this conclusion. (See *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir.2003), cert. denied --- U.S. ----, 124 S.Ct. 805, 157 L.Ed.2d 732 (2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 954 (9th Cir.2002), but these cases have now been reversed on the issues of right of custody. 

In *Furnes v Reeves*, 362 F.3d 702 (11th Cir., 2004), the Eleventh Circuit distinguished Croll because it involved Norwegian law and Plaintiff Furnes's ne exeat right had to be be considered in the context of his additional decision-making rights by virtue of his joint “parental responsibility” under Norwegian law. In reaching its view that the ne exeat right was only a limitation, the Croll majority relied in part on how the particular agreement in Croll gave Mrs. Croll the sole "custody, care, and control" of the child, and thus the sole right to determine Christina's place of residence within Hong
Kong. The Eleventh Circuit noted that under Norways "Children Act", parental responsibility is broadly defined to include the right "to make decisions for the child in personal matters." Where parents exercise "joint parental responsibility" but the child lives with only one parent, the parent with whom the child resides has decision-making authority "concerning important aspects of the child's care," but not all aspects of the child's care. While the parent with whom the child resides has the authority to determine where the child will live within Norway, the Children Act grants a parent with joint parental responsibility, decision-making authority over whether the child lives outside Norway. Both parents must consent to the child moving abroad. This joint parental responsibility effectively gave the father the right, generally referred to as a "ne exeat" right, to determine whether the child could live outside of Norway with her mother. The Eleventh Circuit held that Furnes's rights to his daughter under Norwegian law were the type of rights that entitled him to the return of his child under the express terms of the Hague Convention. The court held that "rights of custody" included "rights relating to the care of the person of the child," and in particular, "the right to determine the child's place of residence." Furnes's ne exeat right granted him the substantive right (albeit a joint right) to determine whether the child lives within or outside Norway, and thus the right to determine jointly with Reeves the child's place of residence. This ne exeat right in the context of Furnes's retained rights constitutes a "right of custody" as defined in the Convention.

Habitual residence is not defined by a specified period of time, it is more a state of being or a state of mind.\textsuperscript{31} In that regard, it differs from the "home state" analysis

\textsuperscript{31} Perez-Vera, \textit{supra} note 21.
under the UCCJA and the PKPA\textsuperscript{32} which clearly uses six (6) months as a benchmark. Habitual residence can technically be established after only one day.\textsuperscript{33} "The leading view is that habitual residence is the permanent physical residence of the child as distinguished from the legal residence or domicile."\textsuperscript{34} If a family decides to move, permanently, to another country and thereafter the parents sell the family home, quit their jobs and purchase a residence in another country, the family has effectively changed the habitual residence of the child[ren].\textsuperscript{35} Therefore, if one parent then decides the move was not what he or she really wanted, the child[ren] cannot simply and unilaterally be removed from the "new" habitual residence.\textsuperscript{36}

To establish a basis for asserting habitual residence the attorney must carefully gather all relevant data from the client. This may appear to be an obvious instruction, but it can often prove to be a difficult task. Aside from the common difficulties involved in getting unfavorable details from a client, the Hague attorney may confront cultural and lingual differences that hinder the communication process. Oftentimes it is difficult to explain to a client, in his or her second language, that the Hague proceeding is not a custody proceeding at all. The attorney must carefully explain that the Hague hearing

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\textsuperscript{32} PKPA, \textit{supra} note 38.
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\textsuperscript{33} Although a decision in the New York Supreme Court, Kings County (Cohen v. Cohen, Index No. 22490/93, August 1993) posed, but left unanswered, the following question, ". . .whether one party may change their mind as to a move to another country and thereby negate an apparent change in the child's habitual residence.''
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\textsuperscript{35} \textit{D'Assignies v. Escalante}, (No. BD 051876, Super. Ct. of Cal. December 9, 1991) (citing \textit{In re Bates}, HighCourt of Justice, Family Division, United Kingdom; February 23, 1989). \textit{Mahoney v. Mahoney}, \textit{supra}
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\textsuperscript{36} \textit{Cohen v. Cohen}, \textit{supra} note 31, But see \textit{Diorinou v. Mezitis} 237 F3d 133 (2d Cir, 2001) where other parent acquiesced to change of residence.
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will determine only where the custody hearing should take place, not who will have custody of the child[ren]. The attorney will also find that this rule must be reinforced time and again as the client insists on describing how negligent the other parent can be and has been.

To avoid certain misunderstandings, the attorney should attempt to collect any and all documents regarding the family such as affidavits from teachers and neighbors regarding how "settled" the child[ren] were in the foreign jurisdiction. To accomplish this, it may be necessary for the client to contact his or her foreign lawyer in order to obtain the pertinent documents.\(^{37}\)

The attorney has other sources of information that he or she may not be aware of. The Central Authority in the child[ren]'s state of habitual residence may have documents on record that will assist the attorney in building his or her case. For instance, the attorney may discover that it is difficult to show that the client had a right of custody of the child[ren] at the time of the removal. Based on information from the government and the American Embassy, the foreign Central Authority may be able to gain access to documents that the attorney and client cannot.

The issue of habitual residence can be a controlling factor as to whether an abduction will apply under the Hague Convention. In one case, *Santiago v. Lopez*\(^{38}\), the court ruled that children, who lived with their parents on a United States military base in Germany for nine years, were not habitual residents of Germany. In contrast, in a more recent Federal Court of Appeals case, *Friedrich v. Friedrich*\(^{39}\), the court ruled that under

\(^{37}\) If the client does not have an attorney in his or her home country, it may be necessary to have the client obtain foreign counsel in order to make access to necessary documentation quicker and simpler.

\(^{38}\) Index No.71083-91 (S.Ct.of New York, County of Bronx, August, 1992).

\(^{39}\) 983 F.2d. 1396 (6thCir.1993), 78 F3d 1060 (6th Cir, 1996)
the case of *Dare v. Secretary of the Air Force*[^40], children living on an army base were habitual residents of the country in which the base was located[^41].

