

The Year in Review

Volume 54 *International Legal Developments*
Year in Review: 2019

Article 12

February 2024

International Family Law

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Recommended Citation

Robert G. Spector & Melissa A. Kucinski, *International Family Law*, 54 ABA/SIL YIR 175 (2024)

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International Family Law

ROBERT G. SPECTOR¹ & MELISSA A. KUCINSKI

I. International Litigation

A. THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (THE CHILD ABDUCTION CONVENTION)

Most U.S. international family law litigation involved the Child Abduction Convention and its implementing legislation, the International Child Abduction Remedies Act (ICARA).² U.S. federal and state courts have concurrent jurisdiction to resolve a request for the return of a child under ICARA.³

The Convention operates to promptly return children to their habitual residence. To obtain an order returning a child, the petitioner must prove that the child was wrongfully removed from, or retained outside of, the child's "habitual residence" and that the petitioner had "a right of custody," which he/she was "actually exercising" (or would have exercised, but for the abduction), under the law of the child's habitual residence.⁴

1. *Applicability of the Child Abduction Convention*

The Child Abduction Convention applies only to countries that have ratified or acceded to it and between countries that have accepted the accession of the other as a treaty partner.⁵ It cannot be made applicable to a case by the parties' stipulation.

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2. International Child Abduction Remedies, 22 U.S.C. § 9001 et seq. (2014).

3. 22 U.S.C. § 9003 (2014).

4. As is often noted, the law of the Child Abduction Convention is relatively straightforward, but the facts can be complicated, although some cases are fairly easy to determine. *See, e.g.,* Quintero v. de Loera Barba, No. 5:19-148, 2019 WL 1386556, at *3 (W.D. Tex. Mar. 27, 2019).

5. *See* Alikovna v. Viktorovich, No. 19-cv-23408-BLOOM/Louis, 2019 WL 4038521 (S.D. Fla. Aug. 27, 2019) (dismissing a petition to return a child to Russia because the United States has not accepted Russia's accession to the Child Abduction Convention).

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2. *Habitual Residence of the Child*

a. Intent Cases

The Child Abduction Convention does not define the term “habitual residence.” Courts have made this fact-based determination in a number of cases, leading to a split among the circuits as to its definition.⁶ The majority view, pioneered by the Ninth Circuit, looks to the parents’ shared intent in determining their child’s habitual residence.⁷ In some cases, the parties’ intent is clear, for example, as when the parties agreed that the mother could move their child to the United States for one year and then the parties would consider where the child should live thereafter.⁸ Under those facts, there is no shared intent for the child’s habitual residence to change to the United States.⁹

The parties’ intent often must be inferred by examining the facts of the case. For example, a court determined that the child’s habitual residence was Italy when the parties’ only shared residence was in Italy and where they lived for more than a year before the child was born.¹⁰ The child went to preschool in Italy, and his doctors were there, as was his extended family.¹¹ Before the mother brought him to the United States, the child had only left Italy three times for short trips.¹²

Such an intent does not mean that the parties intended to permanently relocate the child’s habitual residence. It only means that the parties intended to change the country with which the child would normally identify. Thus, when the father agreed that the mother could relocate the children to the United States for three years, this meant that he agreed that, for at least the next three years, the child’s habitual residence would be the United States.¹³ When a petition to return the children was filed after that three-year period, it was reasonable to assume that the children had been

6. Normally a child can have only one habitual residence. There may be some cases where more than one habitual residence is possible but that cannot occur in a case where a wrongful retention occurred shortly after the child was removed. *De Lucia v. Marina Castillo*, No. 3:19-CV-7 (CDL), 2019 WL 1905158, at *4 (M.D. Ga. Apr. 29, 2019).

7. It is entirely possible that the parties intended for one child to have its habitual residence in Canada and the other child in Arizona. *Asumadu v. Baffoe*, 765 F.App’x 200, 201 (9th Cir. 2019).

8. *Sundberg v. Bailey*, 765 F.App’x 910, 913 (4th Cir. 2019).

9. *Id.* at 913, 1145; *see also* *Watts v. Watts*, 935 F.3d 1138 (10th Cir. 2019) (noting that while the parents had moved their family to Australia, they had intended to stay there for a limited time period while they obtained specialized medical care for one child, had lived in Australia for about eleven months, maintained a home in the United States, had left many sentimental possessions in the United States when they had moved to Australia, and maintained United States financial ties, including the father’s business and bank accounts there).

10. *Saada v. Golan*, No. 18-CV-5292(AMD)(LB), 2019 WL 1317868, at *2, 15 (E.D.N.Y. Mar. 22, 2019), *rev’d*, 930 F.3d 533 (2nd Cir. 2019).

11. *Id.* at *15.

12. *Id.*

13. *See e.g.* *Bandžius v. Šulcaite*, No. 18-CV-3811, 2018 WL 5018459, at *1–2 (N.D. Ill. Oct. 15, 2018).

