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## International Family Law

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# International Family Law

ROBERT G. SPECTOR\*

## I. International Conventions — Developments

### A. THE HAGUE CHILD SUPPORT CONVENTION

The United States ratified the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Hague Child Support Convention) in 2010. Implementing legislation has passed the U.S. House of Representatives. The Convention will come into force internationally on January 1, 2013, with the ratifications of the United States, Norway, and Albania.<sup>1</sup>

### B. HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT, AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN, CONCLUDED OCTOBER 19, 1996 (THE 1996 CONVENTION)

The United States has signed the 1996 Convention and is committed to ratification. The process will be through a combined effort of federal and state legislation. The state legislation will be amendments to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Uniform Law Commission has appointed a drafting committee, and the proposed amendments had a first reading in 2012.<sup>2</sup> A second and final reading will take place in summer 2013.

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1. *Status Table: 38: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, HAGUE CONF. PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=131](http://www.hcch.net/index_en.php?act=conventions.status&cid=131) (last visited Feb. 7, 2013).

2. See *Committees: Hague Convention on Protection of Children*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Committee.aspx?title=Hague%20Convention%20on%20Protection%20of%20Children> (last visited Feb. 7, 2013).

C. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (THE ABDUCTION CONVENTION)

The Hague Conference on Private International Law held a special session on the working of the Convention in January 2012. The conclusions and recommendations of the session can be found on the website of the Hague Conference.<sup>3</sup>

## II. International Litigation

A. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

As in past years, most of the international family law cases in the United States involved the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>4</sup> and its implementing legislation, the International Child Abduction Remedies Act.<sup>5</sup> This treaty has more ratifications and accessions than any other family law treaty concluded under the auspices of the Hague Conference on Private International Law.

The Convention operates to return children to the state from where they were taken so that state can determine issues of custody and visitation. To obtain a return order, the petitioner must prove that: (1) the child was abducted from, or retained from returning to, the country of the child's habitual residence; (2) the petitioner had "a right of custody" under the law of the abducted-from State that is recognized under the Convention; and (3) the petitioner was actually exercising those rights, or would have exercised those rights but for the abduction. Jurisdiction is appropriate in either federal or state court.

### 1. *Applicability of the Abudction Convention*

The Hague Abduction Convention applies only to countries that have ratified it or acceded to it. The Convention cannot be made applicable to a case by the stipulation of the parties. The Convention ceases to apply when the child in question turns sixteen.

### 2. *Habitual Residence*

As in all Hague conventions, the Abduction Convention does not define the term "habitual residence." Therefore, courts have had to determine this "fact-based" issue in a number of cases. The Fifth Circuit adopted the majority view among other circuits that look to the parents' shared intent in determining their child's habitual residence.<sup>6</sup>

A number of cases applied the "intent" standard this year. For example, a father's petition for the return of his infant son to France was dismissed when he failed to show that

3. *Conclusions and Recommendations of the Sixth Meeting of the Special Commission*, HAGUE CONF. PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=publications.details&pid=5378&dtid=2](http://www.hcch.net/index_en.php?act=publications.details&pid=5378&dtid=2) (last visited Feb. 7, 2013).

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 [hereinafter Hague Abduction Convention].

5. Pub. L. No. 100-300, 102 Stat. 437 (codified at 42 U.S.C. §§ 11601-11 (2006)).

6. *Larbie v. Larbie*, 690 F.3d 295, 310-11 (5th Cir. 2012). The leading case is *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 1999).

France was the American-born infant's habitual residence.<sup>7</sup> In that case, the unmarried parents lacked a mutual, settled intent that the mother and child would remain in France after they returned there from the United States. The court, in dismissing the petition, emphasized the couple's unstable and dysfunctional relationship. In another case, a Mexican mother did not consent to her husband retaining their daughter in the United States after the girl was smuggled across the Mexico/U.S. border, where their intent that the child live in the United States was conditioned on the mother also being able to enter the country (which she was unable to do).<sup>8</sup> In another case, where the parties' last fixed intent was to live in Maine, the United States was found to be the child's habitual residence, and therefore, the father's retention of the child after a visit to the United States was not wrongful.<sup>9</sup> The court also noted that, although the child's immigration status can form a part of the analysis concerning the parents' shared intent, it does not by itself determine whether a child is a habitual resident.

Another court held that an agreement the parents of a non-marital child signed stating that the child could live in Iceland constituted very strong evidence that the habitual residence of the child was Iceland.<sup>10</sup> The same rationale justified holding that a notarized affidavit signed by a child's parents while vacationing in Puerto Rico, in which the father agreed that the child would remain there with the mother indefinitely after he returned to Argentina, constituted evidence of the parents' last agreed-to intent as to where the child should live, and therefore changed the child's habitual residence from Argentina to Puerto Rico.<sup>11</sup> Likewise, parents who had a "bi-continental marriage" and routinely traveled with their child between the father's home in Italy and the mother's home in New York did not have a shared intent that Italy would be the child's habitual residence because the parents' separation agreement that was signed several years earlier provided that the mother would have custody and live in New York.<sup>12</sup>

Not all circuits use the parental-intent test to determine habitual residence, however. In the Sixth Circuit, the intent of the parents is not usually relevant to a determination of habitual residence. Thus, the mother's intent in a case where the mother relocated to the United States from Sweden following her divorce was held not to affect the determination that the child's habitual residence was in Sweden.<sup>13</sup>

### 3. *Rights of Custody*

In *Radu v. Toader*, where neither the divorce decree nor the law of Romania explicitly gave a petitioner-father a *ne exeat* right, he did not have a right of custody when the divorce decree explicitly awarded custody to the respondent-mother.<sup>14</sup> In some situations it is often necessary to analyze the decision of a foreign tribunal completely to determine exactly what effect the decisions have on a parent's right of custody. For example, in

7. *Brosselin v. Harless*, No. C11-1853MJP, 2011 WL 6130419, at \*6-9 (W.D. Wash. Dec. 8, 2011).

