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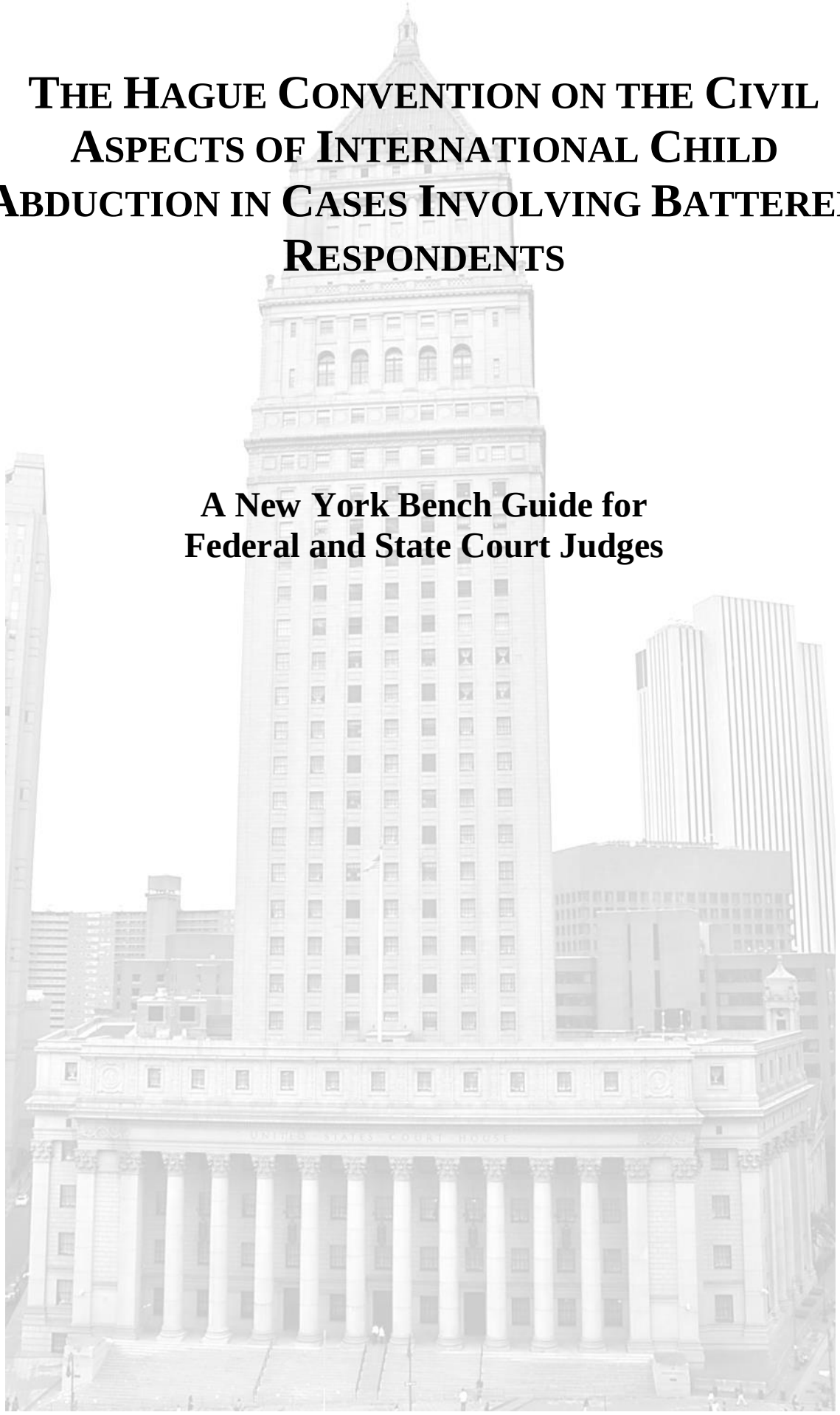
THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN CASES INVOLVING ALLEGATIONS OF DOMESTIC ABUSE

A New York Bench Guide for Federal and State Court Judges

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION IN CASES INVOLVING BATTERED RESPONDENTS

A New York Bench Guide for Federal and State Court Judges



The Hague Domestic Violence Project and the New York Hague Convention and Domestic Violence Bench Guide Consulting Committee has developed this Bench Guide, *The Hague Convention on the Civil Aspects of International Child Abduction in Cases Involving Battered Respondents*, for both federal and state court judges in New York who are confronted with a petition for return pursuant to the Hague Convention in cases involving domestic violence.

Please visit www.haguedv.org for more information about the Hague Domestic Violence Project and for more resources on the Hague Convention and domestic violence.

May 2017

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The Hague Convention on the Civil Aspects of International Child Abduction in Cases Involving Battered Respondents

Appendices

The Hague Convention on the Civil Aspects of International Child Abduction and Domestic Violence *At-A-Glance*

The Guide's central focus is the relationship between domestic violence and the Hague Convention in cases where the taking parent is alleged to have been psychologically or physically abused by the left-behind parent.

This Guide refers to *parental* abduction and *parental* custody rights, but either or both the parties may be someone other than a parent.

This Guide is *applicable* to:

- Petitions filed pursuant to the Hague Convention;
- Petitions filed in U.S. courts (state or federal); and
- Petitions seeking return of a child to his or her habitual residence.

This Guide is NOT *applicable* to:

- Cases involving rights of access (also referred to as access cases);
- Cases in which the child has been removed from or retained outside of the United States; or
- Cases in which the left-behind parent is a victim of domestic violence.

A. SOURCES

The Hague Convention, Appendix A, is an international treaty intended to protect children by providing a civil legal framework for return to their habitual residence when they are wrongfully removed or retained across international borders.

International Child Abduction Remedies Act (ICARA), Appendix B, is the federal legislation implementing the Convention in the United States.

Central Authority: Article 6 of the Convention directs each Contracting State to designate a Central Authority to facilitate the Convention's implementation. In the United States, the U.S. State Department's Office of Children's Issues (OCI) serves as the Central Authority. OCI's website has a resource page for judges that includes links to primary resources, links to related criminal and civil laws, and information about the International Hague Network of Judges.

Further Guidance:

1. **Elisa Pérez-Vera, Explanatory Report**, Appendix D, is recognized as the official history and commentary to the Hague Convention. Courts often look to this report for guidance in interpreting the Convention, although it was never adopted as part of the Convention.
2. **U.S. State Department's Text and Legal Analysis**, Appendix E, is the State Department's legal analysis of the Convention. Like the Explanatory Report, courts have looked to the Text and Legal Analysis for support in treaty interpretation.

B. ELEMENTS OF A HAGUE CONVENTION CASE

3 STEPS:
1. DOES THE COURT HAVE **JURISDICTION?**
2. WAS THE TAKING **WRONGFUL?**
3. DO ONE OR MORE OF THE **5 EXCEPTIONS** TO MANDATORY RETURN APPLY?

Courts should articulate their findings and the standards applied in their rulings.

(1) JURISDICTION

The court has **jurisdiction** if**:**

- The child was removed from or retained outside of a country that is a Contracting State to the Convention *and* a Treaty Partner with the United States;
- The child is under the age of 16;
- The child is located in the state and county or federal district of the court; **AND**
- The child is not the subject of any other Hague Child Abduction proceeding.

Removal from state courts—Both state and federal district courts have original and concurrent jurisdiction in cases arising under the Convention. If the petitioner files a Hague Convention petition in state court, the respondent has the right, pursuant to the federal removal statute, to file a notice of removal in federal district court.

Abstention by federal courts—If the Hague Convention case has already been raised and litigated in state court, abstention by the federal court would be appropriate. If the Hague Convention case has not been raised, or has been raised but not litigated in state court, courts have largely found abstention doctrines do not apply. An ongoing state court custody proceeding does not require abstention by the federal court.

