

The Hague Abduction Convention
Trends in Litigation

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Introduction

Until recently, disputes involving international litigants were an anomaly in matrimonial practice. Typically if there were international implications of a matrimonial dispute they were largely ignored and the litigant who obtained the first order necessarily achieved a juridical advantage.

The unwitting result was judicially sanctioned forum shopping at best, and permissive child abduction at worst.

In 1988 the United States ratified the previously negotiated Hague Convention on Civil Aspects of Child Abduction. With that action both state and federal courts within the United States began to apply not only the provisions of the Convention in securing the return of wrongfully removed and retained children, but to address issues of jurisdiction and enforcement in the resolution of international matrimonial dissolutions.

Now that the case law has begun to develop as we have had more than a decade to work out the subtleties, litigation under the abduction convention has taken some interesting turns.

As the United States attracts immigrants from around the world, and American citizens study and work abroad with regularity, the opportunity for counsel to encounter a family case giving rise to the application of various state and federal laws and international treaties has increased exponentially. This requires counsel to not only recognize but also anticipate the problems implicated by the termination of a family relationship where litigants have international ties.

I. Child Custody Litigation

The majority of the cases across the United States addressing international family practice have arisen in the context of the resolution of child custody. As challenging as devising custody and access agreements may be in interstate cases, factors of distance, culture and enforcement make international child custody arrangements truly daunting.

As such the motivation to litigate is enhanced when predictability of enforcement and difficulties of continuing access produce disparate positions.

The initial question to be resolved in any application is whether the court may exercise subject matter jurisdiction over a determination regarding child custody and access. Until very recently case law had usually limited the application of the Uniform Child Custody Jurisdiction Act in “international cases” to requests for the enforcement of foreign decrees. Those cases developing in the context of the abduction of a child stressed the requirement of litigants to utilize the Hague Convention on Civil Aspects of Child Abduction as an exclusive remedy and found that the jurisdictional provisions of the UCCJA were not determinative where the competing jurisdiction was outside the United States.

The result of such analysis was that the court when asked, almost always exercised jurisdiction if requested, basing their action on the general *parens patriae* power over a child located within its borders.

Eventually, with the growing number of cases implicating international jurisdictional issues, courts had to address the issues common to international civil litigation in the context of the family.

By way of example, in *Hosain v. Malik*, (671 A.2d 988 1996); a Maryland court was asked to address the enforceability of an order entered in a foreign jurisdiction. Because the jurisdiction in question, Pakistan, based its family code upon Islamic law, the court engaged in an analysis of the whether or not the process and substance of the issuing court were sufficiently similar to those, which would be engaged in by a Maryland court to warrant the extension of comity. Critical to a determination that comity could be extended to the proffered order was expert testimony that the ultimate basis of the code was the “best interest of the child standard”. That evidence, even in the presence of statutory presumptions for an award of custody and the entry of a custody judgment by default, proved dispositive. The Maryland Court decided to extend comity and enforce the foreign judgment. However that result could not be described as common. *Amin v. Bakhaty*, 798 So.2d. 75 (Supreme Court LA. 2001); See also, *Laskosky v.Laskosky*, 504 So.2d 726(Miss.1987)

In 1996 the New Jersey Supreme Court issued an opinion in which it applied the provisions of the UCCJA to an International Child Custody Dispute providing comprehensive citation to the treatment of the issue throughout the United States. Further, the Court directed that even if denominated the “home state” the continued exercise of subject jurisdiction in an international child custody matter required a *forum non-conveniens* analysis. The Court also referred to the judicial communication requirements of the then newly negotiated but not yet ratified, Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996). *Ivaldi v. Ivaldi*, 147 NJ 190; 685 A.2d. 1319 (1996)

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) makes its provisions fully applicable to international litigation. Currently, 34 states have ratified the UCCJEA and there are pending bills in another states. See *The Uniform Child Custody Jurisdiction and Enforcement Act* (with prefatory notes and comments), Vo. 32, No. 2, Family Law Quarterly, Summer 1998; *Turner v. Frowein*, 253 Conn. 312; 752 A. 2d. 955 (Conn. 2000)

II. International Child Abduction

One of the most frequent motivations for international family litigation is the threat of the removal or retention of a child across borders, or filing to affect the return of a child abducted. The initial analysis is whether the country or countries implicated by the family history are signators to the Hague Convention on the Civil Aspects of Child Abduction, *opened for signature*, October 25, 1980, T.I.A.S. No. 11670 (1980), 19 I.L.M. 1501 [hereinafter Abduction Convention]

A. Hague Convention Cases

The Abduction Convention became United States law upon the enactment of federal enabling legislation, the International Child Abduction Remedies Act (ICARA), Pub. L.No.100-300, 102 Stat.437 (codified as amended at 42 USC 11601-11610 (1988)). The purpose of the Abduction Convention is to provide by treaty a civil remedy for the prompt return of children wrongfully retained or removed from their country of habitual residence. Litigants may assert the protection of the Abduction Convention if they reside in a Contracting State, that is, a country, which has ratified or acceded to the Abduction Convention, and the subject child has been wrongfully removed to or retained in another contracting State.