8. *Mota v. Castillo*, 692 F.3d 108, 116 (2d Cir. 2012).

9. *See Thompson v. Gnirk*, No. 12-CV-220-JL, 2012 WL 3598854, at \*13-14 (D.N.H. Aug. 21, 2012).

10. *Vela v. Ragnarsson*, 2011 Ark. App. 566, 386 S.W.3d 72, 74-75.

11. *Darin v. Olivero-Huffman*, No. CIV. 12-1121 CVR, 2012 WL 3542514, at \*13 (D.P.R. Aug. 16, 2012).

12. *Guzzo v. Cristofano*, No. 11 CIV. 7394 RJS, 2011 WL 6934108, at \*6-7 (S.D.N.Y. Dec. 30, 2011).

13. *Jensie v. Jensie*, No. CIV.A. 2012-203 WOB, 2012 WL 5178168, at \*6 (E.D. Ky. Oct. 18, 2012).

14. *Radu v. Toader*, 805 F. Supp. 2d 1, 10, 12-13 (E.D.N.Y. 2011), *aff'd*, 463 F. App'x 29 (2d Cir. 2012).

*Felder v. Wetzel*,<sup>15</sup> various orders of the Swiss Guardianship Authority and court were responses to the daughter's need for emergency psychiatric care in United States. The orders did not strip the mother, a Swiss resident, of her right of custody under Swiss law because the Swiss Authority's ex parte order restricting the mother from removing her daughter from the hospital was merely a precautionary injunction. The Authority's subsequent decree revoked the injunction in recognition that the emergency measures taken by the Massachusetts Family Court obviated the need for the Authority's prior precautionary measures, and the appropriate Swiss court with jurisdiction issued an order stating that the Authority's revocation of the mother's parental custody was obsolete.

A removal or retention is only wrongful if the left-behind parent with a right of custody was actually exercising that right at the time of removal or would have exercised that right but for the removal. A federal district court interpreted this requirement to mean short of clear abandonment, a parent with valid custody rights under the law of the child's habitual residence should be found to be exercising such rights.<sup>16</sup>

#### 4. *Wrongful retention*

In *Chafin v. Chafin*, the father's taking of his child's passport so that the child and the mother could not return to Scotland after a visit with the father intended to determine whether reconciliation was possible constituted a wrongful retention of the child.<sup>17</sup> The Eleventh Circuit determined that the appeal was moot, however, because the child had already returned to Scotland.<sup>18</sup> The Supreme Court granted certiorari to resolve a conflict between the circuits concerning the mootness issue.<sup>19</sup>

#### 5. *Defenses*

##### a. Settled in New Environment

A respondent may assert several defenses to prevent the child from being returned. One defense is contained in Article 12 of the Hague Abduction Convention. It provides that the judicial authorities of the abducted-to country need not return the child if more than one year has elapsed between the abduction, or retention, and the filing of the petition for return and if the child has settled in a new environment.<sup>20</sup> The one-year period of Article 12 runs from the wrongful retention or removal. The Second Circuit in *Lozano v. Alvarez*<sup>21</sup> disagreed with other circuits,<sup>22</sup> holding that this provision of Article 12 was not subject to equitable tolling. It noted that the one-year period is not a statute of limitations

15. 696 F.3d 92, 99-100 (1st Cir. 2012).

16. *Fernandez v. Somaru*, No. 2:12-CV-262-FTM-29, 2012 WL 3553779, at \*9 (M.D. Fla. Aug. 17, 2012).

17. *Chafin v. Chafin*, 101 So. 3d 234, 236 (Ala. Civ. App.) (discussing *Chafin v. Chafin*, 37 Fam. L. Rep. (BNA) 1600 (N.D. Ala. 2011), cert. granted, 133 S. Ct. 81 (2012)).

18. Brief for Petitioner, *Chafin v. Chafin*, No. 11-1347 (U.S. Sept. 27, 2012), 2012 WL 4503268 at \*13. The Eleventh Circuit's order dated February 6, 2012 is unpublished but incorporated in the record on appeal to the U.S. Supreme Court. See Joint Appendix, *Chafin*, No. 11-1347, 2012 WL 4481425, at app. 1.

19. *Chafin v. Chafin*, 133 S. Ct. 81, 81 (2012). For the most recent case holding that the return of the child does not render the case moot, see *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012).

20. Hague Abduction Convention, *supra* note 4, art. 12.

21. 697 F.3d 41, 55 (2d Cir. 2012).