(2) WRONGFUL

The taking is **wrongful** if the petitioner proves the following by a ***preponderance of the evidence***:

- Habitual Residence—that the child was removed or retained from his or her country of *habitual residence* ["Habitual residence" has not been defined in the Convention or ICARA but should be given its "ordinary meaning."]; **AND**
- Custody Rights—that the removal or retention was in breach of the petitioner's *custody rights* [The petitioner's rights under the authority of the child's habitual residence—through law, judicial or administrative decision, or legal agreement—must amount to "custody rights" within the meaning of the Convention]; **AND**
- Custody Rights Actually Exercised—that those custody rights were *actually exercised* at the time of removal or retention or *would have been exercised* but for the removal or retention [Did the petitioner keep or seek to keep any sort of regular contact with the child.].

If the petitioner fails to establish this* prima facie *case, the remedy of return is not available.
If the petitioner is successful, the burden shifts to the respondent to prove one or more of the exceptions (defenses) to return.

(3) EXCEPTIONS

The court **may deny return** if the respondent proves one or more of the following by a ***preponderance of the evidence***:

- One Year and Well-Settled—that *one year has passed* between the date of removal or retention and the date petitioner commences the proceeding **AND** the child is now *well-settled* in the new environment [The court can consider many factors, including: child's age; duration of stay and stability in the new residence; consistent schooling or daycare; participation in extracurricular activities; friends and relatives; stability of housing; respondent's employment; and immigration status.]; **OR**
- Consent or Acquiescence—that the petitioner *consented or subsequently acquiesced* to the removal or retention [Two separate defenses with analytical difference. Acquiescence requires a level of formality whereas consent can be inferred from informal actions or behavior.]; **OR**
- Mature Child Objection—that the child *objects* to return AND is *mature enough* to have his or her objection considered [Child's objection must be more than mere preference and the child must be mature enough to have his or her objection considered. It is for the court to determine how much weight to give to the child's objections.]; **OR**

The court **may deny return** if the respondent proves one or more of the following by ***clear and convincing evidence***:

- Grave Risk or Intolerable Situation—that return poses a *grave risk* that the child will be exposed to physical or psychological harm or an otherwise *intolerable situation* [Intended to prevent future harm. It may apply if the child will be returned to a zone of war, famine, or disease, or in cases of serious abuse or neglect. History of spousal abuse is also relevant to a grave risk determination. It is **not**, however, a vehicle to litigate custody.]; **OR**
- Human Rights and Fundamental Freedoms—that return would not be permitted by the fundamental principles of *human rights and fundamental freedoms* [This has been restrictively interpreted and applies to cases where return "shocks the conscience."].

COURT'S OPTIONS:

1. DENY PETITION—REQUIRED IF PETITIONER FAILS TO PROVE *PRIMA FACIE* CASE.
2. MANDATORY RETURN—REQUIRED IF REMOVAL OR RETENTION IS PROVED TO BE "WRONGFUL" (WITHIN THE MEANING OF THE CONVENTION) **UNLESS** ONE OR MORE EXCEPTIONS (RESPONDENT'S DEFENSES) APPLIES.
3. DISCRETIONARY RETURN—IF ONE OR MORE EXCEPTIONS (RESPONDENT'S DEFENSES) ARE PROVED, THE COURT MAY DENY THE RETURN OF THE CHILD.

INTRODUCTION

This Bench Guide, developed by the New York Hague Convention and Domestic Violence Bench Guide Consulting Committee, provides guidance to federal and state court judges confronted with a petition for return of a child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention") in cases involving allegations of domestic violence.

The information in this Guide is applicable to cases filed in the United States in federal or state court seeking return of a child taken to or retained in the United States ("incoming cases") and in which the respondent ("taking parent") alleges physical or psychological abuse by the petitioner ("left-behind parent"). The Guide focuses on the intersection of domestic violence and the Convention, discussing the dynamics of domestic violence and the applicability of domestic violence to the court's analysis in a Hague Convention case.

The Convention was designed to protect children from the harms of abduction, and it established procedures to ensure the prompt return of children "wrongfully removed or retained" from their countries of habitual residence. The exceptions to mandatory return of an abducted child, often referred to as affirmative defenses, outline the limited circumstances under which a child would be better served by remaining in the removed-to country rather than being returned to his or her country of habitual residence. If an exception is established, return is discretionary.

The attention of this Guide to cases involving domestic violence is critical because, unlike federal legislation to prevent child abduction, neither the Convention nor ICARA provides an explicit defense for parents fleeing domestic violence. However, domestic violence is relevant within the broader context of the exceptions to mandatory return and the consideration of settled intent with regard to habitual residence. Parents who flee across international borders due to domestic violence often do so for their own safety and the safety of their children. Still, they frequently find themselves in court facing a petition under the Hague Convention where they may be viewed as an "abductor" or "wrongdoer." Thus, it is critical that courts understand the dynamics of domestic violence and the ways in which domestic violence is relevant to the consideration of whether a petition for return should or should not be granted.

GLOSSARY

KEY TERMS: A QUICK REFERENCE

This section briefly defines important terminology used in the Convention and this Guide. For an in-depth definition of specific terms, please refer to the substantive sections within.

Access Case: Pursuant to Article 21 of the Convention, a petitioner may file a petition to secure "the effective exercise of rights of access" to a child. When a petitioner files for access, rather than return, the case is referred to as an access case. Alternatively, a petitioner may file a petition for return but fail to prove that he or she enjoyed rights of custody (an element of the *prima facie* case for return). Petitioner may then move to amend his or her petition to seek rights of access. This Guide does not address rights of access in depth. (For more on rights of access compared to rights of custody *see* Part III, § 3.4; *see also* "Rights of Access" and "Rights of Custody," *infra*.)

Central Authority: Article 6 of the Convention directs each Contracting State to designate a Central Authority to facilitate the Convention's implementation. Central Authorities coordinate and cooperate with various agencies from both countries involved to secure the prompt, voluntary return of a child or to facilitate access to a child. The Central Authority's role is that of a facilitator, not a fact finder, and it has no power to order a child's return. The procedure of each Central Authority varies, and each is responsible for managing its own caseload and priorities. In the United States, the U.S. State Department's Office of Children's Issues (OCI) serves as the Central Authority.

Office of Children's Issues: International Parental Child Abduction Division	
United States Department of State Bureau of Consular Affairs Office of Children's Issues SA-17 9th Floor Washington, DC 20522-1709	Phone: 888-407-4747; 202-501-4444 Fax: 202-485-6221 E-mail: AskCI@state.gov Web address: childabduction.state.gov

Contracting State(s): A country that is party to the Convention is a Contracting State, meaning the Convention is in force in that country. The Convention only applies to Contracting States. A country may become a Contracting State by ratifying or acceding to the Convention. As of March 1, 2017, there were 96 Contracting States and this number continues to expand. The Hague Conference on Private International Law maintains a Status Table of Contracting States, available on their website at http://www.hcch.net. For more on Contracting States *see* Part I, § 2.1; *see also* "Treaty Partner."

Explanatory Report: Elisa Pérez-Vera's Explanatory Report, Appendix D, is recognized as the official history and commentary to the Hague Convention and courts often look to this report for guidance in interpreting the Convention, although it was never adopted as part of the Convention. (Note Justice Stevens' comment on this in a footnote in his *Abbott v. Abbott* dissent: "As the Court recognizes . . . the Executive Branch considers the Pérez-Vera Report 'the "official history"'for the Convention and 'a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.'" 560 U.S. 1, 24 n.1 (2010) (citing Text & Legal Analysis).)