**Rights of Custody and Rights of Access**

A right of custody and/or a right of access "may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[^42] For example, if custody has already been awarded to one parent then that parent has a right of custody. If the other parent has been granted visitation rights, then that parent has a right of access. This right of access, though, is not sufficient in and of itself to qualify as a right of custody sufficient to order a return under the Convention. In a very controversial case, the Second Circuit in a 2-1 decision ruled in the case of *Croll v. Croll* that a *ne exeat* order did not give a “right of custody” under the treaty[^43]. In a stinging dissent, Justice Sotomayor is critical of the majority looking at “right of custody” as a pure custody terminology. The *Croll* decision was distinguished in a First Circuit Case, *Whallon v. Lynn*,[^44] the court discusses that *Croll’s* *ne exeat* clause was one of a negative right and in this case the *ne exeat* was a positive right. There were two cases before the Supreme Court on Petition for Certiorari asking for a right to argue for a uniform decision on the “rights of


[^41]: This is true regardless of the fact that the parents may be citizens of another country or domiciled outside that country. In point of fact, military personnel retain, as their legal residence, their last place of residence prior to entry into service.

[^42]: Hague Convention, *supra* note 1, Article 3; see *Roy Peter Costa v. Debra Jean Costa*, (U.K. 1991) High Court of Justice, Family Division CA 518/91; see also *In re C*

“custody”. The Supreme Court had never taken a case involving the Hague Convention until January 12, 2011 when it heard the arguments on the case of Abbott v. Abbott 130 S.Ct. 1983, 176 L.Ed.2d 789, 78 USLW 4373, 10 Cal. Daily Op. Serv. 5983, 2010 Daily Journal D.A.R. 7161, 22 Fla. L. Weekly Fed. S 317. The Supreme Court finally took the first two Hague Cases of Abbott v. Abbott and Duran v. Beaumont. 130 S.Ct. 3318, 176 L.Ed.2d 1216, 77 USLW 3369, 78 USLW 3687, 78 USLW 3009, 78 USLW 3678. Both cases had decided that a ne exeat order is not a right of custody. However in the first case ever to be heard by the Supreme Court on any issue involving the Hague Convention, The Supreme Court, Justice Kennedy, held that father’s ne exeat right granted by Chilean family court was a “right of custody,” under Hague Convention, abrogating Croll v. Croll, 229 F.3d 133, Fawcett v. McRoberts, 326 F.3d 491, Gonzalez v. Gutierrez, 311 F.3d 942. Both cases were remanded to the Circuit Court for trial only on the issues of the exceptions to the treaty for returning children. The majority opinion in Furness v. Reeves, supra held the day and is the law of the land. Justice Sotomayor whose dissented in Croll was vindicated in this opinion and she was in the majority on Abbott, supra.

If one parent suspects that the other might abduct the child[ren], that parent may obtain a court order that prevents the other parent from leaving the jurisdiction with the child[ren]. This is known as a ne exeat order. This too may give the parent a right of custody as defined by Article 3 and 5 of the Hague Convention.45

44 Whallon v. Lynn 2000WL1610609 (1st Cir, 2000)
45 Hague Convention, supra note 1, Article 3 & 5; see Costa supra note 40, but see
There are times however when the notion of who has a right of custody becomes clouded.\textsuperscript{46} If parents are married and have not begun any divorce or custody proceedings, and thus have \textbf{joint custody}, the United States views them as having an equal right of custody of the child[ren]. However, this may not be true in other countries. In a situation where the child was born out of wedlock, many countries will give a superior right of custody to the mother. Custody rights are defined by the laws of the country of the child's habitual residence,\textsuperscript{47} so the attorney may have to do some research into rights of custody and access in the foreign jurisdiction prior to filing the petition.

A parent does not have to have actual physical custody to be exercising rights of custody. Decisions regarding the child's well-being, including the right to determine the place of residence of the child[ren], are considered rights of custody.\textsuperscript{48} In the case of \textit{Costa v. Costa},\textsuperscript{49} the court found that, "the right to determine a child's place of residence is therefore included among the rights of custody to which Article 3 applies."\textsuperscript{50} Therefore, if a court or a parent must approve a relocation of a child[ren], that very fact gives rise to a recognizable non-custodial "right of custody" within the meaning of the Convention.\textsuperscript{51}

\textit{Croll v. Croll} supra note 41.

\textsuperscript{46} It, therefore, becomes the job of the attorney to explain to the judge that the right of custody can mean different things.


\textsuperscript{48} Hague Convention, \textit{supra} note 1 Article 5.

\textsuperscript{49} \textit{Costa} supra note 40.

\textsuperscript{50} \textit{Id}.

\textsuperscript{51} \textit{Costa}, \textit{supra} note 40, but see \textit{Croll v. Croll}, \textit{supra} Note 41.
In an Australian case, C v. C, the court found that a clause in a custody order stating that "neither the husband or the wife shall remove the child from Australia without the consent of the other..." was sufficient to find that the father had rights of custody. Although the father did not have the right to determine the place of residence within Australia, he did have the right to decide whether the child remained in Australia or lived anywhere outside that country.

In some instances, it may be beneficial to obtain a custody decree prior to applying for return of the child[ren] under the Convention. An order which is based, in part, upon a finding that there was a wrongful removal or retention within the meaning of Article 3 may speed up the process of return. Even if there is a custody decree, the Convention does not require its enforcement or recognition; "it only seeks to restore the factual custody arrangements that existed prior to the wrongful removal or retention."

Custody rights must have actually been exercised by the left-behind parent at the time of the breach by the abducting parent, or would have been exercised but for the breach, in order for the Convention to apply. The burden is on the petitioner to prove that his or her custody rights were or would have been exercised. The burden is on the party opposing return to prove the nonexercise of custody rights.

53 Id.
54 Id.
56 Hague Convention, supra note 1, Article 17.
58 Id.
59 Hague Convention, supra note 1, Article 13.
For example, in Meredith v. Meredith\(^{60}\), Mrs. Meredith brought an action under the Hague Convention, in the United States, claiming that her child was wrongfully removed from England by the child's father. Mrs. Meredith had taken her child to France, on December 7, 1989, with the consent of the child's father. A few weeks later, she telephoned her husband and notified him that she would not be returning to Arizona with their child. Instead, she moved to England without notifying her husband and, with the help of her family, concealed her whereabouts from him.

