# The Utah Journal of Family Law

VOLUME 5 2018 NUMBER 1

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# HAGUE CONVENTION ACTIONS: A NUTS-AND-BOLTS PRIMER

*James M. Hunnicutt*

## I. INTRODUCTION

A few decades ago, several countries recognized a troubling problem. Some parents in nasty custody fights would resort to the "nuclear option" of international parental abduction: absconding with a child to a different country where the court system likely would not do much about it. In an effort to address the problem, diplomats from different countries, all with different legal systems and traditions, put their heads together and forged the Hague Convention on the Civil Aspects of International Child Abduction.[1]

The treaty was written in 1980, and the United States Congress implemented it in 1988 with the passage of ICARA, the International Child Abduction Remedies Act.[2] The public policy behind the Hague Convention is that parents should not unilaterally relocate with their children across international frontiers, and that the courts of a child's home country are best positioned to decide custody and visitation issues.[3] About half of the world's

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[1] *See generally*, Hague Convention on the Civil Aspects of International Child Abduction, U.S., October 25, 1980, 1343 U.N.T.S. 89; codified at T.I.A.S. No. 11670, Senate Treaty Doc. No. 99-11, reprinted at 51 Fed. Reg. 10498 (hereafter, the "Hague Convention"). Inasmuch as the Hague, Netherlands is home to several international organizations, many treaties have been written there, many of which also are known as the "Hague Convention," including a Hague Convention regarding international adoptions, another Hague Convention on international service of process, etc. Throughout this article, the phrase "Hague Convention" refers strictly to the Hague Convention on the Civil Aspects of International Child Abduction. The full text of the treaty can be found at the website for the Hague Conference on Private International Law, at www.hcch.net.

[2] 22 U.S.C. § 9001 *et seq.*, formerly 42 U.S.C. § 11601 *et seq.*

[3] *See, e.g.*, *Abbott v. Abbott*, 560 U.S. 1, 20 (2010); *Navani v. Shahani*, 496 F.3d 1121, 1128-29 (10th Cir. 2007) (quoting Perez-Vera, Elisa, *Explanatory Report: Hague Conference on Private International Law*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (CHILD ABDUCTION) 426, 430, 434–35, ¶¶ 19, 34 (1981)). Many courts have cited this "Perez-Vera Report," which was prepared by the official Hague Conference reporter for the

countries are treaty members, including Mexico, Canada, most of Europe, most of South America, Australia, and parts of Africa and Asia.[4]

This article endeavors to set out in a very introductory fashion the basic nuts and bolts of prosecuting and defending a Hague action in an American court. For starters: a Hague lawsuit happens where the child is located.[5] So if the child was wrongly taken from the U.S. to Canada, the Hague action must take place in the Canadian province where the child is located. For a Hague case that ends up being litigated in an American court, the petitioner is the parent trying to recover the child back to the foreign country, and the respondent is the parent in the U.S. trying to keep the child here.

The primary remedies of a Hague action are: (1) an expedited order for the immediate return of a child back to his/her home country,[6] (2) an order giving law enforcement broad authority to carry out such an order,[7] and (3) robust provisions to recover attorney fees and other costs.[8] Hague actions are not to determine custody.[9] The design and purpose of Hague cases is that they move quickly, in order to allow the proper courts to decide custody and parent-time.[10]

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Convention. This report is also available on the website for the Hague Conference on Private International Law, at www.hcch.net.

[4] The website of the Hague Conference on Private International Law (www.hcch.net) lists the contracting states to the Hague Convention.

[5] *See* 22 U.S.C. § 9003(b).

[6] *See, e.g.*, *id.*; *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228-29 (2014).

[7] *See, e.g.*, 22 U.S.C. § 9004(a); *Vasquez v. Colores*, 648 F.3d 648, 650 (8th Cir. 2011) (affirming grant of Hague petition and order to U.S. Marshals to transfer child from respondent to petitioner).

[8] *See* 22 U.S.C. § 9007(b).

[9] "[T]he Hague Convention and ICARA do not empower us to address 'the merits of any underlying child custody claims.'" *Padilla v. Troxell*, 850 F.3d 168, 178 (4th Cir. 2017) (quoting 22 U.S.C. § 9001(b)(4)); *see also*, *e.g.*, *Alcala v. Hernandez*, No. 4:14–cv–04176-RBH, 2015 WL 4429425 at *8 (D.S.C. July 20, 2015) ("courts cannot issue an order regarding the merits of the underlying custody dispute or to determine the best interests of the child-the only inquiry is whether the treaty requires the prompt return of the child to his or her home country").

[10] *See, e.g.*, 22 U.S.C. § 9121(a)(1)(A) & (a)(2) ("It is the policy of the United States (1) to promote the best interest of children wrongfully abducted from the United States by establishing legal rights and procedures for their prompt return… [and] (2) to promote the timely resolution of abduction cases…").

The treaty and case law dictate that Hague actions are expedited proceedings.[11] The court can permit discovery and convene a formal trial, however, they are not required.[12] According to the treaty, courts should endeavor to resolve Hague cases within six weeks of commencement.[13] By the same token, the petitioner needs to act quickly. If the left-behind parent delays in contacting the authorities or starting a Hague case, his/her chances of success generally decrease.

If a U.S. parent calls you asking for help because his/her child was taken to a different country, you cannot file a Hague petition in an American court, but you can help in other ways. For example, you or the client should contact the U.S. State Department, specifically the Office of Children's Issues, to enlist the government's aid.[14] That agency should contact the appropriate government agency of the other country to help find a lawyer

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[11] *See, e.g.*, Hague Convention, art. 2 (courts "shall use the most expeditious procedures available"); *Chafin v. Chafin*, 568 U.S. 165, 179 (2013) ("courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation").

[12] *See West v. Dobrev*, 735 F.3d 921, 930 (10th Cir. 2013) ("neither the Convention nor ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires 'that discovery be allowed or that an evidentiary hearing be conducted' as a matter of right in cases arising under the Convention. … Where circumstances warrant, both the Convention and ICARA provide the district court with 'the authority to resolve these cases without resorting to a ... plenary evidentiary hearing.'") (citing *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001)).

[13] Hague Convention, art. 11 ("If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay."). In the lingo of Hague actions, the terms "requesting country," "requesting state," "country of origin," or "state of origin" refer to the country that wants the child back, or the alleged country of "habitual residence." *See* Hague Convention, arts. 11, 34; U.S. State Dep't, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986), hereinafter the "State Department's 1986 Analysis." The terms "requested country" or "requested state" mean the country where the child currently is located. *See* Hague Convention, arts. 12-14, 17, 20, 24.