1. LEGAL ACTION ON BEHALF OF A PARENT WHOSE CHILD HAS BEEN ABDUCTED TO THE UNITED STATES

(a) Bringing a Petition under the Abduction Convention

The Abduction Convention is not a device for the resolution of the merits of a custody dispute. The stated purpose of the convention is to promptly restore the status quo, which existed before the wrongful removal or retention. The **only** decision that a court is asked to make is whether or not the child in question should be physically

returned. Although often thought of as a jurisdictional determination, in fact a return order does not establish or abridge subject matter jurisdiction for a determination on the merits.

The Convention permits both an administrative and a judicial remedy, and the two are not mutually exclusive. Each contracting state maintains an administrative agency denominated as the “Central Authority” for litigants requesting the return of their children. Most “left-behind” parents, as they are often described, will have filed with the Central Authority in the child’s habitual residence to seek assistance in the return. If they have not, they should be strongly encouraged to do so. By filing a request for return they may be able to obtain assistance in the collection of documents, translations services and legal fee reimbursement. Once the request for return is filed in the habitual residence, it is communicated to the Central Authority in the United States. The United States Department of State, Office of Children’s Issues serves as the Central Authority for all applications made to seek the return of a child to the United States of America. The National Center for Missing and Exploited Children (NCMEC), Alexandria Virginia serves as the receiving agency for all applications to seek the return of a child to a foreign country.

For cases under the Abduction Convention the NCMEC, as the Department of State’s delegated authority, is empowered to contact the abducting parent and encourage a voluntary return where appropriate. They can also contact judges to inquire as to the status of the litigation and provide legal authority and bench guides if requested.

Practice Note: Neither the National Center for Missing and Exploited Children nor the United States Department of State conducts an evaluation of the truth, veracity or substantive merits of any abduction claim. Despite the fact that the Treaty provides in Art.27 that the Central Authority has the authority to determine the legitimacy of such a claim. Once an application is received, they will begin the process to facilitate the voluntary return of a child by directly contacting the parent alleged to have wrongfully removed or retained a child. The letter, signed by a representative of the Department of State threatens that the Department of State will initiate action should a voluntary return not be forthcoming. The letter is essentially a form letter, with the name of the parent and child plugged in. Further, a letter follows it closely to the Court, if there is a pending proceeding in the United States. The “judicial letter” is also a form letter, sent on State Department stationary, which while indicating at its close that the Department takes no position on the application clearly lends credibility to a pending application.

When defending, I provide both client, and the local court notice of the likelihood of the receipt of such a letter. Further, I request that the National Center provide a copy of the actual application, which has been forwarded for administrative action.

(b) Consideration of Where to File

A petition for return may be brought in either state or federal court under ICARA. 42 USC 11603(a). The petitioner elects the forum by filing a petition. There is federal

case law that indicates that the removing parent cannot initiate a petition under the convention. *Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997). Because abducting parents often seek to protect or legitimize their behavior by filing an application in state court for custody, practitioners had, in the past, recommended that an application for return be made to the federal Court. The federal court was seen as far less inclined to expand the scope of the proceedings into a best interest analysis, and more inclined to treat the proceeding in a summary fashion. Federal Judges were thought to be more familiar with the application of international law, the preemptive nature of federal law, and the enforcement of foreign judgments. Yet, in what can only be described as an unsettling trend in litigation, an increasing number of cases brought in federal court give rise to complicated, technical arguments that produce results arguably inconsistent with the underlying principals of the Treaty.

Developing Issues:

It appears the choice of forum has become a more strategic question as the family bar becomes more familiar with federal court practice and federal judges seem more intent of finding ways of either avoiding the litigation, or disposing of the analysis with various procedural devices.

Of particular concern has been the increasing successful use of various federal court jurisdictional arguments to successfully move a case from federal court, or gain its summary dismissal or disposition.

Federal Court doctrines to Decline to Exercise Jurisdiction:
Abstention, Removal, Mootness and Ripeness:

Most counsel believed that with the detailed opinion of the Court in *Lops v. Lops*, 140 F3d. 927, *reh.den. en banc July 23, 1998*, that the future application of the abstention doctrine in this type of litigation would likely be unsuccessful. In *Lops*, the left-behind mother filed her initial application for return of the minor children in state court in South Carolina. Subsequently she discovered that their grandmother was actually hiding the children across the state line in Georgia. She filed in the federal court in Georgia, and the defending father filed a motion to dismiss on abstention grounds. Despite the pending proceeding in South Carolina, the federal court determined that the doctrines of abstention based either upon *Younger* or *Colorado River* would not support the federal court declining to hear the case.

Yet, the trend that has followed is the federal court's utilizing both analyses, arguably to avoid having to address difficult determinations.

See; *Bromley v. Bromley*, 30 F.Supp. 2d 857, (E.D. Pa. 1998); *Cerit v. Cerit*, 188 F.Supp. 2d. 1239 (D. Hawaii, 2002) *abstention granted*; *Grieve v. Tamerin*, 269 F.3d 149 (2nd Cir. 2001) *denied review of district court's Younger based dismissal*; *Bekier v. Bekier*, 298 F.3d. 1051 (11th Cir. 2001), *dismissal on federal mootness grounds* ; *Toren v. Toren*, 191 F3d 23 (1st Cir. 1999) *dismissal on ripeness grounds*.