On April 26, 1990, Mr. Meredith was awarded custody by an Arizona court after Mrs. Meredith had been served with notice, through her parents, and given an opportunity to be heard to which she had not responded. A month later, Mr. Meredith, with the help of an attorney in England, regained physical custody of the child and brought her back to the United States. It was after the child's removal that Mrs. Meredith filed a petition under the Convention.

The Court determined that Mrs. Meredith only had physical possession of the child rather than legal rights of custody at the time of the removal, even though prior to the custody order both parents had legal custody and denied her petition.\(^{61}\)

**Article 15 Ruling - Decision of Wrongful Removal or Retention**

Under Article 15, the Treaty provides that the judicial or administrative authorities, prior to issuing an order for the return of the child[ren], can request that the authorities of the state of habitual residence of the child[ren] issue a decision stating that the removal or retention was **wrongful** under their laws.\(^{62}\) It is very helpful to have the Central Authority or the court of the foreign country issue such a determination prior to bringing the petition for return, if possible. It can be argued that this determination,


\(^{61}\) Id. at 1436.

\(^{62}\) Hague Convention, *supra* note 1 Article 15.
though not binding, is certainly persuasive evidence on the issue of wrongful removal. If this has not been done in advance and the judge requests it, this could further unduly delay the return of the child[ren] until such a determination is rendered.

**Immigration and the Hague Convention**

The Hague Convention on the Civil Aspects of International Child Abduction focuses on issues of residency, not citizenship. It is important to note that the Convention does not confer any immigration benefit. Anyone seeking to enter the United States who is not a United States citizen must fulfill the appropriate entry requirements, even if that person was ordered by a court to return to the United States. This applies to children and parents involved in any child abduction case including a Hague Convention case.

When a taking parent in a Hague Abduction Convention case is ineligible to enter the United States under United States immigration laws, the parent may be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole in order to participate in custody or other related proceedings in a United States court.
Drafting the Hague Convention Papers

It is important to stress that time is of the essence in a Hague Convention case. The lawyer may and should begin drafting the petitioning papers immediately. The actual Hague Petition generally requires only a small amount of case specific information and therefore may be drafted before meeting with the client in the United States. For these purposes, the information in the Request for Return is often sufficient. The Petitioner usually wishes to come to the United States as soon as possible in order to see the child[ren]. In such a case it is necessary to obtain a stay of any Orders of Restraint or Protection quickly. Note that immediate contact with the abducting parent may not be advisable if the Petitioner believes the abductor may again flee with the child[ren]. The attorney should use his or her best judgment.

Warrant in Lieu of Writ of Habeas Corpus

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

ORDER FOR ISSUANCE OF WARRANT IN LIEU OF WRIT OF HABEAS CORPUS


Hague Convention, supra note 1, Article 11 (The Convention requires that Hague cases proceed promptly and expeditiously); Hague Convention, supra note 1, Article 12 (Creates an additional defense if an action is not brought within one year between the abduction and the date of filing the Petition for Return.); Also, the more swiftly the attorney acts, the less time there is for the abducting parent to learn of the proceedings and re-abduct or secrete the child[ren].
Upon the reading and filing of the PETITION FOR RETURN OF THE CHILD PURSUANT TO THE CONVENTION and the International Child Abduction Remedies Act and Petitioner’s PETITION FOR A WARRANT IN LIEU OF WRIT OF HABEAS CORPUS, it appears that (NAME OF CHILD[REN]) are persons under sixteen (16) years of age, are illegally held in custody, confinement or restraint by (NAME OF ABDUCTING PARENT) (and her family) at (specific location of child[ren]) and from which it appears that a Warrant should issue in lieu of Writ of Habeas Corpus.

ORDERED, that a Warrant of Arrest issues out of and under the Seal of the [name of court] directed to any peace officer within the State of [name of state where the are being held] commanding the peace officer to take into protective custody (NAME OF CHILD[REN]) and release (NAME OF CHILD[REN]) to the Petitioner or his/her agent; and it is further

ORDERED, that this case shall be heard at a hearing scheduled on the ___ day of ___, at ___ o’clock in the fore/afternoon of that day at _____________________, or as soon thereafter as counsel may be heard; and it is further

ORDERED, that the peace officer serve a copy of the following listed documents on [NAME OF ABDUCTOR] and execute and deliver to Petitioner the appropriate proof of service thereof:

(1) Warrant In Lieu of Writ Habeas Corpus; and

(2) Notice of Petition Under Hague Convention; and

(3) Petition For Return of Child[ren] To Petitioner.

ORDERED, that Petitioner or his agent shall not remove (NAME OF CHILD[REN]) from the (name of the state) pending further order of this Court, and it is further,

ORDERED, that this Order gives any peace officer within the (name of state) the authority to search [name of place Petitioner believes the child[ren] are being held], or any other place where (NAME OF CHILD[REN]) are reasonably believed to be present, for the purpose of determining whether (NAME OF CHILD[REN]) are present.

J. S. C.
Notice of Petition Under the Hague Convention

The next likely document to be drafted is the Notice of Petition. This document provides the abducting parent with the following: the case caption naming the Petitioner and Respondent; the existence of the Hague Convention and ICARA; the date, place and time of the hearing; notice that Respondent’s personal appearance is required at the Hague hearing; and the attorney’s address and telephone number.

The following is a good model:

NOTICE OF PETITION UNDER HAGUE CONVENTION

NOTICE is hereby given to ________ , that a PETITION FOR RETURN OF CHILD[REN] (Copy attached) has been filed with the ______ Court of the State of ______, County of ___.

A hearing on this matter will be held at ________ at the Courthouse located at ________ on the __ day of ___, 199___, or as soon thereafter as counsel may hear.

YOU ARE ORDERED TO APPEAR PERSONALLY AT THE HEARING.

Dated:

TO: Respondent

Attorney, Esq.