[14] The U.S. State Department's Office of Children's Issues can be reached at 888-407-4747, and has a very helpful website at https://travel.state.gov/content/childabduction/en.html.

there who can pursue a Hague action in that country.[15] Further, if the American state in which you are located would have had jurisdiction over the child but for the parental abduction, use normal family law channels to try to obtain a state court custody order that the parent might be able to use in the foreign jurisdiction. It can help a petitioner's Hague action in the other country if he/she can point to a valid American state court custody order indicating the child belongs back in the United States.

## II. MAKING A PRIMA FACIE CASE

For a petitioner to establish a *prima facie* case to obtain an order for the immediate return of a child to a foreign country, the petitioner must show the following elements by a preponderance of the evidence:

(1) The other country has adopted the Hague Convention too.[16]
(2) The child is under 16 years of age.[17]
(3) The respondent wrongfully removed the child from the other country, OR wrongfully retained the child, *i.e.*, wrongfully failed to return the child to the other country when the respondent's visit was supposed to end.[18]
(4) The petitioner had "rights of custody" at the time of the wrongful removal/retention, and was actually exercising those rights at that time.[19]
(5) The child's place of "habitual residence" was in the other country at the time the child was wrongfully removed or retained.[20]

**Wrongfulness and Rights of Custody**. "Wrongfully" means the removal/retention violated the petitioner's "rights of custody" under the laws of the place where the child was "habitually resident."[21] Although not necessary, the best type of evidence to show that a child's removal/retention was wrongful is a certified translation of a pre-existing foreign custody order clarifying that the child should not have been removed or retained.[22] If no

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[15] In Hague parlance, each member country has a government agency tasked with international parental abduction issues called its "central authority." *See* Hague Convention, arts. 6-7; 22 U.S.C. § 9101(10).
[16] *See*, *e.g.*, Hague Convention, *passim*; *Abbott*, 560 U.S. at 9-10.
[17] *See* Hague Convention, art. 4. Even if the petition is commenced before the child's sixteenth birthday, if the child turns 16 while the case is pending, "the Convention shall cease to apply." *Id.*
[18] *See, e.g.*, Hague Convention, art. 3; 22 U.S.C. § 9003(e)(1)(A); *Chafin*, 568 U.S. at 168.
[19] *See, e.g.*, Hague Convention, art. 3; *Chafin*, 568 U.S. at 168.
[20] *See, e.g.*, *id*.
[21] *See, e.g.*, *id*.
[22] *See, e.g.*, *Abbott*, 560 U.S. at 14, 19-21 (holding that Chilean order barring parents from removing child from Chile provided custody rights enforceable in a Hague action); *Furnes v. Reeves*, 362 F.3d 702, 720 & n.15 (11th Cir.

such order yet exists, your client should retain an attorney in the other country and try to obtain such a custody order as soon as possible.[23]

If there is no foreign custody order in place, one should try to obtain an affidavit or similar statement from the governmental agency in the foreign country tasked with enforcement of the Hague Convention (*i.e.*, the "central authority" of the other country) explaining the petitioner's rights of custody under the laws of that country.[24] If the parties opt to fight over what custody rights arise under the foreign country's legal traditions, courts will consider the testimony of legal experts from there.[25] Alternately, an affidavit from an attorney in that country explaining how custody rights function there may suffice.[26] Under Article 15 of the Convention, the American court can ask the other country's central authority for guidance respecting the petitioner's alleged rights of custody and whether or not the removal/retention was wrongful.

As another option depending on which foreign country is involved, American courts may have already established some precedent regarding how rights of custody operate in that other country. For instance, there have been

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2004) (enforcing order from Norway granting noncustodial parent *ne exeat* rights), *abrogated on other grounds by Lozano*, 134 S. Ct. at 1231.

[23] If you have such a custody order, however, you might be better off filing an action under the UCCJEA rather than the Hague Convention, discussed *infra* Section VI.

[24] *See, e.g.*, *Ozaltin v. Ozaltin*, 708 F.3d 355, 363, 368 (2d Cir. 2013) (affirming order to return child to Turkey in part because court properly relied upon letter from the Turkish central authority, respecting *ne exeat* rights arising during the pendency of a divorce action in Turkey); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1277-79 (N.D. Ga. 2004) (relying on letters from Argentine central authority to establish *patria potestas* rights arising under Argentine law); *see also* Hague Convention, art. 8(e), (f), (g) (contemplating petitions being accompanied by "an authenticated copy of any relevant decision or agreement," "a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State," or "any other relevant document").

[25] *See, e.g.*, *Ozaltin*, 708 F.3d at 363 (trial court also received live testimony from competing legal experts from Turkey).

[26] In multiple cases, the court relied on an affidavit from a foreign attorney to make findings regarding whether the respondent's removal/retention violated the laws of the other country. *See, e.g.*, *Ovalle v. Perez*, No. 16-16568, 681 Fed. Appx. 777, 784-85 (11th Cir. Mar. 1, 2017) (unpublished); *Whallon v. Lynn*, 230 F.3d 450, 458 (1st Cir. 2000); *Flores-Aldape v. Kamash*, 202 F. Supp. 3d 793, 803 (N.D. Ohio 2016); *Acosta Saldivar v. Rodela*, 879 F. Supp. 2d 610, 621 (W.D. Tex. 2012).

multiple cases here in American federal courts seeking return of children to Mexico in which the American judge analyzed Mexico's laws to determine whether or not the respondent violated the petitioner's rights of custody.[27]

There does not necessarily have to be a specific court order from the other country if the removal/retention violated the laws there. For instance, many countries' legal systems provide that both parents naturally have custody rights that would be violated if one parent takes the child out of that country without both parents first agreeing, even if there is no court order in place.[28] This is usually referred to as a "*ne exeat*" right, *ne exeat* meaning "that he not depart" in Latin.[29] For example, Mexico's laws generally provide both parents *ne exeat* rights that block the other parent from relocating with the child outside Mexico without both parents' consent.[30] In the absence of a specific court order, however, some countries' legal traditions provide that removing a child from that country would not violate the other parent's rights.[31]

**Exercising Rights of Custody**. Once the petitioner has established that he/she had rights of custody, the petitioner also needs to show that "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."[32] Generally speaking, courts should "liberally find" that the petitioner was exercising custody rights so long as the petitioner was having

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[27] *See, e.g.*, *Whallon*, 230 F.3d at 456-57 (considering the Civil Code for the State of Baja, Mexico to find rights of custody); *Flores-Aldape*, 202 F. Supp. 3d at 803 (considering the Civil Code for the State of Querétaro, Mexico to find rights of custody); *Acosta Saldivar*, 879 F. Supp. 2d at 624 (considering Mexican federal law and the Civil Code for the State of Chihuahua to find rights of custody).