22. *Id.* at 56. See *Dietz v. Dietz*, 349 F. App'x 930, 932-33 (5th Cir. 2009) (summ. order); *Duarte v. Bardales*, 526 F.3d 563, 569-70 (9th Cir. 2009); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004).

and that neither the text nor the background materials of the Convention supported equitable tolling. The State Department has also interpreted the Convention as not allowing tolling. An intermediate appellate court in New Jersey came to the opposite conclusion, but only where the acts of the abducting parent actually prevented the left-behind parent from timely commencing an action. In *F.H.U. v. A.C.U.*, the court found that bureaucratic delays and the petitioning mother's financial and travel difficulties were not sufficient to equitably toll that one-year period for an action seeking return of the child from the United States to her habitual residence in Turkey.<sup>23</sup>

In determining whether a child is well-settled, the *Lozano* opinion held that while immigration status can be a factor in determining whether a child is well-settled, it cannot be a determining factor. The court held that the following facts should be considered in determining whether a child is well-settled:

- (1) the age of the child;
- (2) the stability of the child's residence in the new environment;
- (3) whether the child attends school or daycare consistently;
- (4) whether the child attends church [or participates in other community or extracurricular school activities] regularly;
- (5) the respondent's employment and financial stability;
- (6) whether the child has friends and relatives in the new area; and
- (7) the immigration status of the child and the respondent.

#### b. Preference of the Child

A second defense is provided in Article 13. The child need not be returned if the child objects to being returned and has attained an age and maturity where it is appropriate to take account of the child's views.<sup>24</sup> There were no cases discussing this defense this year.

#### c. Grave Risk of Harm

A third defense is contained in Article 13(b) and provides that a child need not be returned if the child would be subjected to a great risk of psychological or physical harm if returned.<sup>25</sup> The respondent is required to prove this defense by clear and convincing evidence.<sup>26</sup> This, according to the Seventh Circuit, means that the trial court must make findings of fact with regard to the risk of physical or psychological harm.<sup>27</sup> Therefore, a district court had to be reversed in an action brought by a Canadian father against an American mother.

23. *F.H.U. v. A.C.U.*, 48 A.3d 1130, 1145, 1147 (N.J. Super. App. Div. 2012).

24. Hague Abduction Convention, *supra* note 4, art. 13.

25. *Id.* art. 13(b).

26. 42 U.S.C. § 11603(e)(2)(A) (2006).

27. *Khan v. Fatima*, 680 F.3d 781, 789 (7th Cir. 2012).

A grave risk defense was sustained in a case where the court found the Peruvian father had committed acts of domestic violence in front of the child, had threatened to kill himself and the child, and the Peruvian police did not appear to take the matter seriously.<sup>28</sup>

But, in *Nixon v. Nixon*, the return to the Australian father of a child wrongfully retained by the mother in the United States after the father returned to Australia following the family's trip to New Mexico was held to not have posed a grave risk of harm to the child.<sup>29</sup> In that case, there was no danger of the child's separation from the mother, who was nursing the child, as the mother also planned to return to Australia, and the father did not intend to seek sole custody. The father's leg cramping and obsessive-compulsive disorder did not pose a danger to the child, and the mother's financial concerns did not indicate an intolerable situation. Another case rejected the defense in a situation where the father was a member of an Israeli community that condones polygamy and considers women subservient to men because the trial court found that her return would not place her in an intolerable situation.<sup>30</sup>

#### d. Other Attempted Defenses

A father's membership in an Israeli community that condones polygamy and considers women subservient to men is also not a basis for denying his petition for his daughter's return from the United States under Article 20 of the Hague Abduction Convention because the return of a child would not utterly shock the conscience of the court or offend all notions of due process.<sup>31</sup>

The equitable doctrine of "unclean hands" was held not to apply in a proceeding under the Convention.<sup>32</sup> In another case, the mother's petition for return of her child should not have been granted where her ex-husband had been awarded custody in their Texas divorce action.<sup>33</sup> The court said that the return order itself effected a "wrongful removal." The panel also noted the mother gave clear and unequivocal consent for the Texas court to make a final custody determination, noting that she never initiated custody proceedings in the United Kingdom. "Quite simply, the only thing in the record suggesting that [she] disagreed with the Texas court's authority is the filing of the instant action . . . Although the mother — like most parents — was devastated to lose primary custody of her child, that fact cannot serve as evidence of non-consent."<sup>34</sup>

### 6. Other Issues Under the Hague Abduction Convention and ICARA

#### a. Attorney Fees

A prevailing petitioner in a return action is entitled to attorney fees, unless the recovery is clearly inappropriate.<sup>35</sup> In *Saldivar v. Rodela*,<sup>36</sup> the court, after an exhaustive discussion,

28. *Acosta v. Acosta*, No. CIV. 12-342 ADM/SER, 2012 WL 2178982, at \*5-6, \*9-10 (D. Minn. June 14, 2012).

29. *Nixon v. Nixon*, 862 F. Supp. 2d 1168, 1180-82 (D.N.M. 2011).

30. *Walkie v. Kitt*, No. 12 C 5937, — F. Supp. 2d —, 2012 WL 5237262, at \*8-9 (N.D. Ill. Oct. 24, 2012).

31. *Id.* at 11.

32. *Uzoh v. Uzoh*, No. 11-CV-09124, 2012 WL 1565345, at \*7 (N.D. Ill. May 2, 2012).

33. *Larbie v. Larbie*, 690 F.3d 295, 298 (5th Cir. 2012).

34. *Id.* at 310-11.

35. 43 U.S.C. § 11607(b)(3) (2006).

determined that fees should be awarded even if the petitioner was represented by Legal Aid. The court also determined that the defense of “unclean hands” did not apply to the issue of whether attorney fees should be awarded and ultimately reduced the award by 55 percent given the father’s “straightened” circumstances.