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habitually resident in the United States.¹⁴ In *Farr v. Kendrick*, although the children ended up residing in Mexico for nearly three years, the mother always viewed the move as temporary in nature, the father and mother retained strong ties to the United States and came back for frequent visits, the family members retained U.S. citizenship and only had temporary status in Mexico (which lapsed for some of them in 2017), and the father never stopped banking and obtaining car insurance in the United States.¹⁵ The court determined that the habitual residence never changed from the United States.¹⁶

In another case, the court concluded that the objective evidence showed the parties never intended to abandon the Ukraine as the child's habitual residence.¹⁷ The family spent most of their lives in Ukraine. The child attended school in Ukraine. Their friends and extended family were almost entirely in Ukraine. There was no objective evidence that the parents jointly decided to abandon Ukraine as their home or to relocate the children to another country regardless of the domicile of one or both parents. While the respondent was determined to relocate to California, the petitioner never shared that firm unconditional intention.¹⁸

In determining whether the parties agreed to change the child's habitual residence, the court must often sort through conflicting testimony.¹⁹ For instance, the appellate court remanded a case to the trial judge to sort through conflicting testimony to determine whether the parents agreed that the child's habitual residence should change to the United States or whether the agreement was contingent upon the father being able to join them.²⁰ If the latter, then habitual residence did not change from Colombia to the United States.²¹

14. *Id.* at *9.

15. No. CV-19-08127-PCT-DWL, 2019 WL 2568843, at *2 (D. Ariz. June 21, 2019).

16. *Id.* at *15.

17. *Chumachenko v. Valent*, No. 18-CV-9728-LTS, 2018 WL 6437062, at *5 (S.D.N.Y. Dec. 7, 2018).

18. *Id.*

19. *See Campomanes Flores v. Elias-Arata*, No. 3:18-cv-160-J-34JBT, 2018 WL 3495865 (M.D. Fla. July 20, 2018).

20. *Calixto v. Lesmes*, No. 8:17-cv-2100-T-33JSS, 2019 WL 397003, at *3 (M.D. Fla. Jan. 31, 2019).

21. *Calixto v. Lesmes*, 909 F.3d 1079 (11th Cir. 2018); *Calixto*, 2019 WL 397003, at *3 (on remand, the district court concluded that the father's belief that they would travel to the United States as a family was unfounded, particularly in view of the fact that the parents were no longer together at the time); *Cf. Nissim v. Kirsh*, 394 F.Supp.3d 386 (S.D.N.Y. 2019) (finding that the parties' decision to move to the United States was conditioned on the mother, father, and the child living in the same home as a family. Because the mother eliminated that condition by unilaterally carrying off the child to another home on the other side of the country, there was no mutual agreement that the child's habitual residence would change from Israel to the United States).

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b. Acclimatization Cases

The Sixth and Eighth Circuits continue to adhere to the doctrine that a child's perspective determines its habitual residence. In other words, habitual residence depends on whether the child has become acclimatized to its new country from the child's point of view. But the Sixth Circuit recently held that in cases involving very young children it would be appropriate to use the shared parental intent standard.²² Cases exist, however, involving newborn children where it is impossible to determine acclimatization from the child's perspective, and there is no shared parental intent.²³ The Sixth Circuit, en banc,²⁴ affirmed the district court's determination that the child's habitual residence was Italy and not the United States. The court held that so long as the district court applied the correct legal standard, the determination of habitual residence was a question of fact subject to clear error review and noted that, on this record, the district court could have decided the question either way.²⁵ The majority took pains to note that its decision did not mean that an infant's place of birth will always be the habitual residence if it remains there up to the abduction. Such a standard would create its own problems.²⁶ The dissent took the position that in the case of newborn children where there is no parental agreement, the child does not have a habitual residence.²⁷ Since the burden of proof is on the petitioner to show that the child was abducted from its habitual residence, it would follow that the child has no habitual residence and, therefore, the Convention is inapplicable. The Supreme Court has granted certiorari and will decide the case during the 2019–2020 term.²⁸

In other cases, a child in the United States for one year to attend school had not become so acclimatized to the United States that it would change the child's habitual residence from Serbia to the United States.²⁹ Under the acclimatization standard, it is not often possible to decide habitual residence

22. *Carvajal Vasquez v. Gamba Acevedo*, 931 F.3d 519, 526 (6th Cir. 2019) (applying the "intent" test to children that were two years old).

23. *See e.g. Taglieri v. Monasky*, 907 F.3d 404 (6th Cir. 2018) (en banc 10-7 decision).

24. *Id.*

25. *Id.* at 408.

26. *Id.*, *abrogated by Diagne v. Demartino*, No. 2:18-cv-11793, 2018 WL 4385659 (E.D. Mich. Sept. 14, 2018) (holding that a child who is born when the parents are disputing which country the child should live in has no habitual residence).

27. *Taglieri*, 907 F.3d at 418.

28. *Monasky v. Taglieri*, 139 S.Ct. 2691 (2019) (determining how a child's habitual residence under the Child Abduction Convention is determined and whether determinations of habitual residence are reviewed de novo or with any kind of deference to existing decisions).

29. *Djeric v. Djeric*, No. 2:18-cv-1780, 2019 WL 1046893, at *4 (S.D. Ohio Mar. 5, 2019); *see also Djeric v. Djeric*, No. 2:18-cv-1780, 2019 WL 2374070, at *2 (S.D. Ohio June 5, 2019) (noting that the attorney fee request was drastically reduced due to Mr. Djeric's impecunious circumstances and his good faith belief that the parties had agreed that he could take the child to the United States).