[28] *See, e.g.*, *Salazar Garcia v. Galvan Pinelo*, 808 F.3d 1158, 1164-67 (7th Cir. 2015) (Mexico); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343 (5th Cir. 2004) (Australia); *Giampaolo*, 390 F. Supp. 2d at 1276-78 (Argentina); *Lalo v. Malca*, 318 F. Supp. 2d 1152, 1157 (S.D. Fla. 2004) (Panama); *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1286 (S.D. Fla. 1999) (Venezuela), *aff'd*, 244 F.3d 1250 (11th Cir. 2001).

[29] *See*, *e.g.*, *Abbott*, 560 U.S. at 2.

[30] *See, e.g.*, *Whallon*, 230 F.3d at 458-59.

[31] *See, e.g.*, *Radu v. Toader*, 463 Fed. Appx. 29, No. 11-3546, 2012 WL 556174, at *1 (2d Cir. Feb. 22, 2012) (unpublished) (upholding denial of Hague petition because Romanian law does not provide noncustodial parents with inherent *ne exeat* rights).

[32] Hague Convention, art. 3(b).

"any sort of regular contact with his or her child" at the time of removal/retention.[33]

**Habitual Residence**. Neither the Hague Convention nor ICARA define the term "habitual residence."[34] Rather, American courts (primarily federal courts) have developed a body of case law describing "habitual residence." When a child has been born and raised in the other country and lived there continuously until the moment of removal/retention, it is probably a foregone conclusion that the other country is the child's place of habitual residence. The place of habitual residence becomes less clear, however, if the parents previously had moved the child from country to country, or had agreed to return to the United States after a temporary stay in the other country. When contested, singling out the place of habitual residence is "'a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case.'"[35]

"A person may have only one habitual residence, and it should not be confused with domicile."[36] "[H]abitual residence 'connotes actual residence plus some continuity and persistence even though it does not connote the intended permanence or emphasis on expressed intent often associated with domicile.'"[37] "The concept of habitual residence differs from domicile, in that domicile includes elements of future intent, citizenship, and nationality."[38]

Courts consider two key factors in determining what place is the child's habitual residence: "shared parental intent" and "acclimatization." First, a child's habitual residence generally should be the last place that the child lived per the parents' most recent agreement.[39] Second, "a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of

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[33] *Bader v. Kramer*, 484 F.3d 666, 671 (4th Cir. 2007) (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996) ("*Friedrich II*")).
[34] *See, e.g.*, *Blackledge v. Blackledge*, 866 F.3d 169, 180 (3d Cir. 2017).
[35] *Id.* (quoting *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291 (3d Cir. 2006)).
[36] *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003).
[37] *Koch v. Koch*, 416 F. Supp. 2d 645, 649 (E.D. Wis. 2006).
[38] Hon. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, xiv (Federal Judicial Center, 2d ed. 2015).
[39] *Gitter v. Gitter*, 396 F.3d 124, 135 (2d Cir. 2005) (to determine habitual residence, courts look at "the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared"); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) ("a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.").

settled purpose' from the child's perspective."[40] "The [settled] purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely; indeed, his purpose, while settled, may be for a limited period."[41] Different circuits approach differently how to balance the child's acclimatization to a particular location versus shared parental intent to make that place the child's home.[42]

Sometimes respondents make the wily argument that by removing the child from the other country, they unilaterally managed to change the child's place of "habitual residence" so the Hague Convention cannot apply. This argument fails because courts look at where the child had been living immediately before the removal/retention, not the child's location after the removal/retention.[43] "A person can have only one habitual residence. On its

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[40] *Feder*, 63 F.3d at 224.

[41] *Mozes v. Mozes*, 239 F.3d 1067, 1074 (9th Cir. 2001) (internal citation omitted).

[42] *See, e.g.*, *Ahmed v. Ahmed*, 867 F.3d 682, 689-90 (6th Cir. 2017) (collecting and comparing cases).

> There is a split among the circuit courts concerning the factors to look to in determining a child's habitual residence and, in particular, the role that the intent of the parents plays in the acquisition of a new habitual residence. An apparent majority of the circuits follow the rationale of the Ninth Circuit opinion in *Mozes v. Mozes*. That decision focuses on the question whether a child's habitual residence has changed based on whether the parents have demonstrated a shared intention to abandon the former habitual residence and, if so, whether there has been a change in the child's geographic location for a period of time that is sufficient for the child to become settled or acclimatized. Other circuits, such as the Third, Seventh, and Eighth Circuits, place the primary focus of determining habitual residence on the degree that the child has become settled in his or her new environment.

Garbolino, *supra* note 38, at xiv.

[43] *See, e.g.*, *Cohen v. Cohen*, 858 F.3d 1150, 1153 (8th Cir. 2017) ("Habitual residence is determined as of the time 'immediately before the removal or retention' and depends on 'past experience, not future intentions.'"); *Mauvais v. Herisse*, 772 F.3d 6, 14 (1st Cir. 2014) ("courts should be 'slow to infer' that an established country of habitual residence has been abandoned, when

face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward."[44] Even if the parents agreed on the child taking a short trip to the U.S., that does not change the child's place of habitual residence.[45] But if a short-term trip evolves into something more, left-behind parents risk losing out on relief under the Hague Convention if they delay.[46]

## III. THE AFFIRMATIVE DEFENSES

Once the petitioner has established a *prima facie* case, the court must order immediate return of the child, unless the respondent can establish one of the affirmative defenses. Very often, the affirmative defenses are where "the rubber meets the road" in Hague cases. Frequently, respondents asserting affirmative defenses have little option but to make witnesses of their children, although courts have considerable discretion in how to receive the children's point-of-view. The prevailing approach seems to be *in camera* interviews of the children conducted by the judges, but courts also have utilized guardians ad litem and child psychologists to serve as intermediaries, and in some instances have had children testify from the witness stand.[47]

All of the affirmative defenses are supposed to be "narrowly construed."[48] None of the defenses are compulsory upon the court, *i.e.*, "even if a defense is established, a court still has discretion to order the return of the child if it would further the aim of the Convention which is to provide for the return of a wrongfully removed child."[49]

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the parents have not demonstrated a shared intent to do so"); *Darin v. Olivero-Huffman*, 746 F.3d 1, 11 (1st Cir. 2014) ("One parent's wishes are not sufficient, by themselves, to effect a change in a child's habitual residence.").