#### b. Access

A federal district court determined that not only would the mother have to return to Turkey with the children at the end of the school year, but also that the court had jurisdiction to enforce the visitation order issued by the Turkish court while the children were in the United States.<sup>37</sup>

#### c. Procedural Issues

It is usually improper to stay a Hague return order pending appeal.<sup>38</sup> A mother’s appeal from a federal district court order granting her ex-husband’s petition for the return of their children to the Czech Republic, based not on a finding of wrongful removal, but instead on the parents’ stipulation that the children be returned there for a custody hearing, must be dismissed as moot.<sup>39</sup>

A California court held that it was improper for a trial court to condition the child’s return on the mother returning with the child because the mother could, by her unilateral action, defeat the return order.<sup>40</sup> It was also improper to condition the return on the father obtaining a dismissal of the criminal charges brought against the mother in Italy since obtaining the dismissal was beyond the father’s control.

In an unusual case, the district court in Schleswig, Germany, ordered the father to obtain a decision from a U.S. court by October 23 as to whether the “removal or retention of the parties’ minor daughter [by the mother] was wrongful” under the Hague Abduction Convention.<sup>41</sup> The U.S. district court, noting the “somewhat awkward position,” did so even though it noted that the mother had not been served and could vacate the court’s ruling within forty-five days of being served.<sup>42</sup>

### B. THE HAGUE SERVICE CONVENTION

According to the Texas Court of Appeals for San Antonio, the method of service set forth in Article 19 of the Hague Service Convention, which states “to the extent the internal law of a contracting state permits methods of transmission of documents coming abroad, for service within its territory, the present Convention shall not affect such provisions,”<sup>43</sup> applies only when the internal law of the contracting state specifically provides

36. *Saldivar v. Rodela*, No. EP-12-CV-00076-DCG, — F. Supp. 2d —, 2012 WL 4497507, at \*6, \*9, \*17 (W.D. Tex. Oct. 1, 2012).

37. *In re S.E.O.*, 873 F. Supp. 2d 536, 545-47 (S.D.N.Y. 2012).

38. *Rowe v. Vargason*, No. 11-1966, 2011 WL 6151523, at \*2 (D. Minn. Dec. 9, 2011).

39. *Leser v. Berridge*, 668 F.3d 1202, 1210-11 (10th Cir. 2011).

40. *Maurizio R. v. L.C.*, 135 Cal. Rptr. 3d 93, 113-14, 116 (Cal Ct. App. 2011).

41. *Hynes v. Berger*, No. CIV. JFM-12-3000, 2012 WL 4889854, at \*1 (D. Md. Oct. 12, 2012).

42. *Id.*

43. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361.



for the service of documents coming from abroad.<sup>44</sup> Therefore, for a mother to establish that service of process on the father, a Mexican resident, complied with Article 19 of the Service Convention — so as to be effective as to the mother’s petition to enforce a Mexican child custody order — the mother was required to show that the service of process method employed complied with the internal law of Mexico. Because the mother did not prove that the father was served through Mexico’s Central Authority, the father was not properly served with process, and a default judgment entered against him was void.

In another case, a Minnesota district court erred when it relied on Minnesota law to determine whether service was proper in Norway instead of determining the issue under the Service Convention.<sup>45</sup>

### C. OTHER CASES INVOLVING INTERNATIONAL FAMILY LAW LITIGATION

#### 1. *Marriage*

A New Mexico court rejected an Australian judgment stating that a woman who had lived with a man from 1981 until his death in 2007 was his “de facto spouse,” holding that the Australian judgment did not create a marriage recognizable under New Mexico law such that the woman could be considered the man’s surviving spouse because a “de facto” relationship pursuant to the law of New South Wales in Australia is not equivalent to marriage in Australia and because the relationship between the couple “was not equivalent to a common law marriage” under New Mexico law.<sup>46</sup> Louisiana recognized a marriage of first cousins that was entered into in Iran in 1976.<sup>47</sup>

Texas determined that a woman was entitled to an annulment for fraud when she showed that the man from Colombia married her only to obtain a green card, and when he was able to live in the United States, he left her and took most of her assets.<sup>48</sup> The court rejected the husband’s argument that she was only entitled to a divorce. The Colorado Court of Appeals decided that, after declaring a couple’s marriage invalid on the ground that the wife had fraudulently induced the husband to marry her to gain entry into the United States, a judge should not have proceeded to divide part of the husband’s retirement plan and award the wife spousal support.<sup>49</sup> The court said that the wife should not be rewarded for her fraudulent conduct. Also entitled to an annulment was a “husband” whose “wife” had failed to obtain a legal divorce from her first husband in Pakistan after he pronounced a *talaq* to her there, making the current relationship bigamous.<sup>50</sup>

#### 2. *Divorce — Recognition of Foreign Judgments and Divorce*

An Alabama appellate court held that a trial court had jurisdiction to divorce a husband and wife where the husband had been a resident of Alabama for six months even though

44. *In re* J.P.L., 359 S.W.3d 695, 707 (Tex. App. — Fort Worth 2011, pet. denied).

45. *Shults v. Shults*, No. A11-935, 2012 WL 254496, at \*2, \*4 (Minn. Ct. App. Jan. 30, 2012).