However the 4th Circuit in *Fawcett v. Mc Roberts*, confirmed that an appellant could successfully defend an application for dismissal on mootness grounds, in any circumstance in which the appellant continued to suffer financial detriment or negative consequence to the further prosecution of their matter. *Fawcett v. Mc Roberts*, 326 F.3d 491 (4th Cir. 2003); *U.S. Supreme Court Cert. Denied*, (December 1, 2003).

As an example of the extraordinary means that a court will take to avoid returning a child, despite the arguable lack of legal authority to deny the petition review the case of *Silverman v. Silverman*, 267 F3d 788 (8th Cir. 2001). Here, the 8th Circuit finds that the district courts reliance upon the abstention doctrine to dismiss the Israeli petitioner's application to be an abuse of discretion. Directing a remand, the district court then determined that Israel was not the child's habitual residence, and even if it was, there was a grave risk of harm in returning the child to that state. The district court then attempted to deny the return based upon the inherent "grave risk" of harm existing in the State of Israel. After a second appeal, and rehearing en banc, the determination is eventually reversed and remanded with an immediate return order. *Silverman v. Silverman*, 338 F.3d. 886 (8th Cir. August 2003).

Summary Disposition: The Courts have increasingly avoided taking testimony, in favor of disposition of cases in a summary fashion. Sometimes this reflects a determination on the merits, in other circumstances it reflects the application of procedural devices.

In a case arising out of a somewhat unique fact pattern, the 6th Circuit engaged in a lengthy discussion of abstention, federal disentitlement and the application of FRCP 56 in denying requested discovery on asserted defenses.

March v. Levine, 249 F.3d 462 (6th Cir. 2001), *reh.den.* (2001), *writ of certiorari denied*, 151 L Ed 2d 695, 122 S.Ct. 810 (U.S. 2002). In the March case, the petitioner father had left the United States with his two minor children immediately after the disappearance of their mother under circumstances deemed suspicious. They remained in Mexico approximately one year prior to the maternal grandparents obtaining a court order for access. They took their access order, obtained in the United States, for enforcement in Mexico. Mexican authorities assisted in the organization and enforcement of those rights of access. Once they began their one-month access, they impermissibly removed the children from Mexico and retained them in the United States at the conclusion of their visitation. The respondents believed the petitioner had murdered their daughter, and had fled the United States for the purpose of avoiding further investigation and prosecution. They had obtained a default judgment in a wrongful death action, which they had filed in Tennessee.

The Mexican government issued an arrest warrant against the grandparents for kidnapping. In the meantime, the grandparents had instituted a state court application for termination of parental rights and custody of the children in Tennessee.

The petitioner filed a Hague application for return of the children to Mexico, in district court insisting that the court expedite the proceeding and enter a provisional order directing the return of the children. The respondents raised their enumerated defenses which included that the petitioner should be disentitled from bringing the petition under the fugitive disentitlement doctrine. The petitioner then sought summary or partial summary judgment regarding the relief requested. The Court determined that it would decide the motions prior to allowing discovery.

A month later, the district court entered a fifty-two-page opinion and an order which granted the petition and ordered the children immediately returned. The court found that the petitioner had met his burden of demonstrating a wrongful retention and the respondent had not demonstrated the enumerated exceptions to the return. The Court declined to order the petitioner disentitled and then stayed the order to facilitate appellate review. On appeal the respondents argued that the court erred in refusing to permit discovery, or a hearing on the merits prior to ruling on the petition or otherwise permit them to develop their affirmative defenses. They argued that the Court erred when it granted summary judgment and that the abstention doctrine was applicable to the matter.

The 6th Circuit was unpersuaded. The Court disposed of the abstention doctrine with little comment, since it had not been raised prior in the yearlong litigation. The court dismisses the disentitlement argument, in that the contempt charges from which the petitioner was deemed to have been a fugitive were only fines, and not criminal contempt, avoidable by the performance of required acts, with no specific sentence imposed. While the court allowed that civil contempt charges could conceivably give rise to the disentitlement, in fact such cases usually involve contempt of Federal Court orders originating in the case at bar. *See additional comments in Walsh v. Walsh, 221 Fed 204, 216 (1st Cir. 2000) disfavoring the imposition of the doctrine as "too severe a sanction in a case involving parental rights."* Interestingly, this court cites *Troxil v Granville*, to bolster that proposition.

The weightier and somewhat novel issue is whether it is appropriate to treat a Hague matter in a summary fashion. While the Convention speaks in terms of expedited proceedings and immediate action, most assume that the representations contained in the filed applications for return are accurate.