[44] *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) ("*Friedrich I*").

[45] *Blackledge*, 866 F.3d at 180 ("'courts will find no change in habitual residence' where the evidence of shared parental intent reflects that the 'child's initial move from an established habitual residence was clearly intended to be for a specific, limited duration.'").

[46] *See, e.g.*, *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) ("*Blondin II*").

[47] *See Garbolino*, *supra* note 38, at 125 (collecting cases).

[48] *See, e.g., de Silva v. Pitts*, 481 F.3d 1279, 1285-86 (10th Cir. 2007).

[49] *Id.* at 1285; *see also* Hague Convention, art. 18 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."); *Blondin v. Dubois*, 189 F.3d 240, 246 n.4 (2d Cir. 1999) ("*Blondin I*") ("even where the grounds for one of these 'narrow' exceptions have been established, the district court is not necessarily bound to allow the child to remain with the abducting parent.").

Further, the Hague Convention's affirmative defenses may not be used "as a vehicle to litigate (or relitigate) the child's best interests."[50] Family law attorneys should avoid their usual approach of arguing over the child's best interests, because (a) they are irrelevant, and (b) the court could infer your reliance on a "best interests" argument means your actual Hague case is too weak to stand on its own.

The affirmative defenses are generally known by the following labels: grave risk of harm, mature child, well-settled, consent and acquiescence, and public policy.

**Grave Risk of Harm Defense.** A court "is not bound to order the return of the child" if the respondent establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[51] Courts apply this exception narrowly because the Hague "Convention establishes a strong presumption favoring return of a wrongfully removed child."[52] The grave risk of harm defense must be established by clear and convincing evidence.[53]

The exception does not apply to just any abuse. The question is "at precisely what level will return expose the child to a '*grave* risk' of harm or place the child in an '*intolerable* situation'?"[54] There is "no clear answer, though '[t]he person opposing the child's return must show that the risk to the child is grave, not merely serious.'"[55] "The grave risk exception is to be interpreted narrowly, lest it swallow the rule."[56] When courts apply this particular affirmative defense, the abuse is supposed to be very severe.[57]

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[50] *Danaipour v. McLarey*, 286 F.3d 1, 14 (1st Cir. 2002) (quoting State Department's 1986 Analysis, *supra* note 13, at 10,510); *see also, e.g.*, *Mendez v. May*, 778 F.3d 337, 343 (1st Cir. 2015) ("The Convention's underlying principle is that the courts of a child's country of habitual residence should be the entities to make custody determinations in the child's best interest.").
[51] Hague Convention, art. 13(b).
[52] *Danaipour*, 286 F.3d at 13-14.
[53] *See* 22 U.S.C. § 9003(e)(2)(A).
[54] *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (italics in original).
[55] *Id.* (quoting *Friedrich II*, 78 F.3d at 1068).
[56] *Souratgar v. Fair*, 720 F.3d 96, 103 (2d Cir. 2013) (quoting *Simcox*, 511 F.3d at 604).
[57] *See, e.g.*, *Hernandez v. Cardoso*, 844 F.3d 692, 695-96 (7th Cir. 2016) (affirming district court's conclusion that returning the child to Mexico would pose a grave risk based on evidence that father habitually beat mother in front of child which included an incident in which he "slapped, kicked and beat her with a wooden board"); *Gomez v. Fuenmayor*, 812 F.3d 1005, 1007-10 (11th Cir. 2016) (affirming denial of Hague petition because mother and her boyfriend engaged in a campaign of terror against father, including making

**Mature Child Defense.** A court "may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its

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threats against him, shooting his girlfriend, and planting drugs in and vandalizing his mother's car); *Ermini v. Vittori*, 758 F.3d 153, 165 (5th Cir. 2014) (affirming denial of Hague petition because father "engaged in a 'sustained pattern of physical abuse,' directed at [mother] and the children" and "'was in the habit' of hitting" them); *Simcox*, 511 F.3d at 608 (reversing return order based on evidence of "repeated beatings, hair pulling, ear pulling, and belt-whipping" and verbal abuse of the children combined with physical abuse of the mother in front of the children); *Van de Sande v. Van de Sande*, 431 F.3d 567, 569-70 (7th Cir. 2005) (reversing return order based on father's threat to kill children, mother, and "everybody" plus his "propensity for violence, and the grotesque disregard for the children's welfare that he displayed by beating his wife [their mother] severely and repeatedly in their presence"); *Thomas v. Orion*, No. 2:16-cv-445-FTM-38MRM, 2016 WL 7046564, at **7-8 (M.D. Fla. Dec. 5, 2016) (unpublished) (finding return of children to mother in Canada would pose grave risk based on evidence of "filthy" and "deplorable" living conditions, "lack of food," and "[mother's] proclivity to attach herself to men she does not know well"); *Sadoun v. Guigui*, No. 1:16-CV-22349-KMM, 2016 WL 4444890, at *9 (S.D. Fla. Aug. 22, 2016) (unpublished) (holding that return of children to their father in France would expose them to grave risk of physical or psychological harm based on overwhelming evidence of "psychological abuse of the Children and Respondent—particularly when Petitioner hurls obscene epithets at her in their presence—other indicia of domestic violence, and Petitioner's reckless disregard for his family's safety when he drives while intoxicated"); *Elyashiv v. Elyashiv,* 353 F. Supp. 2d 394, 398-400 (E.D.N.Y. 2005) (refusing return where father severely abused mother in the children's presence, "routinely used his belt, shoes or hand to hit [them] approximately once or twice a week," held a pillow against child's face, owned swords and firearms and told the children how each would be used to harm them and their mother, etc., resulting in serious psychological harm to the children, including suicidal ideations and pulling one's hair out); *Rodriguez v. Rodriguez,* 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (refusing return where child had been belt-whipped, punched, and kicked, and where the child's mother had been subjected to more serious attacks, including choking her and breaking her nose); *In re Oliver A. v. Diana Pina B.*, 151 A.D.3d 485, 487 (N.Y. App. Div. 2017) (holding that return to Norway would result in grave risk to children based on evidence of "multiple acts of domestic abuse towards [mother] by the father, at times in the presence of the parties' children," "text messages sent by the father threatening the mother's life," and "visible signs of injury to [the] daughter" from one of father's "violent incidents").