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on a motion for summary judgment because it is so fact-based.³⁰ But a child from Australia who lived in the United States for approximately ten months before the alleged wrongful retention developed close relationships with family members in the United States, attended school, made friends, and participated in a variety of extracurricular activities was habitually resident in the United States.³¹

3. *Rights of Custody and Their Exercise*

A removal or retention is only wrongful if the left-behind parent had a right of custody and was “actually exercising” that right at the time of removal, or would have exercised that right, but for the removal.³²

a. Rights of Custody

The Mexican doctrine of *patria potestas* confers a right of custody upon a child’s parents.³³ Such a right is not extinguished by a divorce decree unless the decree specifically so provides.³⁴ A Guatemalan father of a child born out of wedlock has an obligation to care for, support, educate, and discipline his son—an obligation, when breached, is punishable by criminal sanctions.³⁵ Based on this principle, the father was endowed with joint decision-making authority over important aspects of the child’s life, thereby giving the father a right of custody.³⁶

Conversely, a father had no custody rights at the time his child’s mother took the child from Hungary to New York, so the child was not wrongfully removed from Hungary.³⁷ The father did not have custodial rights with respect to the child until a Hungarian court issued an order declaring him to be the child’s father, which did not occur until nearly a year after the mother took the child to New York. Furthermore, the court was aware of the mother’s plans to leave Hungary yet did nothing.³⁸ In another case, the court determined that the father’s custodial rights under Swiss law were not violated because the divorce expressly empowered the mother to relocate with the children to either “the United States or France” “at [or possibly after] the end of the school term.”³⁹

30. *Capalungan v. Lee*, No. 2:18-cv-1276, 2019 WL 1872978, at *6 (E.D. Ohio Apr. 26, 2019) (Mag. J. Jolson).

31. *Capalungan v. Lee*, No. 2:18-cv-1276, 2019 WL 1330711, at *6 (E.D. Ohio Mar. 25, 2019).

32. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, Hague Conf. on Private Int’l L, Art. 3, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

33. *Diaz v. Rios Ibarra*, No. CV-19-03183-PHX-DWL, 2019 WL 4394491, at *6 (D. Ariz. Sept. 13, 2019).

34. *Id.* at *7.

35. *Palencia v. Perez*, 921 F.3d 1333, 1340 (11th Cir. 2019).

36. *Id.*

37. *See Mohácsi v. Rippa*, 346 F.Supp.3d 295 (E.D.N.Y. 2018).

38. *Id.*

39. *Pfeiffer v. Bachotet*, 913 F.3d 1018, 1025 (11th Cir. 2019).

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b. Exercise of the Right to Custody

Normally, exercising the right to custody is not an issue under the Hague Convention. The vast majority of cases follow the determination made in *Friedrich v. Friedrich* that the only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to find a “right to custody” whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.⁴⁰ Thus, where the evidence conflicts concerning the exercise of custody rights, the more appropriate method of resolving the question is in favor of the parent having exercised those rights.⁴¹

4. *Defenses/Exceptions*

There are several exceptions (defenses) that a respondent may assert in arguing that a child should not be returned to the child’s habitual residence.

a. Child is Settled in His/Her New Environment

Article 12 of the Child Abduction Convention provides that the authorities need not return a child if more than one year has elapsed between the child’s abduction or retention and the child is now settled in the child’s new environment.⁴² The one-year period runs from the date the retention or removal became “wrongful.”⁴³ A retention occurs not on the date the abducting parent formed the intent to wrongfully retain the child, but rather on the date the petitioning parent learned the true nature of the situation.⁴⁴

The factual findings used in determining the “now settled” defense are reviewed under the clear error standard.⁴⁵ This defense can only be considered if it has been more than one year between the abduction or retention and the filing of the return petition.⁴⁶ Given that the date of the wrongful retention is often in dispute, this issue often cannot be decided on summary judgment.⁴⁷

i. *Child Not Returned*

A child who showed significant improvement in English, participation in school activities, receipt of several school awards, and that her family in the

40. 78 F.3d 1060, 1065 (6th Cir. 1996).

41. *Mendieta Chirinos v. Umanzor*, No. 3:18-cv-02668-M, 2019 WL 2287975, at *7 (N.D. Tex. May 29, 2019).

42. Convention on the Civil Aspects of International Child Abduction, *supra* note 32.

43. The one-year period starts at the time the removal or retention became wrongful and the filing of the petition to have the child returned. Seeking the assistance of the Central Authority of the country from which the child was taken does not constitute commencement of a proceeding. *Monzon v. De La Roca*, 910 F.3d 92, 96 (3rd Cir. 2018).

44. *See Palencia v. Perez*, 921 F.3d 1333 (11th Cir. 2019).

45. *Malmgren v. Malmgren*, 747 F.App’x 945, 946 (4th Cir. 2019).

46. *Id.*

47. *See Capalungan v. Lee*, No. 2:18-cv-1276, 2019 WL 1330711 (E.D. Ohio Mar. 25, 2019).

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United States supported her academic and recreational interests was found to be settled in the new environment.⁴⁸

ii. Child Returned

In *Fernandez v. Bailey*, the court joined the majority of circuits in holding that even if a child is settled in the United States, the court still has the discretion to return the child to its habitual residence.⁴⁹ In this case, the mother had abducted her child from Panama for the second time. The Fourth Circuit overturned a trial court's determination that it had authority to allow the child to stay in the United States, even if the petition for return was filed within one year of the abduction.⁵⁰

In *Vite-Cruz v. Sanchez*, the court considered the following factors to determine that the child was not well settled: the child moved homes twice; the child's mother was completely dependent on her boyfriend who was undocumented; the child's primary language was Spanish; and the child needed counseling to help him adjust to the United States.⁵¹

b. Grave Risk of Harm/Intolerable Situation

Under Article 13(b), a court need not return a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."⁵²

i. Defense Not Sustained

Such a defense cannot be decided on a motion to dismiss but requires an evidentiary hearing.⁵³ In determining whether to sustain the defense, the court must consider the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child if returned.⁵⁴ In one case the court's order to return the child was affirmed because the appellate court noted that both parents have strong familial ties in Mexico, and that there exists responsible parties (other than the mother) who can assist in the child's transition if the mother chooses not to return with the child.⁵⁵ The court ordered the District Attorney not to disclose any

48. The court had previously vacated an order by a Nevada family court awarding guardianship to the paternal grandparents who were using that order to interfere with the Hague court's temporary visitation schedule. See *Flores Castro v. Renteria*, No. 2:18-cv-01739-GMN-CWH, 2018 WL 8299943 (D. Nev. Nov. 2, 2018) (Mag. J. Hoffman), *vacated* 382 F.Supp.3d 1123 (D. Nev. 2019).