46. *Dion v. Rieser*, 2012-NMCA-070, 285 P.3d 678, 682.

47. *Ghassemi v. Ghassemi*, 2011-1771 (La.App. 1 Cir. 6/8/12); 103 So. 3d 401, 403, 405.

48. *Montenegro v. Avila*, 365 S.W.3d 822, 823-24 (Tex. App. — El Paso 2012, no pet. h.).

49. *In re* Marriage of Joel, No. 10CA1881, — P.3d —, 2012 WL 3127305, at \*6-7 (Colo. App. Aug. 2, 2012).

50. *Naseer v. Moghal*, No. 0301-12-4, 2012 WL 3288117, at \*6 (Va. Ct. App. Aug. 14, 2012).

the wife was a resident in Scotland.<sup>51</sup> In *In re Marriage Ricard*, an Illinois appellate court held that the doctrine of *forum non conveniens* applies to all divorce cases and that France, where the wife had filed for divorce, would be a more convenient forum for the divorce of a French couple.<sup>52</sup> Finally, an appellate court in Maryland held that it was not an abuse of discretion for a trial court to stay its divorce proceeding in deference to a prior filed divorce proceeding in Ghana.<sup>53</sup>

### 3. *Children's Issues*

#### a. Adoption

Russia signed a new agreement with the United States in 2012 concerning the adoption of Russian children. The agreement "tightens the rules for Americans adopting children from the Russian Federation. Specifically, a foreign family can adopt a Russian child only if there is no Russian family found for the child. The deal also provides for more control of the child following the adoption."<sup>54</sup>

#### b. Custody

##### i. *Jurisdiction and Enforcement*

Two courts addressed the relationship between the UCCJEA and the Hague Abduction Convention. In one case, a Colorado court concluded that even though there was a defense to the return of the child to Canada under the Abduction Convention, application of the UCCJEA required that the Canadian court, as the home state of the child, make the determination as to which parent should have custody.<sup>55</sup> The court also determined that it was proper for the Colorado court to exercise emergency jurisdiction until the Canadian court ruled on custody.

In the other case, an English court determined that England was the child's habitual residence, and, based on that determination, the mother moved to dismiss the father's custody case in Texas on the ground that the jurisdiction issue had been determined in England.<sup>56</sup> The trial court's determination to dismiss the case was reversed on appeal because all England could decide under the Hague Abduction Convention was the merits of the abduction case, not the merits of the custody case, including the jurisdictional issue, and that "home state" under the UCCJEA and "habitual residence" under the Abduction Convention are not equivalent concepts.

A Georgia court determined that it had jurisdiction to terminate the rights of adoptive parents of a child who came from Zambia to Georgia for extensive medical procedures and had lived in Georgia for more than six months with persons acting as parents.<sup>57</sup>

A New Jersey appellate court held that, before dismissing a custody case because of a pending proceeding in Pakistan, a New Jersey judge should have determined whether the

51. *Chafin v. Chafin*, 101 So. 3d 234, 236 (Ala. Civ. App. 2012).

52. *In re Marriage Ricard*, 975 N.E.2d 1220, 1231 (Ill. App. Ct. 2012).

53. *Apenyo v. Apenyo*, 32 A.3d 511, 415 (Md. Ct. Spec. App. 2011).

54. Brandon Gatto, *Putin Signs Russia-US Child Adoption Agreement*, JURIST (Jan. 31, 2012, 9:09 AM), <http://jurist.org/paperchase/2012/07/putin-signs-russia-us-child-adoption-agreement.php>.

55. *In re T.L.B.*, 272 P.3d 1148, 1155 (Colo. App. 2012).

56. *In re A.S.C.H.*, 380 S.W.3d 346, 350 (Tex. App. — Dallas 2012, no pet. h.).

57. *In re E.E.B.W.*, 733 S.E.2d 369, 371 (Ga. Ct. App. 2012).

home state of the child was in New Jersey and whether the child's absence in Pakistan was meant to be temporary.<sup>58</sup> An Ohio court exercised jurisdiction over children based on their significant connections to the forum and the presence of substantial evidence regarding the children despite the fact that at the time the case was filed the father lived in Sweden and the mother and the children in Ethiopia.<sup>59</sup> It should be noted that the mother and children were stranded in Ethiopia because the father had taken their passports.<sup>60</sup>

On the other hand, a Maryland court did not have jurisdiction to decide the custody of two children who had lived in Ghana with their father for more than six months, and even if it might have technically had jurisdiction over one of the children, the doctrine of forum non conveniens sustained the trial court's determination that custody of both children should be decided together in Ghana.<sup>61</sup> A Maryland court also declined to exercise jurisdiction over an international child custody case where Maryland was not the home state of the child at issue, who was living in Japan at the time of the case and had for her entire life, and a Japanese court had not declined to exercise jurisdiction over the matter.<sup>62</sup> The court also determined that Japanese custody law did not violate fundamental principles of human rights.<sup>63</sup>

A Washington court determined that even though it had jurisdiction under the UCCJEA, it should decline jurisdiction in favor of Poland because the child had resided outside Washington for the majority of his life, had resided consistently in Poland since January 2008, and all of the evidence concerning his circumstances and care was located in Poland, as well as most of the witnesses.<sup>64</sup>

It was error for a Texas court to enforce a Mexican custody determination without an evidentiary hearing when the mother explicitly asked for such a hearing before the registration of the Mexican determination.<sup>65</sup> A Florida court determined that once a father returned to Ecuador with his child as ordered by the district court, the mother's appeal became moot.<sup>66</sup>

## ii. Relocation

A Californian court allowed a Thai mother to move to Thailand with her child but conditioned the order on the mother posting a \$10,000 bond and agreeing to the contin-

58. Sajjad v. Cheema, 51 A.3d 146, 154 (N.J. Super. Ct. App. Div. 2012).

59. Mulatu v. Girsha, 2011-Ohio-6226, No. CA2011-07-051, 2011 WL 6017968, ¶¶ 2-4, 34.

60. *Id.* ¶ 7.