views."[58] Under ICARA, a respondent's burden of proof to establish the mature child defense is preponderance of the evidence.[59]

The court has the authority to not return a child if the child does not want to return to his/her place of habitual residence and if the court is persuaded that the child's "age and maturity" support the child's preference to remain.[60] The district courts generally are afforded considerable discretion regarding this defense.[61] There is no particular age limit, rather, some courts have applied this defense when the child was as young as eight,[62] while other courts have ordered the return of 15-year-olds over their objections.[63]

However, "if a court determines that the youngster's opinion is the product of undue influence, the child's wishes are not taken into account."[64] Also, "a court must apply a stricter standard in considering a child's wishes when those wishes are the sole reason underlying a repatriation decision and not part of some broader analysis."[65]

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[58] Hague Convention, art. 13.
[59] *See* 22 U.S.C. § 9003(e)(2)(B).
[60] *See, e.g.*, *Abbott*, 560 U.S. at 22.
[61] *See, e.g.*, *Simcox*, 511 F.3d at 603.
[62] *See Anderson v. Acree*, 250 F. Supp. 2d 876, 883-84 (S.D. Ohio 2002); *Bonilla-Ruiz v. Bonilla*, No. 255772, 2004 WL 2883247, at *4 (Mich. Ct. App. Dec. 14, 2004) (unpublished); *cf. Kufner v. Kufner*, 519 F.3d 33, 40-41 (1st Cir. 2008) (affirming district court's decision to bar 8-year-old from testifying, and to return child to Germany).
[63] *See, e.g.*, *Trudrung v. Trudrung*, 686 F. Supp. 2d 570, 578 (M.D.N.C. 2010); *Barrera Casimiro v. Pineda Chavez*, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713, at **6-7 (N.D. Ga. Oct. 13, 2006) (unpublished).
[64] *See, e.g.*, *De Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007); *see also Yang v. Tsui*, 499 F.3d 259, 279 (3d Cir. 2007) ("*Yang II*") (affirming return order because child's preference to remain in Pennsylvania was based on abducting parent's undue influence); *Trudrung*, 686 F. Supp. 2d at 578 ("there is a 'demonstrated disinclination' among courts to defer to a child's objection as a basis to deny a petition."); State Department's 1986 Analysis, *supra* note 13, at 10,510 ("A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child."). Even if the parent has not improperly influenced the child's opinions, the court still has the discretion not to enforce the affirmative defense (as with any of the affirmative defenses). *See, e.g.*, *Garcia v. Pinelo*, 808 F.3d at 1164-67 (affirming return order even though district court made finding that child was sufficiently mature to offer an opinion to remain in the U.S., but exercised its discretion to order return to Mexico under the circumstances).
[65] *See, e.g.*, *De Silva*, 481 F.3d at 1286.

**Well-Settled Defense.** A petitioner is supposed to start a Hague action within one year of the wrongful removal/retention. One year is not a statute of limitations period barring a Hague action, rather, the petitioner is penalized if he/she does not start a Hague action within one year. In particular, if a petition is not filed within one year of removal/retention, then the "well-settled" affirmative defense potentially becomes available to the respondent. The gist of the defense is that if one year or more has passed and if "the child is now settled in its new environment"[66] then the court may choose to not order the child's return to his/her place of habitual residence. A respondent must prove applicability of the well-settled defense by a preponderance of the evidence.[67] The one-year period is not subject to equitable tolling.[68]

In determining whether a child is well-settled in the new location, courts should consider a number of factors that bear on whether the child has established "significant connections to the new country" including: (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability.[69] In some circumstances, courts will also consider the immigration status of the child and the respondent, but normally only if there is an immediate and concrete threat of deportation.[70] The most important factors are the length and stability of the child's residence in the new place.[71] Overall, the key question is: has the child become so settled in the new country that it would be against his or her best interests to order immediate return to the place of habitual residence?[72] But as with all of the other Hague affirmative defenses, even if the court finds the defense applies, the court still has the discretion to order immediate return of the child.[73]

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[66] *See, e.g.*, *Blondin II*, 238 F.3d at 164.
[67] *See* 22 U.S.C. § 9003(e)(2)(B).
[68] *See Lozano*, 134 S. Ct. at 1231.
[69] *See, e.g.*, *In re B. del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009).
[70] *See, e.g.*, *id.* at 1009-10.
[71] *See, e.g.*, *id.*
[72] *See, e.g.*, *Lozano v. Montoya Alvarez*, 697 F.3d 41, 53 (2d Cir. 2012), *aff'd*, 134 S. Ct. 1224 (2014).
[73] *See, e.g.*, *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003) (even though the father did not file a petition within one year, and even though the children were well-settled in Iowa, the court exercised its discretion to order them returned to France because the mother's "actions are exactly what the Hague Convention seeks to remedy."). *See also*, *supra* note 49 (courts always can order immediate return of child even if an affirmative defense is established).

**Consent & Acquiescence Defenses**. If the respondent can establish (by a preponderance of the evidence) that petitioner consented or acquiesced to the removal/retention, the court may deny the Hague petition.[74] Consent and acquiescence are two related yet separate defenses: "Whereas the consent defense concerns the petitioner's conduct before the contested removal or retention, the acquiescence defense concerns whether the petitioner subsequently agreed to or accepted the removal or retention."[75]

"Consent may be evinced by the petitioner's statements or conduct, which can be rather informal."[76] "The acquiescence defense often requires more formality than consent; accordingly, to find acquiescence we look to evidence such as testimony in a judicial proceeding, a convincing renunciation of rights, or a consistent attitude over a significant period of time. … We evaluate what the petitioner contemplated and agreed to, as well as the nature and scope of consent, including any conditions or limitations. … For both the consent and acquiescence defenses, the inquiry turns on the petitioner's subjective intent."[77] "Determining whether the preponderance of the evidence supports a petitioner's subjective intent to consent to removal is naturally 'fact-intensive.'"[78]