Habitual Residence: The petitioner must prove the left-behind country ("Requesting State") was the child's habitual residence in order to establish that the child's removal or retention was wrongful. Proving habitual residence is an element of the petitioner's *prima facie* case. Habitual residence is not defined by either the Convention or the International Child Abduction Remedies Act (ICARA), and is interpreted by courts according to its "ordinary meaning." For more on Habitual Residence *see* Part III, § 2.00.

Incoming Cases: Incoming cases are those in which the child has been removed to or retained in the United States.

International Child Abduction Remedies Act (ICARA), 22 U.S.C.A. §§ 9001-9010**:** This federal legislation implements the Hague Convention in the United States and establishes procedures for bringing Convention cases in U.S. courts. ICARA is to be applied in conjunction with, and not in lieu of, the Convention. (ICARA should not be confused with the International Child Abduction Prevention and Return Act (ICAPRA), 22 U.S.C.A. §§ 9101-9141, which came into effect in 2014 and requires annual reporting on international child abduction and the success or failure of subsequent procedures for return, including compliance with the Hague Convention in Treaty Partner countries.)

Outgoing Cases: Outgoing cases are those in which the child has been removed from or retained outside of the United States and is located in another country at the time the petition is filed. This Guide does not address outgoing cases.

Petition: The application filed by a party in either state or federal court seeking access to or return of a child who has been brought to the United States from a foreign country. The Convention refers solely to "applications." ICARA makes a distinction between *application* and *petition*, using "application" for that which is filed with a Central Authority and "petition" for that which is filed with a court. Use of the terms in this Guide is according to ICARA definitions.

Petitioner ("Left-Behind Parent"): The petitioner is the person, institution, or any other body seeking return of or access to a child under the Convention. The petitioner may contact the U.S. Central Authority, either directly or through the Central Authority in the country where he or she is located, or may file a petition pursuant to the Hague Convention in either state or federal court. For purposes of this Guide, the petitioner will be located outside the United States. (A petitioner may also file a petition to establish or enforce rights of access, but such proceedings are beyond the scope of this Guide. *See* "Rights of Access," *infra*, and "Access Case," *supra*.)

Removal: This refers to the physical taking of a child, by a parent, relative, or other person, without the permission of a party with custodial rights.

Requested State ("Removed-To Country"): The country where the child is located and where the petition is filed. For the purpose of this Guide, the Requested State will always be the United States.

Requesting State ("Left-Behind Country"): The country the child was removed from or retained outside of.

Respondent ("Taking Parent" or "Abducting Parent"): The respondent is the person who removed or retained the child and must respond to the petition. For purposes of this Guide, this person will be located in the United States at the time the petition is filed and has alleged domestic violence by the petitioner.

Retention: The keeping of a child, by a parent, relative, or other person, outside of a country beyond a previously agreed-upon time period. In such cases, initial removal of the child from the habitual residence was not wrongful.

Return Case: Cases in which a petition has been filed seeking return of a child to his or her habitual residence. Return is available under the Convention only in cases in which the petitioner had rights of custody at the time of removal or retention.

Rights of Access: Under Article 5 of the Convention, rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Where rights of access are at issue, the remedy of return is not available. (This Guide does not address cases involving rights of access in depth. For more on rights of access compared to rights of custody *see* Part III, § 3.4.)

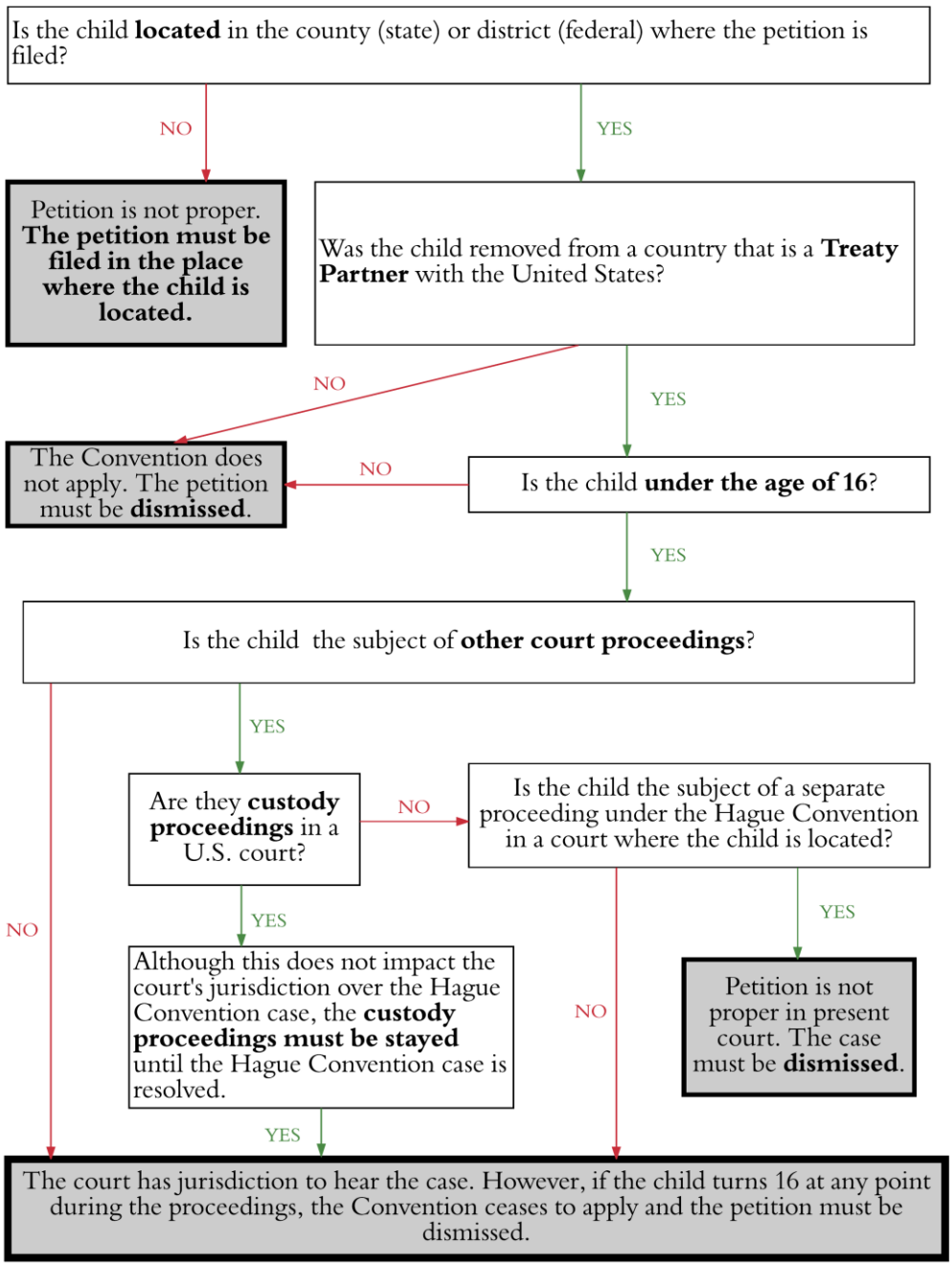
Rights of Custody: Under Article 5 of the Convention, rights of custody "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. . . ." Proving rights of custody is an element of the petitioner's *prima facie* case for return. (For more on Rights of Custody *see* Part III, § 3.00.)

Text and Legal Analysis: The Hague International Child Abduction Convention; Text and Legal Analysis, Appendix E, was drafted by the U.S. State Department before the Convention was in force in the United States, and like the Pérez-Vera Explanatory Report, courts often rely on it for support in treaty interpretation. (In *Abbott v. Abbott*, for example, the U.S. Supreme Court clearly stated the decision was both supported and informed by the Text and Legal Analysis. 560 U.S. 1, 3 (2010).)