________________________

64 See generally, Hague Convention, supra note 1.

65 See generally, ICARA, supra note 12.

66 The Notice of Petition can be copied almost directly from a previous Notice. They do not change very much from case to case.
**Petition for the Return of the Child[ren] to Petitioner**

Finally, the attorney **must** prepare, file and serve the **Petition for Return of the Child[ren] to Petitioner**. This document is generally broken down into sections. The **Preamble** informs the court that the Petitioner is moving under the Hague Convention and that the text of the Hague Convention and ICARA are annexed with the papers. The objectives of the Hague Convention, which are to secure a prompt return of the abducted child[ren] and to ensure that the rights of the Petitioner in one Contracting State are respected by other Contracting States, should also be clearly stated. The most important thing for a lawyer to keep in mind when drafting papers for a Hague Convention case is that, more often than not, the primary purpose of the papers is to educate both the bench and the bar on the Hague Convention.

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67 The **Petition for Return** can be copied from a previous Petition. The form need not change from Petition to Petition.

68 Such sections include: **Preamble; Jurisdiction; Status of Petitioner and Child[ren]; Removal and/or Retention of Child[ren] By Respondent; Custody Proceedings in [Name of country from which child[ren] were abducted]; Relief Requested; Notice of Hearing; Attorneys' Fees and Costs (Convention Article 26 and/or 42 U.S.C. 11607).**


70 Hague Convention, supra note 1, Article 1(b); see also Id. at ¶II B 16.

71 See, Hague Convention, supra note 1, Article 19 (Such an education will involve, among other things, informing the presiding justice and your opposing counsel that the Hague Convention is only to determine what Contracting State has jurisdiction over any and all custody issues. This will become most important when your opposition begins to defend against the Hague Petition. If the judge allows issues of custody to be tried, the purpose of the Hague Convention is defeated. Remember, first and foremost, the Hague is a jurisdictional Convention!)
Under the heading Jurisdiction, the attorney should simply state that ICARA gives the U.S. courts jurisdiction over the case.\textsuperscript{72}

The third heading is the Status of Petitioner and Child. Here the attorney sets forth the elements of the cause of action. The Hague Convention applies to cases where a child under the age of sixteen (16) years\textsuperscript{73} has been removed from his or her state of habitual residence,\textsuperscript{74} in breach of right of custody of Petitioner\textsuperscript{75} which the Petitioner had been exercising\textsuperscript{76} at the time of the wrongful removal or retention.\textsuperscript{77} The attorney should annex a copy of the original [Request for Return] form with the Petition.

The section entitled Removal and/or Retention of Child[ren] by Respondent sets forth, generally, the approximate date of the alleged abduction and states that the abduction was wrongful under Article 3 of the Hague Convention.\textsuperscript{78} This section of the Petition may be written very generally by merely stating the existence of a right of custody, but the issue will become more complicated at the Hague hearing where opposing counsel may defend against the Petition by alleging that the Petitioner never had any right of custody.\textsuperscript{79} This will be covered in more depth under the heading "Defenses to the Hague Convention."

\textsuperscript{72} ICARA, \textit{supra} note 12, 43 U.S.C. 11603(a), §4 ("JURISDICTION OF THE COURTS.-The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.").

\textsuperscript{73} Hague Convention, \textit{supra} note 1, Article 4.

\textsuperscript{74} Hague Convention, \textit{supra} note 1, Article 1.

\textsuperscript{75} Hague Convention, \textit{supra} note 1, Articles 3 and 5.

\textsuperscript{76} Hague Convention, \textit{supra} note 1, Article 3.

\textsuperscript{77} Hague Convention, \textit{supra} note 1, Article 1.

\textsuperscript{78} Hague Convention, \textit{supra} note 1, Article 3 (This is the client's cause of action. A removal or retention is considered wrongful where: ":(a) it is in breach of rights of custody attributed to a person, ..., under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or
Finally, this section should state as specifically as possible where the Petitioner believes the child[ren] are being held in the United States and that the child[ren]'s habitual residence is the foreign jurisdiction.

Custody Proceedings in [name of country] should reference (and annex) any papers regarding proceedings in the State of habitual residence, including orders or decrees issued by the courts of that state. Here the attorney should cite Article 16 which gives the court entertaining the Hague Petition the authority to stay other proceedings regarding the same parties and the same child[ren]. This may also be done by an Order to Show Cause filed in the same Court and served upon the Respondent.

Provisional Remedies refers to requests such as the Warrant in Lieu of Habeas Corpus which is based upon the belief that the abducting parent will again remove and secrete the child[ren].

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79 Hague Convention, supra note 1, Article 3 ("The rights of custody mentioned in subparagraph (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." Such rights include: orders of protection and/or restraint issued by the State of habitual residence; orders of custody either temporary or permanent; equal rights of custody attributable to both parents as a matter of law; and rights of visitation.).

80 Again, note that the ex parte orders are no more determinative than any United States order. See note 6.

81 Hague Convention, supra note 1, Article 16 ("After receiving notice of the wrongful removal or retention of a child under Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which the child 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.").
The section called Relief Requested can be drafted like any court order. For instance the attorney may choose to respectfully request the following: (a) an order directing a prompt return; (b) the issuance of a warrant; (c) the direction of notice; (d) an order staying other proceedings; (e) an order directing Respondent to pay Petitioner's costs and fees; and (f) any other and further relief . . . .

The attorney should, under the heading Notice of Hearing, state the law under which notice is being given. For example, "pursuant to 42 U.S.C. 11603(c)\(^{82}\) the Respondent shall be given notice according to" and then state the appropriate law.

The Hague Convention makes a provision for attorney fees.\(^{83}\) The attorney may want to ask for fees under the heading Attorney's Fees and Costs [Including Transportation Expenses] Pursuant to Convention Article 26 and/or 42 U.S.C. 11607) and submit a bill for fees incurred to date in the case.\(^{84}\) If this strategy is taken, a request should also be made for the court to reserve judgment over any further fees.

The above documents can be verified by the client via fax, therefore, the papers may be drafted, filed and served without the client having to be present in the United States.\(^{85}\)

\(^{82}\) ICARA, supra note 8, 42 U.S.C. 11603(c), §4 ("NOTICE.-Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.").