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[74] *See* Hague Convention, art. 13(a); 22 U.S.C. § 9003(e)(2)(B).
[75] *Padilla*, 850 F.3d at 178 (collecting cases).
[76] *Nicolson v. Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010).
[77] *Padilla*, 850 F.3d at 178 (internal citations omitted).
[78] *Padilla*, 850 F.3d at 176. For example, in a case involving Maine and Australia, the wife and children moved from Australia to Maine. *See Nicolson*, 605 F.3d at 104-07. She argued that her husband had consented to her moving to the U.S. Among other things, the wife presented evidence that husband helped her and the children prepare for the move and that he publicly had acknowledged that his family was moving away, but the husband credibly testified he believed it was only a short-term visit and that their marriage could be saved. Because the focus is the petitioner's subjective intent, the court found that the conflicting evidence failed to overcome respondent's burden of proof. Shifting to whether the husband had acquiesced to the removal after-the-fact, the wife pointed to a temporary custody order issued by a Maine state court to which the husband had stipulated. However, the court found that although the husband had stipulated to the Maine order, even that did not mean he had acquiesced to her taking the children from Australia, and the defense failed. The court ordered the return of the children, but also noted that the Maine custody order still gave custody of the children to the mother.

**Public Policy Defense.** The public policy defense is never really used so barely warrants mention, largely because it overlaps with the grave risk defense but is harder to establish. The court can deny return of the child if returning the child "would not be permitted by the fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms."[79] As with grave risk of harm, the public policy defense must be proven by clear and convincing evidence.[80]

The public policy defense is "'restrictively interpreted and applied.' … The defense is to be invoked only on 'the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.'"[81] The public policy defense "is directed to concerns about harms arising from the child's return to a particular country. Article 20 [of the Hague Convention] envisioned a limited situation where human rights concerns, most likely defined within the parameters of other international agreements, would prohibit return."[82] It appears that no U.S. federal court actually has applied the public policy defense to deny a Hague petition.[83]

## IV. REMEDIES AVAILABLE

**Return Order & Police Assistance**. To help ensure the respondent does not flee with the child while the matter is pending, the petitioner should move swiftly to request provisional remedies prior to the court reaching a final decision. ICARA broadly authorizes courts to "take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition."[84] For instance, the court could order the respondent to turn over the child's passports, or order state level

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[79] Hague Convention, art. 20.
[80] *See* 22 U.S.C. § 9003(e)(2)(A).
[81] *Souratgar*, 720 F.3d at 108 (quoting State Department's 1986 Analysis, *supra* note 13, at 10,510).
[82] *Aldinger v. Segler*, 263 F. Supp. 2d 284, 290 (D.P.R. 2003) (citing Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 28-9 (1994)).
[83] *See Souratgar*, 720 F.3d at 108 (quoting State Department's 1986 Analysis at 10,510); *Tokic v. Tokic*, No. 4:16-CV-1387, 2016 WL 4046801, at *9 (S.D. Tex. July 27, 2016) ("The extraordinary nature of the public policy defense is further exemplified by the fact that, to date, no federal court has denied a petition for repatriation based upon this defense."); *Delgado v. Osuna*, No. 4:15-CV-00360-CAN, 2015 WL 5095231, at *15 (E.D. Tex. Aug. 28, 2015), *aff'd*, 837 F.3d 571 (5th Cir. 2016) ("The Parties have not cited, nor has the Court found, any authority applying this exception to the return of a child").
[84] *See* 22 U.S.C. § 9004(a).

child protective services and/or U.S. Marshals to take temporary custody of the minor child.[85]

If the petitioner ultimately prevails, the court will order the immediate return of the child to the other country.[86] To make sure the child arrives safe and sound back in his or her place of habitual residence, the court can issue orders granting broad authority to law enforcement to enter premises, take physical custody of the child, and otherwise coordinate with the U.S. State Department and the other country's central authority.[87]

**Attorney Fees & Costs**. If a court grants a Hague petition, the court "shall" award attorney fees, court costs, and other costs related to the case[88] -- such as travel, lodging, foster care for the child during litigation, translation

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[85] *See, e.g.*, *Vasquez v. Colores*, 648 F.3d 648, 650 (8th Cir. 2011) (affirming grant of Hague petition and order to U.S. Marshals to transfer child from respondent to petitioner); *Dionysopoulou v. Papadoulis*, No. 8:10-CV-2805-T-27MAP, 2010 WL 5439758, at *1 (M.D. Fla. Dec. 28, 2010) (issuing temporary order directing respondent and children to surrender passports, and directing U.S. Marshals to take children and place them in petitioner's custody); *Neves v. Neves*, 637 F. Supp. 2d 322, 330 (W.D.N.C. 2009) (directing U.S. Marshals to deliver custody of the minor children to Youth & Family Services pending further court order).

[86] *West v. Dobrev*, 735 F.3d 921, 932 (10th Cir. 2013) (affirming order that the children be immediately returned to their mother for their safe return with her to Belgium); *Karpenko v. Leedertz*, 619 F.3d 259, 266 (3d Cir. 2010) (affirming the grant of mother's petition and order for the minor child's immediate return to her mother in the Netherlands).

[87] *See, e.g.*, *Sierra v. Tapasco*, No. 4:15-CV-00640, 2016 WL 5402933, at *11 (S.D. Tex. Sept. 28, 2016) (ordering U.S. Marshals to take custody of child and deliver child to his appointed agent to be returned to Mexico), *aff'd,* No. 16-20660, 2017 WL 2629052 (5th Cir. June 16, 2017); *Guevara v. Soto*, No. 3:15-CV-548-TAV-CCS, 2016 WL 4926375 (E.D. Tenn. Sept. 15, 2016) (directing U.S. Marshals to take custody of the child and deliver the child to the Tennessee Department of Human Services for temporary placement until appropriate arrangements are made with the U.S. Central Authority for the child's return to Mexico); *Oddy v. Morris*, No. CIV. 11-00715 LEK, 2012 WL 464227, at *1 (D. Haw. Feb. 10, 2012) (directing U.S. Marshals to assist in executing a return order and, if necessary, to enlist the assistance of other law enforcement agencies to ensure the safe return of the children back to the United Kingdom); *Sullivan v. Sullivan*, No. CV-09-545-S-BLW, 2010 WL 227924, at *1 (D. Idaho Jan. 13, 2010) (directing U.S. Marshals to assist in executing a return order and, if necessary, to enlist the assistance of other law enforcement agencies to ensure the safe return of the children back to New Zealand).