Treaty Partners: The Convention must be in force not only *in* each country involved in the case, but also *between* the countries. As of March 1, 2017, the United States was a Treaty Partner with 82 Contracting States (including countries and territories). The U.S. State Department maintains a current list of U.S. treaty partners on their website at travel.state.gov.

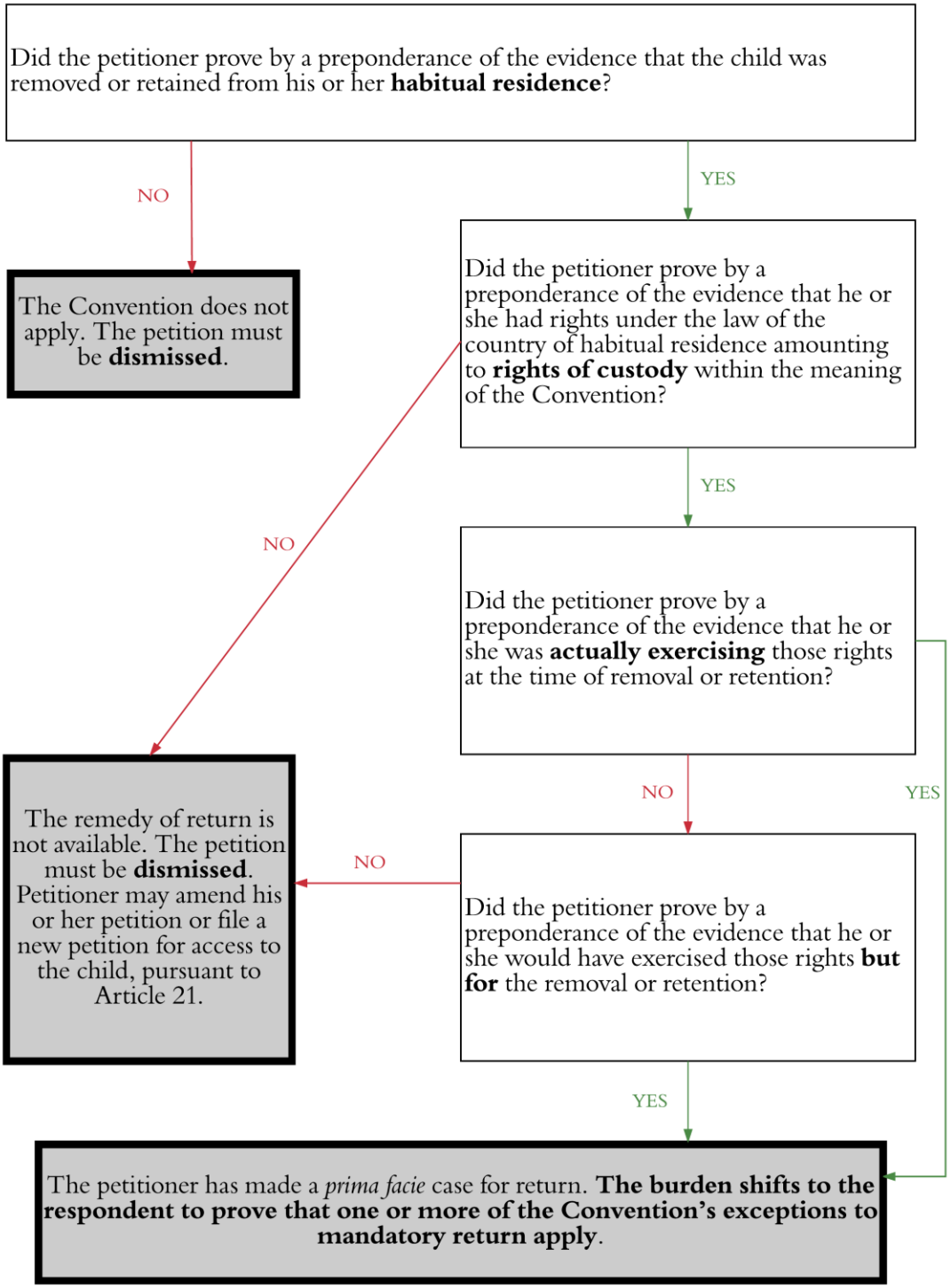
Jurisdiction

This flowchart represents the questions a court should ask to determine whether it has jurisdiction over a Hague Convention case.



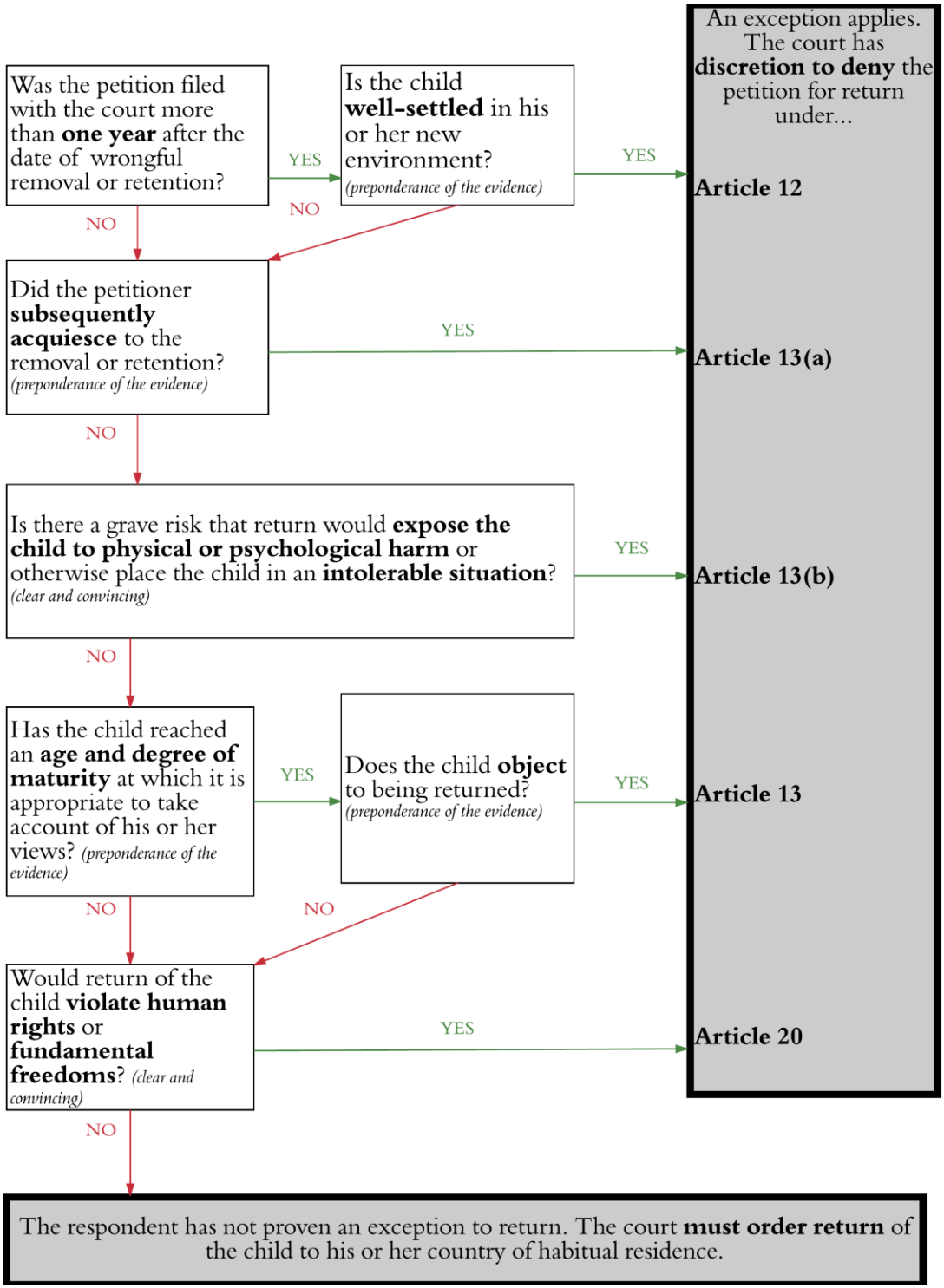
Petitioner's *Prima Facie* Case

This flowchart represents the questions a court should ask when evaluating whether the petitioner has established a *prima facie* case.