49. 909 F.3d 353 (11th Cir 2018). See also *Monzon*, 910 F.3d at 92.

50. *Malmgren*, 747 F.App'x at 945.

51. 360 F. Supp. 3d 346, 358–59 (D.S.C. 2018).

52. *Flores v. Alvaradon*, No. 3:17-CV-00514-RJC-DSC, 2017 WL 8780151, at *2 (W.D.N.C Dec. 11, 2017).

53. *Id.*

54. *Estrada v. Anna R.*, E068248, 2018 WL 4927505, at *3 (Cal. Ct. App. Oct. 11, 2018).

55. *Id.* at *4.

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information to the father relating to the children's itinerary, temporary custodian, and temporary residence in Mexico.⁵⁶

Although Article 13(b) requires a finding of harm to the child, most courts recognize that sustained spousal abuse can, in some instances, create such a harm.⁵⁷ When the district court considers spousal abuse and finds it did not create a grave risk to the child, the appellate court will affirm unless the factual finding is in clear error and there was an abuse of discretion.⁵⁸

In *Eidem v. Eidem*,⁵⁹ the mother argued that the child would be at grave risk if returned to Norway because the child would be taken away from the network of doctors overseeing the child's care in the United States.⁶⁰ But the court determined that the child could receive appropriate care in Norway and the father was willing to administer the health regimen the child needed to develop.⁶¹ In *Quinn v. Quinn*, the court rejected the father's defense that the child would be in grave risk due to the mother's mental condition since the evidence showed the mother could manage her condition and still care for her child.⁶²

ii. Defense Sustained

In *Leonard v. Lentz*, the court previously found an Article 13(b) defense because the child needed medical care for a kidney transplant that was not readily available in Turkey.⁶³ The father's petition to have the child returned after the transplant was dismissed as not ripe for decision at the time.⁶⁴

In *Farr v. Kendrick*, the court, in refusing to return the child to Mexico, found

the evidence concerning Father's administration of corporal punishment is deeply troubling and leads the [c]ourt to conclude the grave-risk exception has been satisfied. It is difficult to say what was most troubling—the frequency of the punishment, the unusually stylized manner in which it was administered, or the risk of injury it posed.⁶⁵

56. *Id.*

57. *Soto v. Contreras*, 880 F.3d 706, 712–13 (5th Cir. 2018).

58. *See id.*; *Gil-Leyva v. Leslie*, 780 Fed. App'x 580, 590 (10th Cir. 2019) ("Evidence of a 'clear and long history of spousal abuse' may suffice to show a propensity for child abuse. . . . but isolated incidents of abuse generally demonstrate a risk of harm only to the spouse. At a minimum, the spouse must 'draw a connection' showing that the risk such abuse poses to her 'constitute[s] a grave risk' to the children.")

59. 382 F. Supp. 3d 285, 292–93 (S.D.N.Y. 2019).

60. *Id.*

61. *Id.* at 293.

62. *Quinn v. Quinn*, No. 3:19-05010-CV-RK, 2019 WL 2518147, at *4 (W.D. Mo. June 18, 2019).

63. 748 Fed. App'x 87, 88 (8th Cir. 2019).

64. *Id.* at 89.

65. 2019 WL 2568843, at *13.

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In *Saada v. Golan*, the Second Circuit determined that the district court's use of undertakings did not sufficiently ameliorate the grave risk of harm to the child if he were to be repatriated to Italy, and, therefore, a remand was warranted to allow the district court to determine whether there existed alternative ameliorative measures that were either enforceable by the district court or, if not directly enforceable, were supported by other sufficient guarantees of performance.⁶⁶

c. Mature Child's Objection

In applying this defense, the court must consider whether the child objects to being returned to the child's habitual residence and not whether the child has a preference to live in one country over the other.⁶⁷ This issue is subject to review under the clear error standard.⁶⁸

In *Djeric v. Djeric*, the court noted that while the twelve-year-old's "maturity and demeanor were undeniably impressive, the [c]ourt will not exercise its discretionary power to refuse ordering his return because [the child's] stated preference did not amount to a 'particularized objection.'"⁶⁹

d. Human Rights and Fundamental Freedoms

Article 20 provides that the child's return 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.⁷⁰ As in the past, no cases arose in 2019 discussing this defense.

e. Consent/Acquiescence to the Removal

In order to show acquiescence, there must be either "an act or statement with the requisite formality, such as testimony in a judicial proceeding[,] a convincing written renunciation of rights[,] or a consistent attitude of acquiescence over a significant period of time."⁷¹ Other courts have required that the totality of circumstances must be examined to determine whether there was consent or acquiescence.⁷² Therefore, no consent existed when the mother allowed the father to bring the child to the United States under the condition he would obtain permission for the wife to also immigrate and he has not done so.⁷³

66. *Golan*, 930 F.3d at 543.