[88] *See* 22 U.S.C. § 9007(b).

costs,[89] private investigator fees, etc. -- unless the court makes specific findings that such an award would be "clearly inappropriate."[90] It is the respondent's burden to demonstrate that an attorney fee award would be clearly inappropriate.[91]

Notably, if a petitioner loses and the respondent prevails, there is no reciprocal attorney fees clause under ICARA ensuring the respondent receives reimbursement of any fees or costs. Some district courts have held that attorney fees may never be awarded to a prevailing respondent because ICARA does not explicitly provide for such an award.[92] One such decision notes that a "one-way fee shifting scheme comports with the purposes for awarding fees under ICARA, namely '(1) to restore the [petitioner] to the financial position he … would have been in had there been no removal or retention; and (2) to deter such removal or retention' from happening in the first place."[93]

**Undertakings**. Another type of relief that courts sometimes grant are known as "undertakings," which come up when a court finds that there is a "grave risk of harm" to the child but elects to order the child's return regardless. Undertaking are "conditions on the children's return, [which] would ameliorate any risk of harm."[94] The idea behind undertakings is to balance the children's need for safety against the Hague Convention's strong policy favoring return of children to their place of habitual residence. "A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those

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[89] *See, e.g.*, *Antunez-Fernandes*, 259 F. Supp. 2d at 816.

[90] *See* 22 U.S.C. § 9007(b); *Neves*, 637 F. Supp. 2d at 344 (awarding petitioner over $10,000 in investigative services fees.); *Dawson v. McPherson*, No. 1:14CV225, 2014 WL 474851, at **8-9 (M.D.N.C. Sep. 23, 2014) (awarding petitioner nearly $7,000 for non-legal expenses which included the cost of a private investigator hired to locate the children in the United States).

[91] *See* 22 U.S.C. § 9007(b)(3) ("Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner…unless the respondent establishes that such order would be clearly inappropriate."); *Whallon,* 356 F.3d at 140 ("It is clear from the statute that the respondent has the burden to establish that a fee/expense order would be clearly inappropriate").

[92] *See White v. White*, 893 F. Supp. 2d 755, 757-59 (E.D. Va. 2012), *aff'd*, 718 F.3d 300 (4th Cir. 2013); *Thompson v. Gnirk*, No. 12-cv-220-JL, 2012 WL 3598854 at *17 (D.N.H. Aug. 21, 2012).

[93] *See White*, 893 F. Supp. 2d at 758.

[94] *Acosta v. Acosta*, 725 F.3d 868, 877 (8th Cir. 2013).

undertakings."[95] "[T]he burden for establishing the appropriateness and efficacy of any proposed undertakings rests with the petitioner."[96]

Just as an example of what undertakings can look like, in one case "[t]he district court ordered [petitioner] to secure dismissal of German criminal charges against [respondent] that arose out of this dispute after he represented that he could do so. It also ordered [petitioner] to act quickly to obtain medical care for [child] and to allow [respondent] reasonable access and visitation until a German court orders otherwise."[97]

All that being said, "undertakings should be limited..."[98] For instance, while a court can order the children to return to the child's country of origin, an undertaking cannot order the *respondent* to return to the other country,[99] or specify that a forensic evaluation take place in a foreign court proceeding,[100] or order that the custody proceedings in the other country do anything in particular.[101] The reality is that once the child departs American borders, undertakings are not enforceable in foreign courts anyway.[102] The Hague Convention and ICARA say nothing about undertakings, and provide no mechanism to enforce undertakings outside the American court's jurisdiction.[103]

On more than one occasion, a district court granted a Hague petition and ordered undertakings to address the "grave risk of harm," only for an appellate court to determine the undertakings were inadequate to protect the children and reversed with directions to dismiss the petition instead.[104]

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[95] *Simcox*, 511 F.3d at 606 (quoting *Danaipour*, 286 F.3d at 21).
[96] *Simcox*, 511 F.3d at 611 (citing *Danaipour*, 286 F.3d at 21); *see also, e.g.*, *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008) (dismissing petition in part because petitioner failed to propose undertakings to ameliorate grave risk of harm).
[97] *Kufner*, 519 F.3d at 41 (affirming return order with undertakings).
[98] *Danaipour*, 286 F.3d at 23.
[99] *See, e.g.*, *Simcox*, 511 F.3d at 610.
[100] *Danaipour*, 286 F.3d at 25.
[101] *Id*.
[102] *Id.* at 23 (undertakings "are not themselves binding on a foreign court"); *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 710 (D. Md. 2015) ("undertakings are generally not enforceable in the country of habitual residence").
[103] Rather, the notion of undertakings evolved through the case law, originating in Britain's court system. *See, e.g.*, *Danaipour*, 286 F.3d at 21.
[104] *See, e.g.*, *Walsh v. Walsh*, 221 F.3d 204, 220-22 (1st Cir. 2000).

## V. RELAXED RULES OF EVIDENCE

Accustomed to the rules of hearsay, foundation, and due process, American lawyers sometimes do not realize that other legal traditions do not approach such principles the same way. For instance, the evidentiary burdens of proof described above are found in ICARA, the American implementing statute, not the treaty itself. The treaty says nothing about burdens of proof.

The rules of evidence are somewhat relaxed in Hague cases in at least one important respect: to avoid respondents unfairly attacking the legitimacy of foreign records, which can be difficult to procure and translate on an expedited basis, ICARA expressly authorizes courts to overlook the typical requirement to have live witnesses authenticate documents before admitting them into evidence.[105]

## VI. INTERACTIONS WITH THE UCCJEA

It is important to keep in mind that a different legal device, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), often can be more effective than the Hague Convention when trying to return a child from the U.S. to a foreign country. The UCCJEA is a uniform statute adopted in nearly every American state, designed to set clear guidelines for jurisdictional disputes regarding where child custody cases should be litigated.[106]

If the petitioner already has a favorable custody order from a foreign jurisdiction, American courts can enforce it under Part 3 of the UCCJEA,[107] which typically is stronger for petitioners because generally speaking there are fewer available defenses under the UCCJEA as compared to the Hague

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[105] *See* 22 U.S.C. § 9005 ("With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court."); *see also* Hague Convention, art. 8(f) (petitions may be supported by "a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State").

[106] *See, e.g.*, *Redmond v. Redmond*, 724 F.3d 729, 739-40 & n.6 (7th Cir. 2013).

[107] *See* Uniform UCCJEA § 105; UTAH CODE § 78B-13-105.