61. Apenyo v. Apenyo, 32 A.3d 511, 519 (Md. Ct. Spec. App. 2011).

62. Toland v. Futagi, 40 A.3d 1051, 1066 (Md. 2012).

63. *Id.* at 1065. See also *In re Hickman*, No. 01-12-00572-CV, 2012 WL 4858070, at \*6 (Tex. App. — Houston [1st Dist.] 2012, no pet. h.) (holding that Texas did not have jurisdiction to adjudicate custody of two children who had lived for more than six months in Japan and that the father did not present sufficient evidence for the trial court to determine whether Japanese custody law violated fundamental human rights law). For other cases where a court determined that it did not have jurisdiction because the child's home state was in another country, see *Malik v. Fhara*, 948 N.Y.S.2d 106 (N.Y. App. Div. 2012) (holding that New York did not have jurisdiction to decide custody of a child whose home state was Bangladesh); *Chafin v. Chafin*, 101 So. 3d 234, 236 (Ala. Civ. App. 2012) (holding that Alabama could not determine custody of a child whose home state was Scotland even though it could grant the husband a divorce).

64. *In re P.M.M.*, 168 Wash. App. 1022, 1026 (Wash. Ct. App. May 29, 2012).

65. *Razo v. Vargas*, 355 S.W.3d 866, 874 (Tex. App. — Houston [1st Dist.] 2011, no pet. h.).

66. *Garces v. Legarda*, 86 So. 3d 602, 604 (Fla. Dist. Ct. App. 2012).

ued jurisdiction of the Californian court on all custody and visitation matters.<sup>67</sup> Another Connecticut trial court did not abuse its discretion when issuing an order allowing a divorced custodial mother to travel with her children overseas without prior notice to their father, even though he was worried that she would take them to her native Russia, whose accession to the Abduction Convention has not been accepted by the United States.<sup>68</sup> The Connecticut Court of Appeals held that it was not in the children's best interest to prevent them from visiting their family there. Additionally, it found that the mother did not pose a flight or abduction risk because she had established a home and career in Connecticut and was in the process of becoming a U.S. citizen.

In comparison, the Washington Supreme Court held that international travel restrictions were properly imposed on a divorcing father's visitation rights where his wife established that he had threatened to abscond with their children to his native India.<sup>69</sup> The court noted that India is not a party to the Hague Abduction Convention, thus making it difficult for the mother to retrieve the children if the father did take them there. The court also approved the use of expert testimony on the likelihood of abduction and rejected the father's claim that this was no more than racial profiling.

### iii. *Substantive Custody Determinations*

The Second Circuit held that an unenforceable Dominican Republic custody decree cannot be used as the basis for deportation of a child who claims he was entitled to stay in the United States because he was living with the father at the time the father became a naturalized citizen.<sup>70</sup>

A Vermont trial court's order awarding the mother primary responsibility of the parties' child, based on the trial court's independent research on the Internet after the close of evidence, was held to be an abuse of discretion.<sup>71</sup> The only matter in dispute with respect to custody was the husband's wish to take the child to visit his home country of Zimbabwe. The husband had asserted during the trial court hearing that there was extensive information available on Zimbabwe. The trial court judge expressed concern about the husband's belief that it was safe to take his daughter. The Vermont Supreme Court held that the trial court's independent investigation of a "sampling" of articles on the Internet was not amenable to review, as it was not possible to determine whether the "sampling" of information was exhaustive or selective. Moreover, the husband was deprived of notice of the trial court's reliance on the articles in making the custody determination and the opportunity to be heard.

A Texas Court of Appeals held that a mother's relocation to Mexico without permission of the court was sufficient to justify a modification of custody to the father because the

67. *Di Napoli v. Di Napoli*, No. B235354, 2012 WL 2878646, at \*5 (Cal. Ct. App. July 16, 2012).

68. *Stancuna v. Stancuna*, 41 A.3d 1156, 1159 (Conn. App. Ct. 2012). See also *Gagnon v. Glowacki*, 815 N.W.2d 141 (Mich. Ct. App. 2012) (allowing mother to move from Michigan to Canada); *M.P. v. M.P.*, 54 A.3d 950 (Pa. Super. Ct. 2012) (trial court abused its discretion in not allowing a mother with sole custody to take the child to Ecuador for a three-week visit). For a case where the trial court appointed the father the primary custodian of the child due to, in part, a risk of abduction by the Taiwanese mother, see *Chen v. Hernandez*, No. 03-11-00222-CV, 2012 WL 3793294 (Tex. App. — Austin 2012, pet. denied).

69. *Katare v. Katare*, 283 P.3d 546, 551 (Wash. 2012).

70. *Garcia v. USICE*, 669 F.3d 91, 96 (2d Cir. 2011).