67. *Custudio v. Torres*, 842 F.3d 1084, 1089 (8th Cir. 2016).

68. *Id.* at 1089.

69. *Djeric*, 2019 WL 1046893, at *6.

70. *Id.* at *5.

71. *Diagne v. Demartino*, No. 2:18-cv-11793, 2018 WL 4385659, at *8 (E.D. Mich. Sept. 14, 2018); see also *Djeric*, 2019 WL 1046893, at *5.

72. *Cocom v. Timofeev*, No. 2:18-cv-002247, 2019 WL 76773, at *10 (D.S.C. Jan. 2, 2019).

73. *Id.* at *13.

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5. *Other Issues Under the Child Abduction Convention and ICARA*

a. Attorney's Fees

Under ICARA attorney fees and costs are to be awarded to the prevailing petitioner, unless the respondent can show that the award would be clearly inappropriate.⁷⁴ Most circuit courts hold that district courts have broad discretion to determine when an award of costs and fees is appropriate.⁷⁵ Generally, in determining whether expenses are “clearly inappropriate,” courts have considered the degree to which the petitioner bears responsibility for the circumstances giving rise to the fees and costs associated with a petition.⁷⁶ For example, awarding expenses is clearly inappropriate where the prevailing petitioner physically abused the respondent since “a [parent] should not be required under the threat of monetary sanctions to choose between continued abuse (mental as well as physical) and separation from a young child.”⁷⁷

Where fees are awarded as a condition to petitioner's voluntary dismissal without prejudice of the return proceeding, the standard governing the attorney fee award is not of ICARA but local law.⁷⁸

b. Procedural Issues

The voluntary return of the child moots the return proceeding.⁷⁹

c. Stays

If the state court will not decide all issues, then it is appropriate for the federal court to order a stay in the state court proceedings until such time as the federal court can determine the abduction claim.⁸⁰

d. Temporary Restraining Orders (TRO)

A petitioner seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

74. *Sundberg v. Bailey*, No. 2:18-cv-002247, 2019 WL 2550541, at *2 (W.D.N.C. Jan. 2, 2019) (This may also include expenses and fees incurred when the original order for fees has to be defended on appeal.).

75. *West v. Dobrev*, 735 F.3d 921, 932 (10th Cir. 2013); *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004).

76. *Vite-Cruz v. Sanchez*, No. 3:18-cv-01943-DCC, 2019 WL 402057, at *1 (D. S.C. Jan. 31, 2019).

77. *See id.* (Denying any recovery for fees and costs because, “Respondent is indisputably indigent and has a large family to support in the United States. In the event Respondent was even able to pay costs, it would be to the detriment of her other children.” But, when the mother's claim of indigence is rebutted by evidence of her lifestyle the trial court did not reduce the father's attorney fee claims.). *See also Asumadu v. Baffoe*, No. CV-18-01418-PHX-DLR, 2019 WL 1531793, at *1 (D. Ariz. April 9, 2019) (costs not awarded due to petitioner's abuse of respondent).

78. *Garcia v. Segovia*, 1:17-CV-239, 2017 WL 6757647, at *2 (W.D.N.C. Nov. 22, 2017).

79. *Id.*

80. *Sundberg v. Bailey*, NO. 1:17-CV-00300-MR-DLH, 2017 WL 5760104, at *2 (W.D.N.C. Nov. 28, 2017), *aff'd* 765 Fed. App'x 910 (4th Cir. 2019).

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the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.⁸¹ In one case, the court found that the mother did not show a “likelihood of irreparable harm in the absence of a TRO.”⁸² Specifically, she did not present “any specific evidence suggesting that the father was likely to flee from Arizona, taking the children with him, in the absence of a TRO. Such a showing is usually necessary to obtain a TRO in an ICARA matter.”⁸³

e. Relationship to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

The question of whether a U.S. court should recognize a foreign court’s refusal to return the child is a question of comity.⁸⁴ But a foreign court’s decision on the return question does not decide custody and therefore does not divest a U.S. court of jurisdiction to resolve custody of the child.⁸⁵

f. Relationship to Asylum Law

In *Ordonez v. Benitez-Guillen*, the court denied respondent’s motion to dismiss because the court did not lack the jurisdiction to order the return of the child because of pending applications for asylum.⁸⁶ As the court noted, all case law suggests that courts maintain subject matter jurisdiction over ICARA claims regardless of the asylum status of a respondent and/or minor child.⁸⁷

g. Other Procedural Issues

It is usually never appropriate for a federal court to abstain from deciding an abduction case merely because a proceeding for custody had been previously filed in state court.⁸⁸ Abstention is only proper if the state proceeding will decide all the issues in the abduction case.⁸⁹

Courts have wide discretion in their procedural determinations. For instance, a federal court has the authority to allow the left-behind parent to testify remotely. Normally such a request will be granted. Because the court has such authority, any attempt to require the left-behind U.S. citizen

81. *Muwakil-Zakuri v. Zakuri*, NO. 17-CV-2062 (JCH), 2017 WL 6453399, at *1 (D. Conn. Dec. 11, 2017); *Cocom v. Timofeev*, No. 2:18-CV-002247, 2018 WL 3958129, at *2 (D.S.C. Aug. 17, 2018) (enjoining the father and his mother from removing the child).