Respondent's Defenses

If a *prima facie* case has been established, a court should consider the following questions to determine whether a defense to removal exists.



PART I. OVERVIEW, JURISDICTION, AND PROCEDURE

§ 1.00 The Hague Convention and ICARA

Key Terms

- ✓ The **left-behind parent** is referred to as the **petitioner**
- ✓ The **taking parent** is referred to as the **respondent**
- ✓ The **left-behind country** is referred to as the **Requesting State**
- ✓ The country ***where the petition is filed*** is referred to as the **Requested State** (for the purposes of this Guide, the Requested State will always be the United States)

The Hague Convention on the Civil Aspects of International Child Abduction[1]

- An international treaty.
- A mechanism for returning a wrongfully removed or retained child to his or her country of habitual residence.
- A mechanism to establish or enforce rights of access, but such proceedings are beyond the scope of this Guide.

The International Child Abduction Remedies Act (ICARA)[2]

- Federal legislation implementing the Convention in the United States.
- Intended to be read in conjunction with, and not in lieu of, the Convention.
- Establishes burdens of proof for Convention elements and defenses.

[1] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (1981) [hereinafter Convention]. Full text attached hereto as Appendix A.

[2] 22 U.S.C.A. §§ 9001-9010. Full text attached hereto as Appendix B. ICARA establishes procedures for bringing child abduction cases in U.S. courts and should not be confused with the International Child Abduction Prevention and Return Act (ICAPRA), 22 U.S.C.A. §§ 9101-9141, which came into effect in 2014, and requires annual reporting on international child abduction and the success or failure of subsequent procedures for return, including compliance with the Hague Convention in Treaty Partner countries.

The Convention's Limited Purpose

- ✓ The Convention seeks to **protect the *status quo ante*** under the law of a child's habitual residence.[3]
- ✓ The Convention is designed to **prevent forum shopping**: according to Pérez-Vera's Explanatory Report, a central purpose of the Convention is to prevent one parent from gaining an unfair advantage in a custody dispute by taking a child to another country in order to invoke that other country's jurisdiction.[4]
- ✓ The Convention provides a ***procedural*** mechanism for prompt return of a wrongfully removed or retained child to his or her habitual residence.
- ✓ **The Convention does not provide for a determination on the merits of custody.**
- ✓ While state court custody proceedings do not require abstention, they must be stayed pending resolution of a Hague action.

§ 2.00 Jurisdiction Over a Hague Convention Case

When one parent removes or retains a child across international borders in violation of another's rights of custody, a petition for the child's return may be filed if:

- The child was removed or retained from a country that is a **Contracting State** to the Convention and a **Treaty Partner with the United States**.[5]
- The child is **under the age of 16**.[6]
- The child is located in the state and county or federal district of the court.
- The child is not the subject of any other Hague Convention proceeding.

The petition may be filed in either a state or federal court where the child is located.[7]

[3] *See Abbott v. Abbott*, 560 U.S. 1, 9 (2010) ("A return remedy does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence."); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3d Cir. 2006).

[4] Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, ¶ 11 (1982) [hereinafter Pérez-Vera, Explanatory Report] ("[T]he situations envisaged are those which derive from the use of force to establish artificial jurisdictional links . . . with a view to obtaining custody of a child."), full text attached hereto as Appendix D. *See also* International Child Abduction Remedies Act, 22 U.S.C.A. § 9001(a)(2) ("Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention."); Department of State Public Notice 957, Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,495 (1986) [hereinafter Text and Legal Analysis] ("The international abductor is denied legal advantage from the abduction . . . ."), full text attached hereto as Appendix E.

[5] Convention at arts. 35, 38.

[6] *Id.* at art. 4.

[7] 22 U.S.C.A. § 9003(a), (b).

Bright-Line Rule

✓ The Hague Convention ceases to apply if the child turns 16 at any time during the proceeding.[8] The petition must be dismissed. However, other remedies may be available under domestic law.[9]

Best Practices

✓ State the jurisdictional elements on the record before proceeding with adjudication:

(1) Is the Requesting State a Contracting State and a Treaty Partner with the United States?

(2) Is the child under age 16?

(3) Is the child located in the state and county or federal district of the court?[10]

(4) Is the child the subject of any other Hague Convention proceedings?

2.1 Contracting States and Treaty Partners

Key Terms

✓ **Contracting State**: A country that is party to the Convention, meaning that the Convention is in force in that country. [For an up-to-date list Contracting States *see* The Hague Conference on Private International Law website at http://www.hcch.net.]

✓ **Treaty Partners**: Countries between which the treaty is in force. [For an up-to-date list of U.S. treaty partners *see* The U.S. State Department's website at http://travel.state.gov.]

If either country involved is **not a Contracting State** *when the petition is filed*, the Convention does not apply, and the petition must be dismissed.[11]

If the countries involved are **not Treaty Partners** *when the petition is filed*, the Convention does not apply, and the petition must be dismissed.[12]

If either country was **not a Contracting State** *when the removal or retention occurred*, the Convention does not apply, and the petition must be dismissed.[13]

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[8] Convention at art. 4.

[9] If the child turns 16 during the proceedings, the Convention ceases to apply and the case must be dismissed. This is a bright-line rule regardless of the circumstances or the stage of a pending case. *See* Text and Legal Analysis, 51 Fed. Reg. 10,504 (stating "the Convention itself is unavailable as the legal vehicle for securing return of a child 16 or older"). Note, however, that nothing in the Convention prohibits courts from applying domestic law that may provide remedies for children over the age of 16 when the Convention does not apply.

[10] If the child is removed from the county or district where the petition is filed, the court loses jurisdiction to hear the case. For best practices to avoid removal of a child from the court's jurisdiction after the petition has been filed *see* Part I, § 5.4, *infra*.

[11] Convention at art. 35.

[12] *Id.* at art. 38 ("The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.").

If the countries involved were **not Treaty Partners** *when the removal or retention occurred*, the Convention might still apply.[14] If the court finds that the Convention does not apply, the petition must be dismissed.

Key Point: Timing of Removal or Retention

- ✓ The Convention applies only to wrongful removals or retentions occurring *after* the Convention has come into effect in each State;[15] however, only one district court has addressed whether removal or retention must *also* have occurred *after* the countries became Treaty Partners.[16]

2.2 The Role of the Central Authority

"A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities."[17] In other words, each Contracting State designates a Central Authority that is charged with specific obligations delineated by the Convention. Central Authorities are directed to "co-operate with each other and promote co-operation amongst the competent authorities in their respective [countries] to secure the prompt return of children and to achieve the other objects of the Convention."[18]

In the United States, the U.S. State Department's Office of Children's Issues (OCI) serves as the Central Authority. OCI's website has a resource page for judges that includes links to primary resources, related criminal and civil laws, and information about the International Hague Network of Judges.