\(^{83}\) Hague Convention, supra note 1, Article 26.

\(^{84}\) When an Order for Return is granted, the court is required to order the person who removed or retained the child[ren] to pay the necessary expenses incurred by and on behalf of the petitioner "including court costs, legal fees, foster home or other care during the course of the proceedings in the action and transportation costs related to the return of the child unless the respondent establishes that such order would be clearly inappropriate" 42 U.S.C. §11607(b)(3).

\(^{85}\) For those clients who are unable to read english, remember to alter the verification to say, "The above referenced papers have been read to me. . . ."
Choosing a Forum

Any court of competent jurisdiction can entertain a Hague Convention case. Usually cases are brought in state court because most attorneys who practice family law are more familiar with state courts, however, ICARA gives both federal and state courts jurisdiction over Hague Convention cases. Therefore, the attorney should carefully consider where the Petition should be brought. Since the Federal courts do not normally hear custody cases, a federal judge may be better able to look solely at the legal issue of jurisdiction, as required by the Convention, without becoming clouded by the custody issues. "Local law regarding ultimate issues of custody are inappropriate and irrelevant." However, the practitioner may still feel more comfortable in the state courts in which he or she normally practices.

If an attorney chooses to bring the action in state court, he or she should consider different local or state courts that handle family cases. For instance, a local court or judge may be perceived to display bias toward a local abducting parent. In that case it may be wiser to bring the action in federal court. Although a case could be brought in either the Federal or the State Courts, there have been various methods used to try to remove the case from a particular court. A case brought in the State Court may be removed to the Federal Court under the Federal Removal Statute. Further, a case could be denied a hearing in the Federal Court under the Younger Abstention Doctrine.

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86 ICARA, supra note 9, 42 U.S.C. 11603(a) & (b).
88 In Matter of Makmoud 1997 WL 43254 (ED NY Dearie,J 1997)
89 Grieve v. Tamerin 269 F3d 149, (2nd Cir. 10/17/2001)
Serving the Respondent

ICARA provides that notice of a Petition under the Hague Convention must be effectuated according to "the applicable law governing notice in interstate child custody proceedings."\(^90\) In the United States, the relevant federal law is the Parental Kidnapping Prevention Act [PKPA]\(^91\) which dictates that the Uniform Child Custody Jurisdiction Act [UCCJA] \(^92\) governs the issue of notice.\(^93\) The UCCJA requires that "reasonable notice and an opportunity to be heard" be provided to the Respondent.\(^94\) This does not specifically require personal service, but in a Hague Convention case, the Notice of Petition and the Petition for Return should ideally be personally served in order to forestall any notice challenge. Of course this is not always possible, especially if the Respondent's whereabouts are unknown.

Often times the Respondent is staying with family in the United States and the Petitioner has a good idea of where to begin looking for the Respondent and the child[ren]. In a case like this, service may be simple. Additionally, frequently the abducting party has availed him or herself of the local courts and obtained an ex parte order which has been served upon the client. When appearing at any scheduled hearing, with or without your own stay, it is easy to serve the Petition on the Respondent or the Respondent's attorney.

Defenses and Exceptions Under the Hague Convention and Rebutting Those Defenses

Defenses

\(^{90}\) ICARA, supra note 12, 42 U.S.C. 11603(c), §4.


\(^{92}\) Uniform Child Custody Jurisdiction Act [hereinafter UCCJA].

\(^{93}\) PKPA, supra note 37, 28 U.S.C.A. 1738A [?].

\(^{94}\) Domestic Relations Law §75-e (McKinney's Consolidated Laws of New York).
Articles 12, 13 and 20 of the Hague Convention provide the defenses available to the Respondent in a Hague case. Such defenses include alleging that: the Petitioner had no right of custody or access at the time of the removal or retention; the Petitioner was not exercising his or her right of custody; the Petitioner acquiesced to the removal or retention; there is grave risk that a return would expose the child to harm or an intolerable situation; the child is of appropriate age and degree of maturity and objects to the return; the child is settled in the new environment; and/or a return would not be permitted by "the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."

These exceptions however, in light of Article 19, are narrowed to prohibit the making of custody decisions at this level. Article 19, therefore, should be kept in mind to rebut issues and testimony that border on issues of custody and parental fitness.

95 Hague Convention, supra note 1, Article 12.
96 Hague Convention, supra note 1, Article 13.
97 Hague Convention, supra note 1, Article 20.
98 Hague Convention, supra note 1, Article 3.
99 Hague Convention, supra note 1, Article 3.
100 Hague Convention, supra note 1, Article 13(a).
102 Hague Convention, supra note 1, Article 13.
103 Hague Convention, supra note 1, Article 12.
104 Hague Convention, supra note 1, Article 20.
105 Hague Convention, supra note 1, Article 19 ("A decision under this Convention concerning the return of that child shall not be taken to be a determination on the merits of any custody issue.").
A Return Would Place the Child[ren] in Grave Risk of Danger

Article 13 allows an authority to refuse to return a wrongfully abducted child if there is a grave risk that the child[ren] would be placed in an intolerable situation or exposed to physical or psychological harm by being returned to the State of habitual residence.\(^\text{106}\) Read along with Article 19\(^\text{107}\), the 13(b) exception has been interpreted to mean protecting the child[ren] from harm that may occur in the State,\(^\text{108}\) not at the hands of the Petitioner.\(^\text{109}\)

However, there has been a shift in recent years in the U.S. law concerning grave risk of harm and a growing realization that it is inappropriate to order that children be sent back to face domestic violence without a full evaluation of the nature of the prior abuse and of the likelihood that the authorities in the country to which the children are being returned will indeed fully protect them and their abused mother.

The Second Circuit upheld an Article 13(b) defense in Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001)., explaining that although The Hague Convention is not designed to resolve underlying custody disputes. (See Hague Convention, art. 19.) this fact, however, does not render irrelevant any countervailing interests the child might

\(^{106}\) Hague Convention, *supra* note 1, Article 13(b).

\(^{107}\) Hague Convention, *supra* note 1, Article 19.