Convention.[108] Plus, while a Hague action only works if the other country has signed and implemented the treaty, it appears possible to seek relief under the UCCJEA if there is a foreign custody order even if it comes from a country that is not a treaty partner under the Hague Convention. Rather, "[a] child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter shall be recognized and enforced" under the UCCJEA, unless "the child custody law of the other country violates fundamental principles of human rights."[109]

Generally speaking, Hague actions are supposed to be focused on obtaining an order for the return of a child back to another country, rather than to enforce visitation rights.[110] There is a disagreement between different courts as to whether or not a petitioner is barred from pursuing a Hague action in federal court to enforce visitation rights arising under foreign law.[111] This circuit split has not been resolved, and perhaps never will be, because

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[108] The UCCJEA defenses are that the court that issued the underlying custody lacked jurisdiction to issue it; or a court of competent jurisdiction has stayed, vacated, or modified the order; or the respondent was not provided notice of the proceedings that led to the other order, or the respondent obtained jurisdiction in the U.S. through "unjustifiable conduct." *See* Uniform UCCJEA §§ 208(a), 310(a); UTAH CODE § 78B-13-208(1), 78B-13-310(1).

[109] *See* Uniform UCCJEA § 105; UTAH CODE § 78B-13-105; *see also* Andrew A. Zashin, *Filling the Gaps with Public Policy: the Application of the Hague Convention Protocol in US Courts in the Absence of a Co-Signing State*, 28 INT'L J. L., POL'Y & FAM. 121 (2014) (arguing that U.S. courts can and should use the UCCJEA to enforce foreign child custody orders issued by children's home countries, even if such orders are from countries outside the Hague Convention).

[110] *See, e.g.*, *Cantor v. Cohen*, 442 F.3d 196, 200-01 (4th Cir. 2006) (collecting cases).

[111] The Fourth Circuit held -- based on language in the treaty, the general principle that federal courts should avoid issuing custody orders, and several district court cases refusing to enforce visitation orders -- that a Hague petitioner "has no right to initiate judicial proceedings for access claims and the federal courts are not authorized to exercise jurisdiction over … access claims." *Cantor*, 442 F.3d at 200. (In other countries, rights of "access" means "parent-time" or "visitation." *See, e.g.*, Hague Convention, art. 5(b); *Abbott*, 560 U.S. at 13.) In contrast, the Second Circuit and Sixth Circuits have relied on different language in ICARA to opine that petitioners can pursue access claims to enforce foreign visitation orders. *See Ozaltin*, 708 F.3d at 363, 368; *Taveras v. Taveraz*, 477 F.3d 767, 777 n.7 (6th Cir. 2007) (agreeing with the Second Circuit in *dicta*); *see also Sanchez-Londono v. Gonzalez*, 988 F. Supp. 2d 113, 129 (D. Mass. 2013) (noting the circuit split on whether a petitioner may enforce rights of access in a Hague case), *aff'd*, 752 F.3d 533 (1st Cir. 2014).

this particular issue probably does not come up very often because the UCCJEA is the stronger tool for enforcing foreign visitation orders.

Finally, the UCCJEA includes a provision making clear that relief under the Hague Convention may be pled as part of a UCCJEA custody action in state court.[112]

## VII. FEDERAL OR STATE COURT?

Because the Hague Convention and ICARA are federal laws, Hague petitions can be filed in federal district court. However, ICARA includes a provision authorizing petitioners to commence Hague actions in state court too.[113] One factor to consider is that state court judges tend to deal with child custody issues far more often than federal judges do, so there is a difference in familiarity with family law issues between the two systems.

If a petitioner starts a Hague action in state court, there is a chance that the respondent will remove the action from state court to federal court, which could create some delay -- even though the central point of a Hague case is to obtain immediate return of the child. If the petitioner chooses to contest removal from state to federal court, that likely would ensure some measure of delay. Very few cases address situations in which a petitioner has contested removal of a Hague petition, but at least one reported decision overruled a petitioner's objection to removal because ultimately such cases are grounded in federal statute and international law.[114] One other case suggests a compelling strategy for petitioners who wish to keep their cases in state court and avoid removal to federal district court: plead under the UCCJEA for the immediate return of the child, perhaps even using the nomenclature of ICARA and the Hague Convention, but without actually invoking ICARA or the Hague Convention.[115]

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[112] *See* Uniform UCCJEA § 302; UTAH CODE § 78B-13-302.

[113] 22 U.S.C. § 9003(a).

[114] *See In re Mahmoud*, No. CV 96 4165 (RJD), 1997 WL 43524, at *1 (E.D.N.Y. Jan. 24, 1997) (holding that even though ICARA allows petitions to be filed in either state or federal court, because neither ICARA nor the Hague Convention prohibit removal, respondent has the right to remove ICARA petitions to federal district court under 28 U.S.C. § 1441).

[115] In *Suarez v. Castrillo*, No. 11-cv-01762-MSK, 2011 WL 2669198 (D. Colo. Jul. 7, 2011), the petitioner filed a petition in state court seeking return of the child under the UCCJEA, but did not invoke ICARA or the Hague Convention. Arguing that the petition used terminology "only" found in Hague cases, and pointing out that the petitioner previously had filed paperwork with Canada's central authority, the respondent insisted that the petition fell under ICARA and therefore pled for removal. The federal district court, however, found that removal was inappropriate because the petitioner

If one party commences a custody case in an American state court while the other parent files a Hague petition in a federal court, the Hague action should force a stay of the state court custody action until the Hague petition is resolved.[116]

## VIII. CONCLUSION

Although not the only option, the Hague Convention is an important consideration for child custody disputes that cross international borders. Among other things, practitioners should strongly counsel their clients to avoid wrongfully removing or retaining children from their home countries, not only to avoid potential criminal charges and the Hague Convention's very onerous attorney fees provisions, but also to help preserve stability for the children.

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did not actually mention ICARA or the Hague Convention, and that Colorado's state courts had jurisdiction over all of the issues raised in the petition. *See id.* at **1-3.

[116] *See*, *e.g.*, Hague Convention, art. 16; *Yang v. Tsui*, 416 F.3d 199, 203-05 (3d Cir. 2005) ("*Yang I*") (reversing federal district court's decision to abstain from hearing Hague petition pending concurrent state court action respecting custody); *Holder v. Holder*, 305 F.3d 854, 864-70 (9th Cir. 2002) (same); *see also Lops v. Lops*, 140 F.3d 927, 944 (11th Cir. 1998) (affirming federal district court deciding Hague issue despite South Carolina state court action, in part because the state court action could not proceed as quickly as the federal district court action).