In the *March* case, the district court found that the custodial rights and the issues of wrongful retention could be established on the papers and the respondent's had failed to establish genuine issues of material fact regarding the treaty exceptions they raised. The court cited to *Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250; 91 L.Ed 2d 202; 106 S.Ct.2502 (1986)* stating that to determine whether a dispute is genuine the court must inquire, "*whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law...Moreover the evidence presented must be viewed through the prism of substantive evidentiary burden. The evidence of the non-movant must be believed and all reasonable inferences must be drawn in the non-movant's favor.*"

The Court found that the respondents did not demonstrate that the Mexican authorities are incapable of or unwilling to protect the children. Finally the court noted that to preserve the argument that there was no discovery provided or an evidentiary hearing, an affidavit pursuant to FRCP 56f must be brought, or a motion for additional discovery. It must include reference to all affirmative defenses and the affidavit in support must provide that the party cannot, for the reasons stated, present by affidavit facts essential to justify the party's opposition. Rule 56 does not require or expressly authorize the taking of oral evidence at hearing and the federal court has the discretion to hear evidence on motions by oral testimony or on affidavits. FRCP 43(e). Here the Court elected the latter. Substantively the Court goes on to utilize Article 11 of the Treaty for support for that summary process, coupled with the requirement of, "the most expeditious procedures available" Art. 2.

Practice Note: This case provides the most complete analysis on an issue that is not decided consistently by the Federal bench. This case reviews the legal authority for entertaining the Hague application in a motion for summary judgment. Further it demonstrates the chasm of difference between the way state and federal courts view the application.

As such, if you are defending, precise compliance with the FRCP is imperative. If you are requesting that the federal court abstain, that application must be made in the district court in the initial application, in order to preserve the issue for appeal. If the matter remains in the federal court the motion for discovery should include discovery related to all of the defenses asserted. Including, by way of example, a motion to interview the children as a discovery request, if they are objecting to the return.

Finally, proofs should necessarily include verified affidavits outlining the evidence integral to your ability to prove the case to a clear and convincing standard. This must be coupled with an affidavit outlining the limitations, if any, of the left-behind judicial system in protecting the children.

See also, Raijmakers-Eghaghe v. Haro, 131 F.Supp. 2d 953. (E.D. Mich. 2001) application of summary judgment regarding wishes of children under Art. 13; Miller v. Miller, 240 F3d 392 (4th Cir. 2001) summary return of children, despite state court custody order in which petitioner had participated and been awarded only supervised access.

But see, Tsarbopoulous v Tsarbopoulous, Unreported decision, Ninth Circuit Court of Appeals, decided November 17, 2000. Finding that respondent mother produced sufficient evidence to preclude the entry of summary judgment on her grave risk defense, noting that the allegations are sufficient to raise genuine issues of material fact, even when measured by the requirement that the evidence be clear and convincing.

(c) Contents of a Petition for Return

Whether brought in State or Federal Court the petition for return requires certain components under the Treaty.

Article 3 of the Abduction Convention sets forth the first of the prerequisites asserting the protections of the Abduction Convention. A left behind parent must demonstrate, that the alleged removal or retention is in breach of rights of custody attributed to the petitioner either jointly or alone, under the law of the State of habitual residence. Additionally the petitioner must show that those rights were actually being exercised at the time of the removal or retention, or would have been but for the removal or retention. The convention clarifies that those rights may arise of operation of law, judicial or administrative action or agreement having legal effect.

Article 4 applies the protections of the Abduction Convention to children who habitually resident in a contracting state immediately prior to the removal or retention and ceases to apply when a child attains the age of sixteen.

ICARA specifies that these prerequisites must be established by a preponderance of the evidence. ICARA, *supra* 42, USC 11603(e), *sec. 4*.

Should the specified criteria be met a return of the child is **mandatory**, subject to narrow exceptions.

Article 12 modifies the obligatory nature of return if the application is made more than one year after the removal or retention and the court finds the child has settled into the new environment. In that case the return is discretionary. *David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S. 2d 429(Fam. Ct. 1991); *In re Robinson* 983 F.Supp 1339, 1345 (D.Colo.1997), *In re Wojcik*, 959 F. Supp. 413 (E.D. Mich. 1997).

Developing issues:

Choice of law and the request of judicial or administrative findings under Article 15 of the Convention have become more commonplace. With the case law limitations on breadth of allowable defenses, the battle has been narrowed in many cases to the “wrongfulness” of the removal under the law of the habitual residence. See *Shalit v. Coppe*, 182 F. 3d. 1124 (9th Cir. 1999).

This can be resolved by putting in proofs of the law of the habitual residence or demonstrating that a finding of wrongfulness has, as a matter of law already been made. See *Shealy v. Shealy*, 295 F3d 1117, (10th Cir. 2002) *Case turned on an interim decision of the German family Court allowing for the possibility of ‘military necessity’ in the case of an American servicewoman who was found to have manipulated her return to the United States simply to avoid the German family Court process. The author believes that just as relevant to the German Court’s action is the fact that no party to the litigation is a German national.*

In some cases, strategically it may be advantageous to request that the court of competent jurisdiction in the left-behind country make the Article 15 determination. This is particularly true if there are cultural or religious issues which may be relevant to the wrongfulness argument. The court can make the request of that issuing state for such determination.

However, if it is likely that the resolution will take longer than six (6) weeks, it is arguable that the non-moving party must consent to the delay.

(d) Habitual Residence

Often the applicability of the Treaty is challenged on the ground that the child's habitual residence has shifted or that the contracting state of the petitioner never served as the child's habitual residence. If a respondent is successful in advancing that argument, then the presence of the child in the United States cannot be considered wrongful within the meaning of the Convention; hence, the Treaty is inapplicable. This question can become particularly clouded in pre-judgment cases in which orders for custody have not been entered.