\(^{108}\) An example today, in 1993, would be the "grave risk" of returning a child to Bosnia (although Bosnia is not a signatory, it is an example of a situation that itself poses a "grave risk" of harm).

\(^{109}\) see Gsponer v. Johnstone, 12 FamLR 7 (Family Court of Australia), Zimmerman v. Zimmerman, (Dallas County, Texas, 255th Judicial District). In this case, the court ordered the return of the child to England and found that the Respondent did not meet the burden of proof (clear and convincing evidence) to show that the child would be subject to grave risk of harm if returned to the State of habitual residence (England). If "grave risk" was determined to be the return of the child[ren] to the petitioner, then the case would become a custody case.
have. The Court cited the Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("the “Explanatory Report” or “Report”"). ¶ (an especially useful aid to interpretation of the Convention), to explain further that Article 13(b) "clearly derive[s] from a consideration of the interests of the child…. [T]he interest of the child in not being removed from its habitual residence …. gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report at ¶ 29.Id. at 161 (citation omitted).

The Blondin court also cited Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000). See Blondin, 228 F.3d at 162, 164-65. to find that spousal abuse may also create a "threshold showing of grave risk of exposure to physical or psychological harm." 221 F.3d at 220; see also In re Application of Adan, 437 F.3d 381, 396 n.6 (3d Cir. 2006) (recognizing that evidence of the father’s abuse of the mother is relevant to whether a child’s return would expose him to grave risk of harm). In Walsh, the First Circuit applied the 13(b) exception upon reviewing the risk to the respondent’s children caused by their father’s violent actions directed at third parties. 221 F.3d at 220-21. In order to meet her burden under the grave risk exception, the mother, as respondent, provided evidence that her husband had severely beaten her over the years, and that many of these beatings took place in the presence of her children. Id. This violent behavior demonstrated that the father’s “temper and assaults are not in the least lessened by the presence of his two youngest children.” Id. at 220. Noting that the Hague Convention “does not require that the risk be ‘immediate’; only that it be grave,” Walsh, 221 F.3d at 218, the Walsh court found the abuse of the respondent relevant to Article 13(b) given
that “both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser.” Id. at 220. See H.R. Con. Res. 172, 101st Cong. (1990) (enacted) (stating that “the effects of physical abuse of a spouse on children include . . . the potential for future harm” and that “children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent.”); see also Custody of Vaughn, 664 N.E.2d 434, 439 (Mass. 1996) (“There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages.”); Rodriquez v. Rodriquez, 33 F. Supp. 2d 456, 461 (D. Md. 1999) (finding that “witnessing the abuse of another can be more emotionally traumatic than being the abused” and that returning the children to the habitual residence “even if it did not result in the children’s physical abuse at the hands of their father, would result in psychological trauma because of the children’s fear of physical harm”). Based on the risks to the children caused by their father’s behavior, the First Circuit remanded the Walsh case with instructions to dismiss the father’s petition under the Article 13(b) exception. 221 F.3d at 221.

Similarly, in Van de Sande v. Van de Sande, the Seventh Circuit considered the respondent’s evidence of her husband’s propensity for violence, including his frequent and serious beatings of his wife, as well as his verbal abuse and name calling. 431 F.3d 567, 570 (7th Cir. 2005). Both the physical and verbal abuse occurred in the presence of their children. Id. Though the father never physically abused the son, he spanked the daughter on several occasions. Id. The court found that it would be “irresponsible to think the risk to the children less than grave” given the father’s violent
behavior in their presence. Id. The court emphasized that the “gravity of a risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes.” Id. Though the children had yet to experience severe physical abuse, the Seventh Circuit concluded that “the probability that [the father] . . . would some day lose control and inflict actual physical injury on the children . . . could not be thought negligible. The burden on the Respondent is to prove by clear and convincing evidence\(^{110}\) that there is a grave risk that the child[ren] will be subject to harm if returned. The burden of proof on the Petitioner is only a preponderance of the evidence. Therefore, it is clear that the Convention is drafted to encourage return of abducted children.

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

There is an additional provision of Article 13 (unlettered) which allows for the judicial or administrative authority to consider the child[ren]'s wishes. This, however, depends upon the child[ren]'s age and degree of maturity.\(^{111}\) In the case of *Sheikh v. Cahill*\(^{112}\), the New York Supreme Court ruled that the child, who was nine (9) years old, had not obtained an age and degree of maturity to warrant the court to make the child’s views dispositive. The court found that the *in camera* interview revealed that the child preferred to stay in the United States because of being wooed by his father during his summer vacation visitation. The court further found that the child’s reaction to his summer vacation was expected given his age and degree of maturity. However, the Blondin Court (*Blondin IV*, 238 F.3d at 166) decided that a court may deny the return


\(^{111}\) Hague Convention, *supra* note 1, Article 13.

\(^{112}\) *Sheikh v. Cahill*, 546 N.Y.S.2d. 517, 522(Sup.1989).
of a younger child if the respondent can demonstrate by a preponderance of the evidence, that there is a "considered objection to returning by a sufficiently mature child". The Perez Vera Report, in its Explanatory Report to the Convention sheds light on the rationale behind the exception and the framers' intended application: such a provision is absolutely necessary given the fact that the Convention applies...to all children under the age of sixteen: the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.

PEREZ-Vera Report at 433 Paragraph 30. In short there is no precise age at which a child will be deemed sufficiently mature under the convention.

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

Article 12 states that even if proceedings had been commenced after the expiration 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.**113 This exception provides a defense to an abducting parent in a case where the proceedings were not started within one year after the abduction. The judge would then have to determine whether or not the child is settled in his or her new environment. However, if the time elapsed is less than one year, even if the child is settled in this new environment, the court **must** order the return of the child to the state of Habitual Residence, unless the child comes under one of the other exceptions of the Convention.

**A Return Conflicts with the Fundamental Freedoms of the Requested State**114

113 Hague Convention, *supra* note 1, Article 12.

Another exception, provided under Article 20, allows for the court to refuse to order the return of the child[ren] "if this would not be permitted by the fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms."