The petitioner can elect whether to file an application through the U.S. Central Authority ("Administrative Return") or to file directly with the court ("Judicial Return"). If the petitioner seeks assistance from the Requesting State's Central Authority, that Central Authority will forward an application to the U.S. Central Authority. The Central Authority has no power to

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[13] Convention at art. 35 ("This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States."); *see also Viteri v. Pflucker*, 550 F. Supp. 2d 829, 835-36 (N.D. Ill. 2008) (citing *In re H.* and *In re S.*, [(1991)] 2 A.C. 476 (H.L.), (consolidated appeals before the English House of Lords which went through an extensive analysis before holding that a removal/retention is "a single event" and "cannot be a continuing event")); *cf.* Text and Legal Analysis, 51 Fed. Reg. 10,504 (acknowledging both a strict and liberal interpretation of Article 35).

[14] *See Viteri*, 550 F. Supp. 2d at 837-39 (finding Convention applies when retention occurred **after** the United States and Peru **each** became a Contracting State but **before** they became Treaty Partners and the petition for return was filed **after** they became **Treaty Partners**). *Viteri* appears to be the only case addressing retentions occurring after each country became a Contracting State, but before those countries were Treaty Partners.

[15] Referred to as "entry into force." Note that a Contracting State's date of accession or ratification will **not** be the same date that the Convention enters into force in that State.

[16] *Viteri*, 550 F. Supp. 2d at 837-39.

[17] Convention at art. 6.

[18] *Id.* at art. 7.

order the child to be returned, but it can help facilitate voluntary return of the child. If the petitioner proceeds via the Central Authority, the Central Authority will generally prescreen the application for jurisdictional issues before a petition is filed. If the petitioner files directly with the court, the petition will not be prescreened for jurisdiction defects. In either case, the best practice is to state the jurisdictional elements on the record before proceeding with adjudication.

While a case is pending, the court may request a report about the child's social background;[19] OCI can explain to a party what is required for the report, but the party is responsible for submitting the report directly to the court. OCI can also work with the Central Authority of the Requesting State to obtain "information of a general character as to the law of their [country]."[20]

When a court grants a petition for return, local competent authorities generally facilitate the return. However, OCI may become involved in facilitating return depending on the terms of the return order, or at the request of the local competent authority or foreign Central Authority.

Take Note: OCI's Obligations

- ✓ OCI has the same obligations under the Convention regardless of whether the petitioner files through OCI or directly with the court.

2.3 Stay of Custody Proceedings

Any proceeding addressing the merits of custody in the Requesting State must be stayed pending the outcome of the Hague Convention case:

> After **receiving notice** of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which [the child] has been retained **shall not decide on the merits of rights of custody** until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.[21]

[19] Convention at arts. 7(d); 13.
[20] *Id.* at art. 7(e).
[21] *Id.* at art. 16 (emphasis added). The impact this Article would have on child protective proceedings in U.S. courts has not been addressed; however, domestic courts have power under ICARA to protect the well-being of the child involved. 22 U.S.C.A. § 9004(a). *See also* N.Y. Dom. Rel. Law §§ 76-c, e (providing "temporary emergency jurisdiction" exception to limitations on exercise of jurisdiction when "necessary in an emergency to protect the child").

"Notice" as per Article 16 does not require a petition for return to be filed with the court to trigger a mandatory stay of custody proceedings; rather, proceedings must be stayed on notice that a wrongful removal or retention has been alleged.[22]

After the Hague Convention proceeding has concluded, or if a petition for return is not filed within a reasonable time,[23] any actions regarding dissolution, parentage, or other custody issues may resume or be filed and litigated. If there are questions regarding jurisdiction over custody, the court presiding over the custody case must apply the relevant domestic law to determine jurisdiction.

Determining Custody Jurisdiction

- ✓ The Hague Convention case does not involve an adjudication of the merits of a custody proceeding.
- ✓ If a child is returned to his or her habitual residence outside of the United States, the U.S. court presiding over the custody case will likely find that it does not have jurisdiction to determine or modify custody.
- ✓ If the petition for return is denied, a domestic court presiding over the custody case should refer to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA),[24] to determine whether it has jurisdiction to adjudicate custody.

2.4 Removal and Abstention

Removal of civil actions from state court to federal court is governed by 28 U.S.C.A. § 1441:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United

[22] *See* Convention at art. 16; s*ee also* Text and Legal Analysis, 51 Fed. Reg. 10,509 ("A court may get notice of a wrongful removal or retention in some manner other than the filing of a petition for return, for instance by communication from a Central Authority, from the aggrieved party (either directly or through counsel), or from a court in a Contracting State which has stayed or dismissed return proceedings upon removal of the child from that State.").

[23] There is little guidance as to what would constitute a "reasonable time" for a petition to be filed following notice. *See* Pérez-Vera, Explanatory Report at ¶ 121. In some cases, notice may occur simultaneously with filing the petition, but if a respondent receives notice before the petition is filed and any time has passed since notice was effected, the court will need to determine based on the circumstances of a particular case whether the delay in filing was reasonable or constitutes inaction by a potential petitioner. If delay in filing is due to the parties' attempt at alternative dispute resolution of Hague Convention issues or administrative delays, a court may find such delay reasonable. *See* Text and Legal Analysis, 51 Fed. Reg. 10,509.

[24] In New York, the UCCJEA is codified under Article 5-A of the New York Domestic Relations Law. *See* N.Y. Dom. Rel. Law § 75. For more on the UCCJEA *see* Part I, § 2.6 *infra.*

> States for the district and division embracing the place where such action is pending.[25]

In the United States, both state and federal district courts have original and concurrent jurisdiction in cases arising under the Convention.[26]

If the petitioner files in state court, the respondent has the right, pursuant to the federal removal statute, to file a notice of removal in federal district court.[27]

Procedure for the removal of a civil action is governed by 28 U.S.C.A. § 1446, which requires a respondent to file a notice of removal within 30 days after the receipt of the petition.[28]

Can the federal court abstain from hearing a Hague Convention case?

- If the Hague Convention has **already been raised and litigated** in state court, abstention by the federal court would be appropriate.[29]
- If the Hague Convention **has not been raised** or has been **raised but not litigated** in state court, courts have generally found abstention doctrines do not apply.[30]

[25] 28 U.S.C.A. § 1441(a).
[26] 22 U.S.C.A. § 9003(a).
[27] ICARA does not prohibit removal of state court Convention proceedings to federal court. *See In re Mahmoud*, CV 96 4165 (RJD), 1997 WL 43524, at *1 (E.D.N.Y. Jan. 24, 1997) ("The federal removal statute… authorizes removal by the defendant to federal court if original jurisdiction exists in the district court, except 'as otherwise expressly provided.' Neither the Hague Convention nor ICARA prohibits removal.").
[28] 28 U.S.C.A. § 1446(b). Although the federal removal statute gives a defendant (or respondent in the case of the Convention) 30 days to file a notice of removal, to avoid triggering federal court abstention, a respondent will likely need to file a notice sooner due to the expedited nature of Convention proceedings.
[29] *See Grieve v. Tamerin*, 269 F.3d 149, 153 (2d Cir. 2001) ("New York's resolution of a custody battle is not so bound up with the State's sovereign functions as to be 'important' in the comity-related sense in which the *Younger* cases use the term."); *Yang v. Tsui*, 416 F.3d 199, 202 (3d Cir. 2005) (citing *Copeland v. Copeland*, 134 F.3d 362 (4th Cir. 1998), *Cerit v. Cerit*, 188 F. Supp. 2d 1239, 1244 (D. Haw. 2002)); *see generally Younger v. Harris*, 401 U.S. 37 (1971) (establishing the Younger Abstention Doctrine); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (establishing the Colorado River Abstention Doctrine).
[30] *See Centenaro v. Poliero*, 25 Misc. 3d 1207(A), 901 N.Y.S.2d 905 (N.Y. Sup. Ct. Queens Cty. 2009) ("Only if a Hague Convention proceeding were ongoing before this court would it be appropriate for the Federal court to abstain."); *see also Barzilay v. Barzilay*, 536 F.3d 844, 850 (8th Cir. 2008) ("The pendency of state custody proceedings therefore does not support *Younger* abstention in the Hague Convention context."); *Gaudin v. Remis*, 415 F.3d 1028, 1034 (9th Cir. 2005) ("[A]bstention under [*Younger* and *Colorado River*] doctrines is equally inappropriate in the case of an ICARA petition."); *Yang*, 416 F.3d at 202.