In *Feder v. Evans-Feder*, 63 F3d 217(3rd Cir. 1995) the Third Circuit Court of Appeals addressed a district court decision which held that the retention of the subject child in Pennsylvania could not be considered wrongful as the United States was the child's habitual residence rather than Australia. The litigants were American citizens who had previously resided in Pennsylvania, and recently moved to Australia.

In its decision the Court noted that the term "habitual residence" is purposefully undefined in the body of the treaty, however reviewed the case authority of other courts, particularly the seminal case of *In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989)* to begin to describe habitual residence. Citing the High Court decision," *There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or it may be general. All that the law requires is that there is a settled purpose, at p.10*"

The Feder court held that habitual residence," *is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the children's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.*" *supra* at 223.

Accordingly, the Hague petition was reinstated and the matter remanded to complete the litigation on whether any legitimate defenses to return could be sustained.

Prior to 2001, the leading case providing a comprehensive review of the application of the treaty and particularly the issues related to the wrongfulness of the removal and retention was *Friedrich v. Friedrich*, 78 F3d 1060; (6th Cir. 1996) (*Friedrich II*). The case evolved through protracted litigation arising from the break-up of the marriage of an American servicewoman stationed in Germany and her husband, a German national. The case has been taken to the Sixth Circuit Court of Appeals and recently back to the District Court, see *Friedrich v. Friedrich*, 983 F2d 1396; (6th Cir.1993) ("*Friedrich I*"), the initial case outlining the relevant case law in the application of the convention. This court ordered a remand on the issue of "exercise" of rights of custody and determination on a number of defenses. *Friedrich I* was advanced for the proposition that children living on a military facility are habitual residents of the contracting state in which the facility is located for the purposes of the Treaty, regardless of their citizenship, residency status, or the terms of any status of forces agreements. Further the case reiterated that habitual residence was to be determined by looking backward, not forward in time and from the perspective of the child, not the removing parent. Of note, the court indicates that, "*It [habitual residence] can be altered only by a change in geography, which must occur before the questionable removal and the passage of time, not by changes of parental affection and responsibility.*" *Friedrich I, supra*.

While international construction of habitual residence has largely been consistent, review of selected cases should provide caution. Instructive is the well-known Swedish case, *Johnson v. Johnson, Judgment of Supreme Administrative Swedish Court, Case No.7505-1995*. This case is described in parallel international litigation originating in Virginia, and eventually moving to Sweden. The Swedish family court, without regard to the pendente lite consent judgment entered in Virginia, which denominated habitual residence in the United States, found that the facts of location, settlement and duration had shifted habitual residence. *See also, Johnson v. Johnson, 26 Va. App. 135, 493, S.E. 2d 668(1997)*. The Swedish order is widely criticized in that the parties had specifically agreed that the issues of custody and access were to be resolved at hearing to be held in Virginia.

However, with the 9th Circuit holding in *Mozes v. Mozes*, habitual residence has become a much more subtle analysis, in which the intent of the parties has become the more important focus than the objective factual experience of the children. *Mozes v. Mozes, 239 Fed 1067 (9th Cir. 2001)*. *See also, Gitter v. Gitter 2003 US Dist Lexis 21015, November 21, 2003 Temporary and conditional stay in Israel did not shift children's habitual residence thus Convention did not apply.*

While the Ninth circuit protests that this decision does not modify the holdings in *Friedrich I* and *II*, from the practitioner's perspective nothing could be further from the truth. *Friedrich* is distinguished because, apart from the party's intentions, the child was born in Germany and had never been to the United States, prior to the removal alleged to have been wrongful. Habitual residence, the court points out, cannot be acquired without physical presence. By outlining three possible categories of factual circumstances

giving rise to the identification of habitual residence the court directs the analysis to the concept of family intent, and the motivation of the parties as an integral component of that analysis.

The court comments that the question arises where: 1) there is a demonstrated and manifest ‘settled purpose ‘ to change habitual residence, despite the stated reservations of one of the parents, *Walton v. Walton*, 925 F. Supp. 453, (U.S. 1996 Miss); 2) a child’s initial translocation from an established habitual residence was clearly intended to be only for a specific and delimited period, *In re Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999; *Toren v. Toren*, 26 F.Supp 2d 240 (D. Mass 1998); 3) mutual abandonment of the child’s former habitual residence.

See also and *Kanth v. Kanth*, 79 F. Supp. 2d. 1317 (C.D. Utah 1999); *In re Villalta v. Massie*, Case No. 4:99 CV 312-RH (USDC N.D. Fla 10/27/99); *Janakakis v. Kostin v. Janakakis* (Ky App. 1999)(pet. for cert. denied) 99-1496; 2000 US Lexis 4879, October 2, 2000; *Paz v. Mejia de Paz*, (2nd Cir. Decided Sept. 17, 2002 unpublished), affirms district court finding no ‘settled purpose’ thus never established habitual residence.