71. *Rutanhira v. Rutanhira*, 2011 VT 113, ¶¶ 8-11, 190 Vt. 449, 35 A.3d 143, 146.

mother took the child to Mexico without telling the father beforehand, the child was abruptly removed from school in the middle of the term, the mother and her husband had not secured jobs or a home in Mexico at the time they left with the child, and the mother failed to return the child to the father for his visitation and Christmas visitation as provided in the divorce decree.<sup>72</sup>

### c. Parentage and Child Support

A Californian appellate court determined that it could exercise jurisdiction over a Jordanian father for alimony and child support because he had continued to manage rental real property in California and he continued to hold a pension account/investment in California.<sup>73</sup> In addition the appellate court found that it could not ignore the fact that the property was an important part of the proceedings for “purposes of ascertaining the parties’ financial condition and needs (concerning issues of child support, spousal support or attorney fees) and for purposes of a final division of the marital property.”<sup>74</sup>

Another case exercising jurisdiction over a foreign national for child support was *Oytan v. David-Oytan*.<sup>75</sup> A Turkish husband and his wife were “living in a marital relationship” within Washington state such that jurisdiction over the husband, pursuant to Washington’s long-arm statute, was proper. The court listed a number of factors, including that the husband helped his wife obtain a job in the state, moved his family to Washington from Los Angeles, established a family home in the state, owned personal property in the state, actively sought business opportunities in the state, placed his daughter in school in the state and was active in her school activities, received medical care in the state, registered his car and had insurance in the state, held himself out as living in the state, and returned to the state whenever he was not working. The court therefore found that the couple was “living in a marital relationship within the state” and thus that jurisdiction over the husband was proper.

Notwithstanding a mother’s self-serving statement that she intended “on returning to live in Kansas when able to do so,” a Kansas appellate court held that the evidence was insufficient to support a finding that the mother of an out-of-wedlock child was a Kansas resident, as required to provide the trial court with exclusive jurisdiction to modify the child support order under the Uniform Interstate Family Support Act.<sup>76</sup> The mother’s home in Hong Kong was the center of all aspects of her life. The mother married a Hong Kong resident who was a chief executive officer of a Hong Kong corporation in which the mother claimed a 50 percent interest and which employed her full-time. The child also attended school in Hong Kong.

A German father’s attempt to deviate from Louisiana’s child support guidelines due to higher taxes in Germany was denied because the evidence showed that the father got married in Germany, paid for a lavish wedding, purchased a house, and traveled to the United States on occasions during which he did not attempt to visit the child.<sup>77</sup>

72. *Arredondo v. Betancourt*, 383 S.W.3d 730 (Tex. App. — Houston [14th Dist.] 2012, no pet.).

73. *In re Marriage of Abureyaleh*, No. F063399, 2012 WL 4484914, at \*8 (Cal. Ct. App. Oct. 1, 2012).

74. *Id.*

75. *Oytan v. David-Oytan*, 288 P.3d 57, 69 (Wash. Ct. App. 2012).

76. *State ex rel. SRS v. Ketzal*, 275 P.3d 923, 927 (Kan. Ct. App. 2012).

77. *Estapa v. Lorenz*, 11-852 (La.App. 5 Cir. 3/27/12); 91 So.3d 1103, 1106-07.

A Michigan court held that even if Quebec was not a reciprocating state under the Uniform Interstate Family Support Act, its support order was entitled to be recognized under notions of comity.<sup>78</sup> The Virginia Court of Appeals held that a trial court had the authority to enforce a Cameroon father's duty to support his children by entering a qualified domestic relations order permitting a mother to attach a retirement account belonging to the father for the sole purpose of paying the father's child support arrearage of over \$28,000.<sup>79</sup>

A Minnesota court held an illegal alien in contempt for failure to pay child support and for violating the purge condition by not looking for work.<sup>80</sup> In rejecting the alien father's argument that the purge condition was invalid because federal immigration laws barred employers from hiring him, the court pointed out that such laws did not preclude him from looking for work unless he uses false or fraudulent documents.

#### d. Juvenile Cases

A California court determined that the Guatemalan Protocol is not a treaty and that federal laws pertaining to children who are the victims of human sexual trafficking do not preempt state dependency law.<sup>81</sup> Instead, the court held that concurrent jurisdiction existed, thus triggering similar, but not identical, statutory provisions governing the juvenile court's consideration of whether to terminate state dependency court jurisdiction. Although both systems protect children and seek to facilitate family reunification or repatriation, the court reasoned that the focus of each system differs and that the respective systems are not entirely commensurate. In contrast to the child-centered focus of the California dependency system, "the purpose of the [TVPA and Wilberforce Act] is to combat human trafficking, ensure just and effective punishment of traffickers, and protect their victims."<sup>82</sup> The Californian court held that the child was both a dependent of the California juvenile court and a victim of human sexual trafficking, and thus, was entitled to protections afforded by both systems. The court further rejected the juvenile court's findings that the Guatemalan Protocol was a treaty, explaining:

The Guatemalan Protocol was developed jointly by the Guatemalan Ministry of Exterior Public Relations and the International Labour Organization (ILO), the United Nations agency responsible for delineating and overseeing international labor standards, to assist Guatemalan efforts to meet minimum standards for the elimination of human trafficking in compliance with the U.N. Protocol. The Guatemalan Protocol outlines the steps its various government agencies are to take on behalf of Guatemalans who are victims of human trafficking abroad or Guatemalan or foreign individuals who are victims of trafficking in Guatemala.<sup>83</sup>

A Pennsylvania court held that a Spanish-speaking father's language barrier and lack of appointed counsel made it impossible for him to understand and act upon his parental

78. *Gaudreau v. Kelly*, — N.W.2d —, No. 304345, 2012 WL 4897994, at \*1-2 (Mich. Ct. App. Oct. 16, 2012).