Key Points: Abstention

- ✓ An ongoing **state court custody proceeding** does not necessitate abstention by the federal court.
- ✓ Abstention doctrines are triggered if the Hague Convention petition is in the process of being litigated in state court.

2.5 Full Faith and Credit, *Res Judicata*, and Collateral Estoppel

Courts must accord full faith and credit to the judgment of any other U.S. court with jurisdiction that orders or denies return of a child pursuant to the Convention.[31]

As with abstention, discussed above, this requirement does not apply to decisions made during custody proceedings in state court related to the child at issue in the Hague Convention petition.[32] Although ICARA requires full faith and credit deference only to judgments of U.S. courts,[33] neither ICARA nor its legislative history indicates Congress intended to bar U.S. courts from giving foreign judgments deference under principles of international comity.[34] Moreover, ICARA specifically recognizes the need for uniform international interpretation of the Convention.[35]

A final custody determination in state court does not eliminate a party's right to a determination pursuant to his or her claim under the Hague Convention,[36] but the court presiding over a Hague Convention case has discretion to consider a court's findings made during custody proceedings.[37]

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[31] 22 U.S.C.A. § 9003(g).

[32] *See Diorinou v. Mezitis*, 237 F.3d 133, 145-46 (2d Cir. 2001) (endorsing district court's refusal to enforce custody order from New York because it resulted from "a one-sided and defective presentation" (citation omitted)); *see also Silverman v. Silverman*, 338 F.3d 886, 893 (8th Cir. 2003) (holding that when the state court custody determination addressed only matters of state custody law and did not address issues arising under the Hague Convention, the federal appellate court was not required to uphold the state court ruling because that ruling was not entitled to full faith and credit, did not invoke protection pursuant to issue or claim preclusion, and was not subject to the *Rooker-Feldman* Doctrine).

[33] *See* 22 U.S.C.A. § 9002(8) (defining "State" to mean "the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States").

[34] *Diorinou*, 237 F.3d at 143 ("Even if the limited scope of [ICARA] implies a legislative preference not to extend formal full faith and credit recognition to foreign judgments, we see nothing in ICARA or its legislative history to indicate that Congress wanted to bar the courts of this country from giving foreign judgments the more flexible deference normally comprehended by the concept of international comity."); *see also Velez v. Mitsak*, 89 S.W.3d 73, 82 (Tex. App. 2002) ("The exercise of comity is at the heart of the Convention.").

[35] 22 U.S.C.A. § 9001(b)(3)(B).

[36] *Diorinou*, 237 F.3d at 145-46 (implicitly recognizing that the existence of a custody award does not moot an appeal of a trial court's granting of a Hague Convention petition); *see also Holder v. Holder*, 305 F.3d 854, 865 (9th Cir. 2002) ("It would also undermine the very scheme created by the Hague Convention and ICARA to hold that a Hague Convention claim is barred by a state court *custody* determination, simply because a petitioner did not raise his *Hague Convention* claim in the initial custody proceeding." (emphasis in original)).

Federal courts have the power to vacate state custody determinations and other state court orders that contravene or frustrate the Hague Convention's purposes.[38]

2.6 The Role of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

The Hague Convention **does not address jurisdiction over custody issues**. Rather, the Convention is concerned only with providing an expedited remedy—prompt return of children to their habitual residences when appropriate.

The Uniform Child Custody Jurisdiction and Enforcement Act[39] (UCCJEA):

- Governs jurisdiction in matters regarding custody;
- Was developed to promote uniformity in state courts regarding jurisdiction and enforcement of custody orders;
- Sets forth standards for when courts may make an initial custody determination or modify orders from other states; and
- Requires an analysis independent from Hague Convention proceedings.

Under the UCCJEA, foreign countries are treated like U.S. states. In certain circumstances the UCCJEA may therefore apply in a case involving foreign custody orders, including when enforcement of a foreign custody order is sought.

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[37] Convention at art. 17 (". . . but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying the Convention."); *Diorinou v. Mezitis*, 132 F. Supp. 2d 139, 145-146 (S.D.N.Y. 2000) ("considering the reasons for the New York state courts' decisions" but noting decisions were not binding on a determination of habitual residence or wrongful removal, especially where proceedings were "one-sided and defective"), *aff'd*, 237 F.3d 133 (2d Cir. 2001); *see also Miller v. Miller*, 240 F.3d 392, 399 (4th Cir. 2001) ("[I]t would be an appropriate—albeit discretionary—judicial exercise to 'take account of the reasons' for that decree in appraising the merits of this abduction claim."); *Rivera Rivas v. Segovia*, No. 2:10-CV-02098, 2010 WL 5394778, at *2 (W.D. Ark. Dec. 28, 2010) ("While this Court, in its discretion, may take into consideration the reasoning behind the Arkansas State Court's findings . . . this Court is not bound by those findings and limits itself to consideration of only the narrow question presented by Rivas's Petition under the Convention.").

[38] *See Castro v. Martinez*, 872 F. Supp. 2d 546, 552-53 (W.D. Tex. 2012) ("'Children who otherwise fall within the scope of the Convention are not automatically removed from its protections by virtue of a judicial decision awarding custody to the wrongdoer. This is true whether the decision as to custody was made, or is entitled to recognition, in the State to which the child has been taken. Under Article 17 that State cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer made by one of its own courts or by the courts of another country. This provision is intended to ensure, inter alia, that the Convention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention.'" (quoting Text and Legal Analysis, 51 Fed. Reg. 10,504)).

[39] The UCCJEA (replacing the Uniform Child Custody Jurisdiction Act) promotes uniformity among states with regard to jurisdiction and enforcement of custody orders. The UCCJEA has been enacted by every state except Massachusetts, and by the District of Columbia and the Virgin Islands. *See* N.Y. Dom. Rel. Law § 75.

Key Points: Distinguishing UCCJEA from the Convention

- ✓ Although seemingly related, the UCCJEA is not relevant to the resolution of a case arising under the Convention.
- ✓ The same case can be subject to both the Convention and the UCCJEA.[40]

2.7 International Treaties and the Supremacy Clause

The U.S. Constitution provides that international treaties, along with the Constitution and federal statutes, are the supreme law of the land.[41] If conflict exists between an international treaty and a federal statute, the most recent provision applies.[42]

§ 3.00 Elements of a Hague Convention Case

Burdens of proof are governed by ICARA

- A petitioner must establish each element of the *prima facie* case by a preponderance of the evidence.[43]
- A respondent must prove the grave risk (Article 13(b)) and the human rights (Article 20) exceptions by clear and convincing evidence.[44]
- A respondent must prove the well-settled (Article 12), consent or acquiescence (Article 13(a)), and the mature child's objection (Article 13) exceptions by a preponderance of the evidence.[45]
- **Preponderance of the Evidence**: "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence."[46]
- **Clear and Convincing Evidence**: "The phrasing within most jurisdictions has not become as standardized as is the 'preponderance' formula . . . . It has been persuasively suggested that [the standard] could be more simply and intelligibly translated to the [trier

[40] *See Katz v. Katz*, 117 A.D.3d 1054, 1055, 986 N.Y.S.2d 611, 613 (N.Y. App. Div. 2d Dep't 2014) (applying UCCJEA to determine jurisdiction between countries after return is denied under the Convention and holding that "the denial, by the court in the Dominican Republic, of the father's application for a return of the child pursuant to the Convention, did not preempt his custody proceeding").
[41] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land….").
[42] *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).
[43] 22 U.S.C.A. § 9003(e)(1).
[44] 22 U.S.C.A. § 9003(e)(2).
[45] *Id.*
[46] 2 George E. Dix et al., *McCormick On Evidence* § 339 (7th ed. 2016) (citing Model Code of Evidence Rule 1(3)).

of fact] if [the trier of fact] were instructed that they must be persuaded that the truth of the contention is 'highly probable.'"[47]

Best Practices

✓ Courts should articulate their findings and the standards applied in their rulings.