(e) Rights of Custody

The other preliminary inquiry is whether the petitioner was actually exercising a right of custody that entitles them to the remedy of return. If a custodial determination has previously been made, and sole custody has been granted to the removing parent, subject only to rights of visitation of the left-behind parent, those rights of access do not, on the face of the language Treaty entitle the petitioner to an order for return of the child. *Hague Convention supra Art.21*

Custody rights are defined in Article 5 (a) as, “rights relating to the care of the person of the child, and in particular, the right to determine the child’s place of residence.” The applicable law is the law of the child’s habitual residence. As such, a petitioning attorney may need to produce either the foreign custody order or applicable family code for submission to the court. *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). However it is important to distinguish, particularly in an application made to a state court, that the purpose of the submission is not an application for the enforcement of a foreign judgment, which would require an analysis of the merits of the judgment, the procedure under which it was rendered and a comity based analysis seeking evidence of substantial conformity of the decision making process on both procedural due process and substantive public policy grounds. The proffer of the evidence is merely to demonstrate the nature of the custodial rights enjoyed by the left-behind parent.

In *Loos v. Manuel*, 278 NJ Super 607, 651 A. 2d. 1077 (Ch. Div. 1994) the application for return to Germany was made by the petitioner who described their relationship with the child as one of, “foster parents”. In this case the defending respondents were the child’s grandparents in New Jersey, with whom his abandoning

mother had left the child. The Court's decision turned ultimately on the inability of the foster parents to provide authority for their rights of custody under German law. In the absence of an order providing, among other things, the right of the *Loos* to determine the child's place of residence, the Hague petition was dismissed.

Still, *Friedrich II* makes it clear, "an American decision about the adequacy of one parent's exercise of custody rights is dangerously close to forbidden territory: the merits of a custody dispute." The decision goes on to caution that particularly in pre-judgment separation cases, the acts and motivations of a parent are difficult to analyze and that such an analysis should be conducted by the court of competent jurisdiction. *Friedrich v. Friedrich*, 78 F3d 1060,1064 (6th Cir, 1996).

Developing Issues: The United States Court of Appeals for the 4th Circuit will shortly hear argument in a case where the district court found a breach of rights of custody in the alternative. The left-behind mother exercised only rights of supervised access, but had filed a post-judgment application to prohibit the removal of the child from the jurisdiction. The application had been denied, based in part on the custodial parent's denial of his intention to relocate. Nevertheless, he left the jurisdiction intending to permanently remain in the United States. The district court attributed rights of custody not only to the petitioner but also to the court in the left behind country as additional authority for the return. *Fawcett v. McRoberts*, 168 F.Supp 2d 595 (W.D. Va. 2001). On appeal, the United States Fourth Circuit overturned the District Court's analysis, in favor of the appellant and affirmed the *Croll* case in finding that neither Ms. Fawcett nor the Scottish Courts were exercising a right of custody capable of requiring the remedy of return. *Fawcett v. McRoberts* 326 F3d. 491 (4th Cir. 2003) The Supreme Court of the United States, declined to review the decision on certiorari, despite having granted the Scottish government the right to file an amicus brief in support of the Petition. *Fawcett v. McRoberts* 157 L.Ed 2d 732, 124 S. Ct. 805 (2003).

Although the District Court in *Fawcett* attempted to distinguish the 2nd Circuit's prior decision in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), writ for certiorari denied, 151 L.Ed. 2d. 258, 122 S.Ct. 342 (U.S. 2001) . *Gonzalez v. Gutierrez*, 311 F.3d 942, 954 (9th Cir. 2002) . The Fourth Circuit made it clear that they found the legal analysis to be largely indistinguishable. In *Croll*, the non-custodial father exercised regular access and the mother was subject to a *ne excete* clause which prohibited her removal of the child from the jurisdiction. After the mother retained the child in New York, the left behind father sought the return of the child to Hong Kong. The 2nd Circuit declined to order a return, finding that the treaty provided the remedy of return of the child only to those who alleged a breach of custody rather than access rights.

Undaunted by the 2nd and 4th Circuits, the 11th Circuit has decided, "Our conclusion today diverges from those of the 2nd 4th and Ninth Circuits... We... join the powerful *Croll* dissent in disagreeing with the majority's conclusions." *Furnes v. Reeves*, decided March 10,2004; 2004 U.S.App Lexis 4605; 17 Fla. L. Weekly Fed. C 285.

See also: Whallon v. Lynn, 230 F. 3d 450 (1st Cir. 2000); *Sampson v. Sampson*, 975 P.2d 1211 (Kan. Ct. App 1999); *In re H (a minor)*, [2000] 2 WLR 337 (Lords 2/3/00); *Pesin v Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999); *USDC SD Fla.*, No. 99-6962; *Toren v. Toren*, 191 F. 3d (1999); *Kanth v. Kanth* 79 F. Supp. 2d. 1317 (C.D. Utah).

(f) Service of the Petition

A typical return application case would include the following pleadings; Notice of Petition Under the Hague Convention, Petition for the Return of Children to Petitioner, Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus and/ or Order to Show Cause, Order for Return

(i) Notice of Petition Under the Hague Convention

The provisions of ICARA specify that notice of the Petition must be given “in accordance with the applicable law governing notice in interstate child custody proceedings.” 42 USC 11603 Sec.4(c) Under the Parental Kidnapping and Prevention Act, 28 USC 1738A, the litigant is directed to the provisions of the Uniform Child Custody Jurisdiction Act on the legal requirements for notice.