79. *Nkopchieu v. Minlend*, 718 S.E.2d 470, 477 (Va. Ct. App. 2011).

80. *Zaldivar v. Rodriguez*, 819 N.W.2d 187, 194 (Minn. Ct. App. 2012).

81. *In re Y.M.*, 144 Cal. Rptr. 3d 54, 59 (Cal. Ct. App. 2012) (citing 22 U.S.C. § 7101(a) (2006)).

82. *Id.* at 70 (quoting § 7101(a)).

83. *Id.* at 65.

rights and responsibilities as to his adjudicated dependent children in a proceeding to terminate such rights because all of the spoken and written communications with him about the case were in English.<sup>84</sup>

A California appellate court applied the fugitive disentitlement doctrine to dismiss the appeal of a mother who absconded to Mexico while a dependency proceeding was pending.<sup>85</sup> The mother appeared to use her residency in Mexico as a means to avoid direct supervision by the Department of Children and Family Services (DCFS) and full compliance with her case plan. The mother had no contact with DCFS or the juvenile court for over two years, and even after DCFS located her and the children, she was completely unavailable by telephone, instead limiting her direct communication with DCFS to monthly letters or e-mails. Disentitlement did not require proof that the mother was in violation of the orders that were the subjects of her appeals.

#### 4. *Other Cases*

##### a. Affidavit of Support

There were several cases discussing the federal support affidavit required to sponsor an immigrant to the United States. In *Winters v. Winters*,<sup>86</sup> the court determined that there was no federal jurisdiction to enforce the affidavit. This creates a split of authority on the issue.<sup>87</sup>

In *Love v. Love*,<sup>88</sup> a Pennsylvania appellate court determined that the trial court erred in determining that the wife's ability to enforce the support award was limited to a civil suit instead of seeking alimony. The court also decided that it was error to impute income to the wife to determine whether her income was 125 percent of the federal poverty level and that a deviation from the Pennsylvania alimony guidelines was proper to enforce the affidavit. The Seventh Circuit determined that the person seeking support does not need to attempt to find work in order to minimize damages.<sup>89</sup>

A Texas trial court erroneously limited the liability of the husband under a divorce decree to thirty-six months.<sup>90</sup> The divorce decree was reformed to indicate that the monthly amount continued until the conditions of federal law are met. But, in comparison, an Ohio court held that a man's obligation to his immigrant wife under a federal Affidavit of Support ceased when her "qualifying quarters" of employment combined with his to total the forty quarters required by federal law to terminate his support duty as her sponsor.<sup>91</sup>

##### b. Property

A Minnesota Court of Appeals held that a wife's interest in a Russian apartment that she and her parents received when the Russian government privatized the apartment was appropriately characterized as a gift from the government to the wife and her parents, and

84. *In re* P.S.S.C., 32 A.3d 1281, 1287 (Pa. Super. Ct. 2011).

85. *In re* E.M., 138 Cal. Rptr. 3d 846, 849 (Cal. Ct. App. 2012).

86. No. 6:12-cv-536-ORL-37DAB, 2012 WL 1946074, at \*2 (M.D. Fla. May 30, 2012).

87. See *Montgomery v. Montgomery*, 764 F. Supp. 2d 328, 331 (D.N.H. 2011).

88. 33 A.3d 1268, 1274 (Pa. Super. Ct. 2011).

89. *Liu v. Mund*, 686 F.3d 418, 422 (7th Cir. 2012).

90. *In re* Marriage of Kamali, 356 S.W.3d 544, 547 (Tex. App. — Texarkana 2011, no pet.).

91. *Davis v. David*, 2012-Ohio-2088, 970 N.E.2d 1151, 1158.

therefore, was the wife's separate property.<sup>92</sup> Similarly, a Texas appellate court held that a trial court had not impermissibly modified a divorce decree by ordering the parties to sell their property in India because the order only carries out the parties' divorce decree.<sup>93</sup>

c. Criminal Law

A U.S. District Court for the District of Columbia interpreted the International Parental Kidnapping Crime Act<sup>94</sup> to criminalize a parent taking a child out of the United States with the intent to obstruct the other parent's lawful exercise of physical custody or visitation rights.<sup>95</sup> Accordingly the court found that it was proper to charge the defendant for retaining his daughter in Iran for two years even though he and the child's mother had equal custody rights to the child.

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92. *Avdeyeva v. Barabanov*, No. A11-160, 2011 WL 6141618, at \*2 (Minn. Ct. App. Dec. 12, 2011).

93. *Vats v. Vats*, No. 01-12-00255-CV, 2012 WL 2108672, at \*4 (Tex. App. — Houston [1st Dist.] June 7, 2012, pet. denied).

94. 18 U.S.C. § 1204(a) (2006).

95. *United States v. Homaune*, — F. Supp. 2d —, No. 12-150 (JEB), 2012 WL 4858987, at \*7 (D.D.C. Oct. 15, 2012).