This article functions as a safety valve for a member country to not return a child[ren] to a country where the rights of freedom have been abridged. In addition it might dovetail with Article 13(b) with regard to a return in the event of a grave risk of danger to that country. Yugoslavia, which was signatory, could have this problem if the Treaty still applies to its various new states.

The Burden of Proof

The Respondent's burden of proof, in defending against the Petition for Return, is to prove either by clear and convincing evidence\textsuperscript{116} that the Article 13(b)\textsuperscript{117} or Article 20\textsuperscript{118} exceptions apply or by a preponderance of the evidence\textsuperscript{119} that any other Article 12\textsuperscript{120} or the other Article 13\textsuperscript{121} exceptions apply. The Petitioner's burden of proof is always preponderance of the evidence.\textsuperscript{122}

\textsuperscript{115} Hague Convention, supra note 1, Article 20.

\textsuperscript{116} ICARA, supra note 6, 42 U.S.C. 11603(e)(2), §4.

\textsuperscript{117} Hague Convention, supra note 1, Article 13(b) (Even if a removal or retention has been determined to have been wrongful, an authority may deny a return if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.").

\textsuperscript{118} Hague Convention, supra note 1, 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.").

\textsuperscript{119} ICARA, supra note 9, 42 U.S.C. 11603(e)(2), §4.

\textsuperscript{120} Hague Convention, supra note 1, Article 12 (The Hague Convention provides that an authority may refuse to return a child[ren] who has been wrongfully removed or retained if: the Petitioner waited longer than one (1) year after the wrongful removal or retention to file the Petition; the Respondent can demonstrate that the child[ren] is
Awaiting the Decision

Under the provisions of Article 11 of the Hague Convention,\textsuperscript{123} the judge must act expeditiously. If a decision has not been made within six (6) weeks of the date of the commencement of the action, the Petitioner or the United States Central Authority has the right to request a statement from the authority regarding the reason for the delay.\textsuperscript{124}

Payment of Costs and Fees

Of major interest to attorneys handling cases under the Hague Convention is Section 42 U.S.C. §11607, which provides for the award of cost and fees under the Convention and ICARA.\textsuperscript{125} The Act, in paragraph 2, provides that petitioner may be required to bear the cost 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 unless a return is ordered or the case is covered by Federal or State legal assistance programs. It should be noted that many countries across the world provide funding for counsel in bringing a case for return of the child in their countries. The United States opted against this part of the Convention. Paragraph 3 states that any court ordering the return of a child pursuant to an action brought under this Act "must order the respondent to pay necessary expenses incurred by or on settled in the new environment; or where the authority has reason to believe the child[ren] has been taken to another State.

\textsuperscript{121} Hague Convention, supra note 1, Article 13 (excluding 13(b)) (Even if a removal or retention is been determined to have been wrongful, an authority may deny a return if: the Petitioner was not exercising his or her right of custody at the time of the removal; or, depending on the degree of maturity and age of the child[ren], the child[ren] objects to being returned.).

\textsuperscript{122} see supra note 111.

\textsuperscript{123} Hague Convention, supra note 1, Article 11.

\textsuperscript{124} Id.

\textsuperscript{125} 42 U.S.C. § 11607(b)
behalf of petitioner, including court costs, legal fees, foster home, or other care during the course of the proceeding and transportation costs relating to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." ¹²⁶ This inquiry, therefore, is not into the Respondent's ability to pay but into the inappropriateness of requiring the Respondent to pay. It is very clear that when a petition is brought under the Hague Convention and a successful return is accomplished, than the judge must award counsel fees to the successful party. This may be very helpful in being able to get an attorney to represent a client. In addition, Courts have ruled that the Foreign Attorney who assisted in the case may also be compensated under the Federal Statute. ¹²⁷

Order for Return and the Problems of Return

Once a Request for Return of the child[ren] to the state of that child's habitual residence has been granted, the question then becomes which parent the child[ren] is to return with. In some cases the court orders that the abducting parent return to the state of habitual residence with the child[ren] in order for a custody proceeding to take place there. In other instances, the court turns the child[ren] over to the parent who petitioned for the return. The outcome depends upon the facts and circumstances of each case.

It is important to remember that this is a civil treaty. Its purpose is to ensure the return of a child[ren] to his or her habitual residence in an orderly, expeditious manner. Criminal actions should not be enforced against the abducting parent once that parent has returned to the country of habitual residence with the child[ren]. ¹²⁸

¹²⁶ 42 U.S.C. §11607(b)(3).


¹²⁸ There was one particular instance where the court ordered that the abducting mother return to Germany with the children. The parents had agreed that no criminal action was to be brought against her, however, once the mother arrived at the airport the police retained her for the initial abduction of the children. Therefore, it is a better
Criminal actions can have a detrimental effect on the child[ren], especially when the child[ren] is present to witness the arrest of one of its parents. This is not and was not the intention of this treaty.

Conclusion

It is a good idea to collect as much of the case law around the country and around the world as possible. To be able to argue issues of terminology and theories under the terms of this Convention, the law is now developing in this country. Each new case which is undertaken brings to the forefront a new decision which further construes and helps to write the law in the United States.

Learning and developing arguments which can be used to further reduce child abduction throughout the world is a good by-product of the Convention. Educating judges across the country that just because a party has abducted a child to their courtroom does not give that judge a right to hear the merits of a case thereby allowing an abducting parent to pick their forum is our task. It is important that this convention be given full opportunity to make the world a little bit smaller and protect children by reducing abductions throughout the world.

ELEMENTS TO PUT INTO STIPULATIONS AND AGREEMENTS TO PROTECT AGAINST AN ABDUCTION

In order to protect against an abduction, it is necessary to put certain terms in separation agreement which will insure that a party will succeed in a

idea for the nonabducting spouse to be responsible for the return of the child[ren]. Thonemann v. Thonemann, Supreme Court of the State of New York, Rockland County, Index No. 3438-93, 1993.
Hague Convention Case. First, it is important to state that each party has a **right of custody** under the Hague Convention. Second, it is important that the parties recognize what the **habitual residence** is of the child and that this is where the child lives and should not be move without the consent of the parties. Further the parties should agree if there is to be a move or taken on a foreign trip, that a mirror image order will be filed in both the state where the divorce or custody take place and in any other state where the child might be taken to. Many times a **bond** could be considered if the child is taken away to a non Hague Country or even to a place where Hague is not totally followed even if it is a signatory.