Both the UCCJA and the UCCJEA indicate that the respondent is to be provided with reasonable notice and opportunity to be heard. However, the expedited and summary nature of a Hague proceeding has been interpreted to support *ex parte* proceedings, conducted primarily on the pleadings and affidavits submitted, with an abbreviated time period for the answering papers of the respondent. In the recent case of *Wipranik v. Superior Court of Los Angeles*, 63 Cal. App. 4th 315 (Ca. App.1998), an abducting mother argued to the appellate court that she was not given sufficient time to prepare her response to the Father’s Hague petition. In assessing whether 10 days was adequate notice, the Court found that to determine reasonableness two factors must be weighed. “*The desire to make a decision in a timely manner and the necessity of giving the contestants a reasonable amount of time in which to present their evidence*” at 323, 739; the appellate court upheld the 10 day notice.

(ii) If the location of the abducting parent and the child are known, and there is a concern that upon notice of the Hague petition the abducting parent may leave the jurisdiction the facts supporting such a concern should be prepared with an Order for the Issuance of Warrant in Lieu of Writ of Habeas Corpus. The primary relief requested should be to take the subject child into protective custody, or in the alternative to order that the child not be removed from the state pending the return date of the hearing on the petition. In *Brooks v. Willis* 907 F.Supp 57(S.D.N.Y) supported by proof of a pattern of unilateral removals on the part of the abducting parent, the district court entered on *ex parte* complaint a warrant in lieu of the writ for return of the child and ordered a Hague hearing to be heard within seven days after the child is returned.

Developing Issues:

In a recent case from Pennsylvania, the Federal Court determined that engaging in expedited proceedings that resulted the immediate return of a child without the opportunity of a full hearing was error. *Dincer v. Dincer*, 549, 309; 701 A. 2d. 210(1997); *Egervary v. Rooney*, 159 F.Supp 2d 132 (E.D. Pa 2001); *In re Jeffers*, 26 FLR 1040 (Colo. App. 1999).

See also *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Arizona 1991).

2. DEFENSES UNDER THE HAGUE ABDUCTION CONVENTION

The exceptions to the applicability of the Abduction Convention and the Defenses available once a finding of wrongful removal or retention has been determined is found in Article 12, Article 13 and Article 20 of the Treaty. The first and most effective response to a petition would be to assert that the Convention is inapplicable because the petitioner has not met the burden of demonstrating that he either; enjoys a legitimate right of custody at the time of the removal or retention; that the child was wrongfully removed or retained from his habitual residence; or that more then a year had passed since the alleged wrongful removal or retention and the child had settled in the new environment. *Hague Abduction Convention Art. 3 and 12*.

Once the petitioner has demonstrated the applicability of the Convention and established a *prima facie* case of wrongful removal or retention, the burden shifts to the respondent to demonstrate by a preponderance of the evidence that defenses available under Article 12 or 13 of the Convention should apply. ICARA 42 USC 11603 Sec 4(e) (2) (b). The respondent must establish by clear and convincing evidence that one of the exceptions set forth in Article 13b or 20 of the Convention applies. ICARA 42 USC 11603 Sec 4 (e) (2) (a).

(a) Article 13(a)

The court may deny an application for return if the respondent can demonstrate that the petitioning parent was not exercising rights of custody or had consented or acquiesced in the removal or retention. These cases tend to arise in pre-judgment litigation, or in circumstances in which a permitted temporary visit becomes unilaterally protracted. As the Friedrich II court cautioned, in the absence of significant proof of acquiescence, i.e. a consent order, or a writing of some kind the court will look to the objective evidence in the behavior of the parties. *Friedrich v. Friedrich (1996) supra*; See, *Wanninger v. Wanninger*, 850 F. Supp. 78(D.Mass 1994) (*consent to initial travel but no acquiescence of wrongful protracted retention.*) *Levesque v. Levesque*, 816 F. Supp 662 (D.Kan.1993). A successful proffer of acquiescence may include correspondence acknowledging the petitioners relocation, lengthy delay in the filing of an application or demonstration that negotiation for resolution of the matrimonial difficulties presumed a change in habitual residence of the children. *In re A*, 1 AER 929

(Fam. Ct. 1992). See *Tabacchi v. Harrison*, 2000 W.L. 190576, 2000 US Dist. Lexis 1518 (N.D. Ill 2000); *Krishna v. Krishna*, U.S. Dist. Lexis 4706 (N.D. Cal, 1997).

Developing Issues: The cooperation or acquiescence of a parent to provide travel documentation, particularly in the absence of a definite time frame for travel, may be converted to consent, even when that consent appears to have been subsequently withdrawn. Key to the determination is there is an “indefinite time period” of the travel.