82. *La Salle v. Adams*, No. CV-19-04976-PHX-DWL, 2019 WL 3933750, at *3 (D. Ariz. Aug. 20, 2019).

83. *Id.*

84. *Guimaraes v. Brann*, 562 S.W.3d 521, 536 (Tex. App.—Houston [1st Dist.] 2018, pet denied).

85. *Id.* at 539.

86. No. 2:18-CV-1191, 2019 WL 2289831, at *3 (S.D. Ohio May 29, 2019).

87. *Id.*

88. *See Bordelais v. Bordelais*, No. 17 C 4697, 2017 WL 6988655, at *1 (N.D. Ill. Dec. 19, 2017) (federal return case is a duplicate of the state case and therefore abstention is proper).

89. *Id.*

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to appear and give a deposition pursuant to the Walsh Act⁹⁰ is likely to fail. “The Walsh Act permits a court to exercise jurisdiction over a [U.S.] citizen and to require him to appear in the United States to testify.”⁹¹ The court also has the authority to allow the petitioner to proceed *in forma pauperis* if the petitioner cannot afford the filing fee.⁹²

If a respondent alleges that the petitioner’s inability to care for the child presents an Article 13(b) defense, the trial court can grant the respondent’s request for medical records located in the petitioner’s country.⁹³

Normally post trial developments will not change the results of a return proceeding.⁹⁴

**B. THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE
ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN
CIVIL OR COMMERCIAL MATTERS (THE SERVICE
CONVENTION)**

Service of process under the Convention must be reviewed based on the circumstance of the case. For instance, a Texas court decision terminating the rights of a Mexican father had to be reversed because the father was never served in accordance with the Service Convention.⁹⁵ Likewise, in a California case, a dependency adjudication was reversed because the authorities did not exercise due diligence in locating the father.⁹⁶ But another court determined that when the Mexican husband’s whereabouts were unknown, the Service Convention was inapplicable.⁹⁷

90. *Teller v. Helbrands*, 19-CV-3172-SJB, 2019 WL 3779863, at *2 (E.D.N.Y. Aug. 12, 2019) (Mag. J. Bulsara); 28 U.S.C. § 1783.

91. *Id.* at *1; *Teller v. Helbrands*, 9-CV-3172-SJB, 2019 WL 3975555, at *3 (E.D. N.Y. Aug. 21, 2019) (holding that when the father indicated he would not come to the United States to testify, a subpoena under the Walsh Act would be issued).

92. *Griffiths v. Weeks*, No. 18-CV-60729-BLOOM/Valle, 2018 WL 7824478, at *1 (S.D. Fla. Apr. 5, 2018); *La Salle*, 2019 WL 3933750, at *3.

93. *Quinn v. Quinn*, No. 3:19-05010-CV-RK, 2019 WL 1460928, at *2–*5 (W.D. Mo. Apr. 2, 2019).

94. *Wtulich v. Filipkowska*, 16-CV-2941 (JO), 2019 WL 2869056, at *3 (E.D.N.Y. July 3, 2019).

95. *In re J.R.*, NO. 09-18-00433-CV, 2019 WL 961093, at *2 (Tex. App.—Beaumont Feb. 28, 2019, no pet) (mem. op.).

96. *In re D.R.*, 252 Cal. Rptr. 3d 283, 286 (Cal. Ct. App. 2019).

97. *In re Marriage of Sandoval*, 589 S.W.3d 267, 274 (Tex. App.—Waco Aug. 14, 2019, no pet. h.).

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C. OTHER CASES INVOLVING INTERNATIONAL FAMILY LAW
LITIGATION

1. *Jurisdiction and Recognition of Foreign Marriages and Divorce*

A trial court in Connecticut did not err in recognizing a Brazilian divorce because at least one of the spouses was domiciled in Brazil.⁹⁸ Conversely, a default Ohio divorce decree obtained by a husband after serving his third wife (while he still remained married to his first two) by publication despite knowing her address (in the former marital home on a Russian island off the coast of Japan) was properly set aside.⁹⁹ His fraud on the court, and the third wife's proof of a meritorious annulment or divorce claim on the ground of bigamy, warranted the grant of relief.¹⁰⁰

2. *Children's Issues*

a. Custody

i. *Jurisdiction and Enforcement*

In determining whether a court has enforcement jurisdiction, it often must decide if it is the home state. In one case, because Qatar was clearly the home state of the children when the proceeding commenced, California could not exercise jurisdiction over the children.¹⁰¹ Likewise, Nebraska vacated seven years of custody determinations because, at the time of the original decree, the child's home state was Togo and not Nebraska, and therefore Nebraska never had subject matter jurisdiction.¹⁰² Similarly, an Arizona court determined that it was not the home state when the children were born in the Netherlands and spent only one month total in Arizona.¹⁰³ The father's argument that the Netherlands would not entertain an action by him was dismissed because he presented no actual evidence of Dutch law.¹⁰⁴ In another jurisdictional case, the court concluded that Mexico could not be the home state of the child when the child was living there with the grandmother, who was not awarded custody and did not claim a right of custody under Mexican law, and therefore was not "a person acting as a parent."¹⁰⁵

98. *St. Denis-Lima v. St. Denis*, 212 A.3d 242, 310 (Conn. App. Ct. 2019).

99. *Schaefer v. Mazii*, 2019-Ohio-3808, 2019 WL 4566958, at ¶¶ 2, 21 (Ct. App. Ohio Sept. 20, 2019).

100. *Id.* at ¶ 13.