Clauses in an agreement to determine who has the **passport** of the child and the safeguards of the passport not be given out to a parent who will improperly used by a parent to take the child out of the United States are important. When a passport is to be obtained and notice to both parents.

A uniform Statute which has been promulgated in a few states helps identify factors in child abduction. The statute is like this:

**Factors to determine risk of abduction.**

(1) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

(a) Has previously abducted or attempted to abduct the child;

(b) Has threatened to abduct the child;

(c) Has recently engaged in activities that may indicate a planned abduction, including:

(I) Abandoning employment;

(II) Selling a primary residence;

(III) Terminating a lease;

(IV) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;
(V) Applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child; or

(VI) Seeking to obtain the child's birth certificate or school or medical records;

(d) Has engaged in domestic violence, domestic abuse, stalking, or child abuse or neglect;

(e) Has refused to follow a child-custody determination;

(f) Lacks strong familial, financial, emotional, or cultural ties to the state or the United States;

(g) Has strong familial, financial, emotional, or cultural ties to another state or country;

(h) Is likely to take the child to a country that:

(I) Is not a party to the "Hague Convention on the Civil Aspects of International Child Abduction" and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(II) Is a party to the "Hague Convention on the Civil Aspects of International Child Abduction" but:

(A) The "Hague Convention on the Civil Aspects of International Child Abduction" is not in force between the United States and that country;

(B) Is noncompliant according to the most recent compliance report issued by the United States department of state; or

(C) Lacks legal mechanisms for immediately and effectively enforcing a return order under the "Hague Convention on the Civil Aspects of International Child Abduction";

(III) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

(IV) Has laws or practices that would:

(A) Enable the respondent, without due cause, to prevent the petitioner from contacting the child;

(B) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or

(C) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

(V) Is included by the United States department of state on a current list of state sponsors of terrorism;

(VI) Does not have an official United States diplomatic presence in the country; or
(VII) Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(i) Is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

(j) Has had an application for United States citizenship denied;

(k) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(l) Has used multiple names to attempt to mislead or defraud; or

(m) Has engaged in any other conduct the court considers relevant to the risk of abduction.

§ 1204. International parental kidnapping

(a) Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section—

(1) the term “child” means a person who has not attained the age of 16 years; and

(2) the term “parental rights”, with respect to a child, means the right to physical custody of the child—

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be an affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence; or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant’s control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
FOURTEENTH SESSION FINAL ACT

Excerpts containing the text of the

1980 Hague Convention
on the Civil Aspects of
International Child Abduction

Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela; and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at the Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments--

A. The following draft Conventions--

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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 States to secure the prompt return of children and to achieve the other object's 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
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 or 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 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.
An Act

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC 1. SHORT TITLE.

This Act may be cited as the "International Child Abduction Remedies Act".

SEC. 2. FINDINGS AND DECLARATIONS [42 USC 11601]

(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 Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act 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 Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

SEC. 3. DEFINITIONS. [42 USC 11602]

For the purposes of this Act--

(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 453 of the Social Security Act (42 U.S.C. 653);

(4) the term "Petitioner" means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity 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 Act, 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 7(a).

SEC. 4. JUDICIAL REMEDIES. [42 USC 11603]

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

(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) 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) shall decide the case in accordance with the Convention.

(e) BURDENS OF PROOF. --

(1) A petitioner in an action brought under subsection (b) 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 THE CONVENTION. -- For purposes of any action brought under this Act--

(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 Act.

(h) REMEDIES UNDER THE CONVENTION NOT EXCLUSIVE. -- The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

SEC. 5. PROVISIONAL REMEDIES. [42 USC 11604]

(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 4(b) of this Act 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 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 4(b) 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. 6. ADMISSIBILITY OF DOCUMENTS. [42 USC 11605]

With respect to any application to the United States Central Authority, or any petition to a court under section 4, 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. 7. UNITED STATES CENTRAL AUTHORITY. [42 USC 11606]

(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 Act.

(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 Act.

(d) OBTAINING INFORMATION FROM PARENT LOCATOR SERVICE. -- The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

SEC. 8. COSTS AND FEES. [42 USC 11607]

(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 4 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 4 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. 9. COLLECTION, MAINTENANCE, AND DISSEMINATION OF INFORMATION. [42 USC 11608]

(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), 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 Act.

(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 instrumental 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), 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 United States or of any State; or
(2) would be prohibited by section 9 of title 13, United States
enforcement Code;

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).

(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) 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. 10. INTERAGENCY COORDINATING GROUP. [42 USC 11609]

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, United States Code, for employees of agencies.

SEC. 11. AGREEMENT FOR USE OF PARENT LOCATOR SERVICE IN
DETERMINING WHEREABOUTS OF PARENT OR CHILD.

Section 463 of the Social Security Act (42 U.S.C. 663) is amended --

(1) by striking "under this section" in subsection (b) and inserting "under
subsection (a)";

(2) by striking "under this section" where it first appears in subsection (c) and
inserting "under subsection (a), (b), or (e)"; and

(3) by adding at the end the following new subsection:

"(e) The Secretary shall enter into an agreement with the Central Authority designated by the President in accordance with section 7 of the International Child Abduction Remedies Act, under which the services of the Parent Locator Service established under section 453 shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an applicant to such Central Authority within the meaning of section 3(1) of that Act. The Parent Locator Service shall charge no fees for services requested pursuant to this subsection."

SEC. 12. AUTHORIZATION OF APPROPRIATIONS. [42 USC 11610]

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 Act.


LEGISLATIVE HISTORY-H.R. 3971:
HOUSE REPORTS: No. 100-525 (Comm. on the Judiciary).
Mar. 28, considered and passed House.
Apr. 12, considered and passed Senate, amended.
Apr. 25, House concurred in Senate amendment.