Gonzalez Cabellaro v. Mena, 251 F.3d 789 (9th Cir. 2001)

(b) Article 13b

The majority of cases raising a defense under the Hague Abduction Convention construe the applicability of Article 13b, which provides in pertinent part:

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...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. Hague Convention Art. 13b

In one of the first court cases to address the meaning to be given to the term “grave risk of harm” the Appellate Court in *Tahan v. Duquette*, 613 A.2d 486 addressing for the second time the application for return by a Canadian petitioner regarding a child wrongfully retained in New Jersey. After an earlier determination that the Convention was applicable and the provisions of Article 12 not implicated, *Tahan v. Duquette*, 252 N.J. Super 554 (App Div 1991), the court addressed itself to the definition of “grave risk of harm.” The Court held that “grave risk hearing should be focused on the country to which the child would be returned and whether there is such internal strife or unrest there are to pose a grave risk of harm. Although the court may not delve into the merits of the custody dispute, the court may evaluate the surrounding to which the child would be returned and the basic personal qualities located there.”

In the instructive *Friedrich II*, *supra* the Court in citing *Tahan v. Duquette* defines grave risk of harm as follows:

We believe that a grave risk of harm for purposes of the convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute- e.g. returning to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, three when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. Id. at 2604.

See also *Friedrich v. Thompson*, 1:99 CV00772 (M.D. N.C. 1999). U.S. Dist. Lexis 21305.

An articulation of the narrowed circumstances in which a defense can be raised and litigated to an application for return, is found in *Caro v. Sher*, 296 N.J. Super. 594; 687 A 2d 354 (Ch.Div. 1996). In *Caro*, the subject children who were dual nationals of the United States and Spain were already denominated habitually resident in Alicante Spain by virtue of successful Hague hearing conducted three years earlier. The children were visiting the United States pursuant to an interim agreement of the parties. In defending the second application for return of the children, the respondent asserted that the petitioner was not “exercising” rights of custody pursuant to Article 13a, that the youngest child had developed significant psychiatric problems which could not be effectively treated in Spain. The respondent asserted that the child’s medical condition along with the father’s inability to manage the child created a grave risk of harm to the child and an intolerable situation for the entire family. Finally, the respondent asserted that that the Alicante family court was not, because of serious due process difficulties in the system, capable of addressing these concerns. Judge Hayser, in entering a return order, found that the respondent must not only demonstrate that a grave risk of harm exists, but that even in the presence of a claimed grave risk of harm, the foreign court cannot adequately address the issue, “*under some minimum, concept, for example of procedural due process.*” *Id.* At 608. See also *Janakakis-Jostin v. Janakakis*, KY. App. 1999 Lexis 24.

See also; *Re D*, [2000] 1 FLR 24, [2000] 1 FCR 208 (High Ct. Fam Div. 9/6/99) *Blondin v. Dubois (Blondin III)*, 78 F. Supp. 283, decided January 12, 2000. See *P.F. v. M.F., The Supreme Court of Ireland 1992, No. 390 (transcript) 13 January 1993; D.C. v. B.L.C., High Court, January 1995.*

Article 13

The remainder of Article 13 of the Convention provides that *the judicial authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*” The Court in *Tahan v. Duquette* pronounced that a nine-year old child was not of sufficient age and maturity to be considered in the stated objected to return. In *Caro v. Sher*, *supra* he court declined to interview two of the children who were nine and twelve, finding that, “*the above provision is discretionary. Such interviews will have no impact on the threshold question...*” at 608. It should be noted that many courts, particularly those of the European Union consider the objections of children as much more determinative, and consider those comments at younger ages.

Developing Issues:

Domestic Violence and “undertakings”

The issue of domestic violence has been a consistent theme in Hague Abduction litigation The compelling argument that a

removal or retention, particularly in a pre-judgment motion, is necessary for the protection of the minor child has created significant difficulty for courts.

The line between the assessment of grave risk of harm and that on the merits of a custody determination can often be blurred.

Recently, the New York court denied an application for return on issues associated with domestic violence. *Blondin v. Dubois*, 78 F. Supp. 2d. 283 (S.D.N.Y. 2000); 189 F. 3d. 240 (2d Cir. 1999) *Blondin v. Dubois*, 283 F3d 153 (2d Cir 2001); *Tabacchi v. Harrison*, No. 99 C. 4130, U.S.D.C. for N.D. of Ill, E. Div., 2000 US Dst. LEXIS 1518, Feb. 10, 2000; *Danaipour v. McCarey*, 286 F.3d 1 (1st Cir. 2002)

It is important to remember that even if a defense is found under the treaty, the court can still order the return, subject in many cases an order of undertakings. Undertakings, a term more common in European jurisprudence, refers to orders which place conditions upon the return of the child. However, without judicial cooperation and the coordination of parallel litigation in the left-behind jurisdiction, the enforceability of such orders can be problematic.

See “*Domestic Violence: Is It Being Sanctioned by the Hague Convention*”, Regan Fordice Grilli, 4 S.W.J. of L & Trade Am, 71 Spring 1997; *Walsh v. Walsh* 221 F. 3d 204 July 25, 2000; *Re F (a minor) Abduction: Rights of Custody Abroad*, 1995 3 All E.R. 641 (Eng. C.A.) at 347-48.

See also: Belay v. Getachew, Dist. Ct. Maryland 272 F. Supp 2d 553 2003 July 8, 2003. Even where defense established Court retains discretion to return and equities may so require.

Article 20

Article 20 of the Hague Abduction Convention permits a court to decline to return a child upon presentation of clear and convincing evidence that, “*the return would violate fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms*”. Any Article 20 argument should be addressed as a preliminary matter even in the presence of additional defenses for return.