101. *In re Marriage of O.T. & Lamdagbri*, E058911, 2018 WL 6242412, at *14 (Cal. Dist. Ct. App. 2018).

102. *DeLima v. Tsevi*, 921 N.W.2d 89, 97 (Neb. 2018).

103. *Williams v. Haddad*, 1 CA-CV 18-0746 FC, 2019 WL 4316862, at *6 (Ariz. Ct. App. Sept. 12, 2019).

104. *Id.*

105. *Hernandez v. Mayoral-Martinez*, 942 N.W.2d 80, 83 (Mich. Ct. App. 2019).

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ii. Communicating with Foreign Jurisdiction

In *G.R. v. B.P.*,¹⁰⁶ a juvenile case was remanded to determine the child's home state, which was likely El Salvador, and for the California court to communicate with the court in El Salvador.

California adheres to the view that the failure of a foreign court to return a communication from a California court is the same as declining jurisdiction. Therefore, the failure of a Honduran court to communicate with a California court constituted declining jurisdiction.¹⁰⁷

iii. Inconvenient Forum

In a custody dispute between citizens of Poland over a child, who was a citizen of Poland, where the mother and child returned to Poland in compliance with their visas, and the father violated the terms of the visa that permitted him to remain in the United States, Illinois was an inconvenient forum, and the circuit court abused its discretion when it denied the mother's motion to dismiss.¹⁰⁸

In *Blumenschein v. Blumenschein*, the court approved the mother's request to dismiss the action in favor of an action in Germany. The trial court determined, based on all the factors in the UCCJEA, that the case could more expeditiously proceed in Germany.¹⁰⁹

California determined in one case that India was a more appropriate forum than California and rejected the father's argument that the court could only make such a determination if it had concurrent jurisdiction.¹¹⁰

iv. Modification

California could not exercise jurisdiction to declare the child dependent and neglected when there was a prior Chinese custody decree and the mother still lived in China.¹¹¹

v. Enforcement

If a foreign custody determination is made in substantial conformity with the UCCJEA, it will be enforced in the United States.¹¹² Colorado recognized an Iranian custody order made in substantial conformity with the UCCJEA and therefore could not terminate the parental rights of the Iranian father.¹¹³ The court also concluded that Iranian custody law did not

106. *In re G.R. v. B.P.*, G056676, 2019 WL 349501, at *1 (Cal. Dist. Ct. App. Jan. 29, 2019).

107. *In re C.M. et al. v. G.M.*, B287846, 2018 WL 6716559, at *2 (Cal. Dist. Ct. App. Dec. 21, 2018).

108. *Bonislawski v. Lubowicka*, 2019 IL App (1st) 172911-U, 2019 WL 2752112, at *1 (Ill. App. Ct. June 28, 2019).

109. *Blumenschein v. Blumenschein*, 818 S.E.2d 201, at *1 (N.C. Ct. App. Sept. 18, 2018).

110. *R.B. v. D.R.*, 238 Cal. Rptr. 3d 904, 910 (Cal. Dist. Ct. App. 2018).

111. *In re Y.W. v. W.W.*, B289893, 2019 WL 911668, at *1 (Cal. Dist. Ct. App. Feb. 25, 2019).

112. *See Francois B. v. Fatoumata L.*, 170 A.D.3d 617, 617 (N.Y. App. Div. 2019) (enforcing a French order changing custody from mother to father).

113. *In re A.B.-A.*, 451 P.3d 1278, 1285 (Colo. App. 2019).

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violate fundamental principles of human rights and that the lack of diplomatic relations with Iran did not affect the issue of custody jurisdiction.¹¹⁴

A Michigan trial court appropriately vacated its prior order registering a California custody decree because all parties had left California, the order had been superseded by an Indian order, and India was the home state of the child.¹¹⁵ California was not required to defer to a pending proceeding in Belarus because the father was never given notice of the Belarus proceeding, and therefore that country was not exercising jurisdiction in substantial conformity with the UCCJEA.¹¹⁶ Nor is a Connecticut court required to enforce a Guatemalan guardianship order because it was obtained using a false birth certificate and without notice to the respondent.¹¹⁷

b. Relocation

A court should not allow a parent to relocate to a country that is not a party to the Child Abduction Convention. A Michigan court denied a mother's request to relocate to Pakistan because the United States has not accepted Pakistan's accession to the Child Abduction Convention.¹¹⁸ In another case, a California court concluded that the father had not rebutted the presumption that the custodial parent had a right to relocate herself and the child to Israel.¹¹⁹

c. Restrictions on Visitation

Arizona upheld the imposition of a bond on a father to ensure the children would be returned from Kuwait after visitation.¹²⁰ Factors influencing the decision were the facts that Kuwait has not acceded to the Child Abduction Convention, the father lacked any significant ties to Arizona, and the mother would have little recourse under Kuwaiti law to secure the return of the children.¹²¹ But in *Schut v. Schut*, the court determined that there was no risk in allowing the father visitation time with the child in Germany.¹²²

114. *Id.* at 1284.

115. *Nadimpali v. Byrraju*, 931 N.W.2d 38, 48 (Mich. Ct. App. 2018).

116. *W.M. v. V.A.*, 241 Cal. Rptr. 3d 170, 175 (Cal. Dist. Ct. App. 2018).

117. *Maria G. v. Comm'r of Children & Families*, 202 A.3d 1100, 1111 (Conn. App. Ct. 2019); *see also Qaisi v. Alaeddin*, 580 S.W.3d 891, 894 (Ky. Ct. App. 2019) (Kentucky refused to register a Dubai custody determination because the person seeking registration did not produce any evidence that the determination was made in accordance with the UCCJEA.).

118. *Safdar v. Aziz*, 327 N.W. 252, 262 (Mich. Ct. App. 2019).

119. *Gash v. Ben-Noun*, B287073, 2019 WL 2314677, *1 (Cal. Dist. Ct. App. May 31, 2019).

120. *Lehn v. Al-Thanyayan*, 438 P.3d 646, 655 (Ariz. Ct. App. 2019).

121. *Id.* at 653.

122. *Schut v. Schut*, A18-1631, 2019 WL 3293464, *4 (Minn. Ct. App. July 22, 2019).

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d. Parentage and Child Support

Petitioner did not comply with a Nebraska statute requiring her to send a copy of the pleadings to the respondent's last known address in Guatemala and, therefore, her parentage proceeding had to be dismissed.¹²³

e. Juvenile

i. *Special Immigrant Juvenile Status and Other Proceedings*

An unmarried immigrant under twenty-one years of age is eligible for Special Immigrant Juvenile Status if:

- (1) [the immigrant] is a dependent of a juvenile court, in the custody of a state agency by court order, or in the custody of an individual or entity appointed by the court;
- (2) [the immigrant] cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis found under state law; and
- (3) [it is not in the immigrant's] best interest to return to his or her home country or the home country of his or her parents.¹²⁴

Further, federal immigration regulations require these findings "to be made in the course of state court proceedings."¹²⁵

The Arizona Court of Appeals held that the evidence did not support a trial court's finding that returning a child in the custody of the Department of Child Safety to its father's custody out of the country would not create a substantial risk of harm to the child's mental or emotional health or safety.¹²⁶ The court found that one licensed psychologist testified there was an "emotional risk" if the child were returned to the father due to the father's lack of emotional attunement.¹²⁷

Kentucky determined that a state court may make the finding required to determine when a child is a special immigrant child.¹²⁸ It was not arbitrary or capricious for U.S. Immigration and Customs Enforcement (ICE) to conclude that a temporary ex parte emergency state court custody order did not qualify for special immigrant juvenile status purposes.¹²⁹ New York determined that where a trial court refused to make the requisite findings for special immigrant juvenile status, the appellate court may do so, if the record is sufficient.¹³⁰

123. *Francisco v. Gonzalez*, 921 N.W.2d 350, 353 (Neb. 2019).

124. *E.M. v. J.R.*, B288718, 2019 WL 1236398, *1 (Cal. Dist. Ct. App. Mar. 18, 2019).

125. *Id.*

126. *Dep't of Child Safety v. Juan P.*, 427 P.3d 785, 789 (Ariz. Ct. App. 2018).

127. *Id.*

128. *N.B.D. v. Cabinet for Health & Family Serv.*, 2018-CA-000494-ME, 2018 WL 5725968, *3 (Ky Ct. App. 2018); *see also Bonilla v. Maldonado (In re Bonilla)*, 127 N.E.3d 1181, 1186 (Ind. Ct. App. 2019).

129. *Perez v. Cissna*, 914 F.3d 846, 856 (4th Cir. 2019), *reh'g granted, vacated*, 2019 U.S. App. LEXIS 14479 (2019).

130. *In re Rina M.*, 169 A.D.3d 1031, 1033 (N.Y. App. Div. 2019).

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Maryland determined that a juvenile court had the authority to place children with their father in Mexico.¹³¹

3. *Miscellaneous Family Law Cases*

a. Criminal Law

Philip Zoghiates' pro se motion to reduce his sentence for his participation in the long-running, Miller-Jenkins child kidnapping was denied.¹³²

b. Alimony and Affidavit of Support

California can modify a registered Italian divorce order to increase spousal support, particularly when the Italian court issued an order that it no longer had jurisdiction to modify the order.¹³³ Washington held that "the difference between Washington and Ontario law regarding the duration of a spousal support obligation does not amount to a manifest incompatibility of Ontario's rule with Washington's public policy."¹³⁴

The husband's obligation under the I-864 affidavit of support ended when his wife became a U.S. citizen.¹³⁵

c. Property

Where both parties submitted the interpretation and enforceability of their *mahr* agreement to Iran, it is error for a Massachusetts court to include the value of the *mahr* in the marital estate.¹³⁶

d. Bankruptcy

It is not a violation of the automatic stay for the State of Idaho to collect back due child support as requested by Canada.¹³⁷

131. *In re M.S.*, 2019 WL 1377260, at *14 (Md. Ct. Spec. App. Mar. 26, 2019).

132. *United States v. Zoghiates*, No. 14-CR-175-RJA, 2019 WL 2211459, at *1 (W.D.N.Y. May 22, 2019).

133. *Pike v. Harrell*, No. B287700, 2019 WL 350608, at *3 (Cal. Dist. Ct. App. Jan. 29, 2019).

134. *Brett v. Martin*, 445 P.3d 568, 570 (Wash. Ct. App. 2019).

135. *In re A.M.H.*, No. 14-17-00908-CV, 2019 WL 4419195, *7 (Tex. App.—Houston [14th Dist.] 2019, no pet) (mem. op.).

136. *Ravasizadeh v. Niakosari*, 112 N.E.3d 807, 813 (Mass. App. Ct. 2018).

137. *In re Khurana*, No. 13-20058-TLM, 2019 WL 1431916, at *2 (Bankr. D. Idaho 2019).

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PUBLISHED IN COOPERATION WITH
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