Petitioner's *Prima Facie* Case for Return

- Petitioner must prove that "the child has been wrongfully removed or retained within the meaning of the Convention."[48]
- As defined by the Convention, removal or retention is wrongful when:
  a. "[I]t is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention"[49]; and
  b. "[A]t 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."[50]

Petitioner must prove by a preponderance of the evidence that:

✓ The child was removed or retained from his or her country of habitual residence (Article 3(a));
✓ The removal or retention was in breach of petitioner's custody rights (Article 3(a))[51]; and
✓ Those custody rights were actually exercised at the time of removal or retention or would have been exercised but for the removal or retention (Article 3(b)).

If the petitioner fails to establish a *prima facie* case, the remedy of return is not available, and the petition must be dismissed.

If the petitioner is successful, the burden shifts to the respondent to prove one or more of the Convention's exceptions to return apply. If the respondent fails to establish an exception, the child **must** be returned. If an exception is established, return is **discretionary**.

[47] *Id.*
[48] 22 U.S.C.A. § 9003(e)(1)(A).
[49] Convention at art. 3.
[50] *Id.*
[51] A petitioner may file a petition for return but fail to prove that he or she enjoyed rights of custody, in which case the petitioner may elect to amend the petition, seeking rights of access rather than return of the child. The matter then ceases to be a Return Case and instead becomes an "Access Case." Under Article 5 of the Convention, rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention at art. 5. An Access Case seeks to establish or enforce rights of access when the remedy of return is not available. This Guide does not provide an in-depth discussion of cases involving rights of access. For more on rights of access compared to rights of custody *see* Part III, § 3.4 *infra*.

Exceptions to Mandatory Return: Respondent's Affirmative Defenses

- The court is not bound to order return if the respondent proves by a preponderance of the evidence[52] that:
  - "[T]he proceedings have been commenced **after the expiration of the period of one year** . . ." and "it is demonstrated that **the child is now settled in [his or her] new environment**;"[53] or
  - "[T]he person, institution or other body having the care of the person of the child . . . had **consented to or subsequently acquiesced in the removal or retention**;"[54] or
  - "[T]he child **objects to being returned** and **has attained an age and degree of maturity** at which it is appropriate to take account of [his or her] views."[55]
- The court is not bound to order return if the respondent proves by clear and convincing evidence[56] that:
  - "[T]here 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**;"[57] or
  - Return "**would not be permitted by the fundamental principles** of the requested State **relating to the protection of human rights** and **fundamental freedoms**."[58]

Respondent must prove by a preponderance of the evidence:

- ✓ One year and settled (Article 12); or
- ✓ Petitioner consented or subsequently acquiesced (Article 13(a)); or
- ✓ Mature child objects to return (Article 13).

Respondent must prove by clear and convincing evidence:

- ✓ Return poses grave risk of exposure to physical or psychological harm or an otherwise intolerable situation (Article 13(b)); or
- ✓ Return would result in violation of human rights and fundamental freedoms (Article 20).

Even if the respondent successfully proves that one or more of the exceptions to mandatory return apply, the court may order a child returned to his or her habitual residence.[59]

[52] 22 U.S.C.A. § 9003(e)(2)(B).
[53] Convention at art. 12 (emphasis added).
[54] *Id.* at art. 13(a) (emphasis added).
[55] *Id.* at art. 13 (emphasis added).
[56] 22 U.S.C.A. § 9003(e)(2)(A).
[57] Convention at art. 13(b) (emphasis added).
[58] *Id.* at art. 20 (emphasis added).
[59] *See id.* at arts. 12, 13, 18, and 20.

§ 4.00 When the Convention Does Not Apply

The Convention does not apply to cases in which a child is abducted from one state to another within the United States, regardless of the parents' immigration statuses.[60] The UCCJEA or PKPA may be implicated in intrastate cases and can be addressed in state court proceedings. If the Convention does not apply for any other reason—the child is 16 or older, the Convention is not in force in or between the countries involved, or the petitioner fails to prove his or her *prima facie* case—all issues regarding custody, jurisdiction over the child, and whether any foreign order or agreement is enforceable can be addressed in state court and will be subject to domestic law.

§ 5.00 Procedure

5.1 Authority

Adjudication of a case under the Hague Convention will necessarily require analysis of the **treaty text**.[61] The court may also consider other authorities:

- Drafting history[62] and signatories' intent[63] (Pérez-Vera's Explanatory Report)
- Executive branch interpretation[64] (The U.S. State Department Report)
- Interpretations of sister signatories[65] (Other Contracting States)
- The case law of sister circuits[66]
- Federal circuit court precedent (not binding in state court)[67]

A court's inquiry in a Hague Convention case will be shaped, in part, by decisions of courts in other Contracting States.[68] The U.S. Supreme Court has made clear that the opinions of "sister signatories" are entitled to "considerable weight" when interpreting *any* treaty.[69]

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[60] Text and Legal Analysis, 51 Fed. Reg. 10,504.
[61] *Medellin v. Texas*, 552 U.S. 491, 506 (2008).
[62] *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).
[63] *Yaman v. Yaman*, 730 F.3d 1, 10 (1st Cir. 2013) (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)).
[64] *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (citing *Sumitomo Shoji Am., Inc.*, 457 U.S. at 185).
[65] *Id.* at 16 (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)).
[66] *Gitter v. Gitter*, 396 F.3d 124, 131–32 (2d Cir. 2005) (considering how sister circuits have interpreted habitual residence).
[67] *Yee v. City of Escondido*, 274 Cal. Rptr. 551, 552 (Ct. App. 1990) ("While federal circuit court precedent on issues of federal law is certainly entitled to substantial deference, it is not binding."), *cert. granted in part*, 502 U.S. 905 (1991), *aff'd*, 503 U.S. 519 (1992).
[68] *See Abbott*, 560 U.S. at 9-10 ("This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; *decisions addressing the meaning of 'rights of custody' in courts of other contracting states*; and the purposes of the Convention." (emphasis added)).
[69] *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) ("The opinions of our sister signatories, we have observed, are entitled to considerable weight." (internal quotation marks omitted)); *Air France v. Saks*, 470

In both *Abbott v. Abbott* and *Lozano v. Montoya Alvarez*, the Supreme Court reiterated the importance of sister signatories' decisions specifically in Hague Convention cases, where Congress emphasized the importance of "uniform international interpretation."[70] In discussing the considerable weight given to the opinions of sister signatories, the *Abbott* Court stated: "The principle applies with special force here, for Congress has directed that uniform international interpretation of the Convention is part of the Convention's framework."[71] Similarly, the Supreme Court in *Lozano* said that it was "inappropriate to deploy background principles of American law automatically when interpreting a treaty," and noted that "Congress explicitly recognized the need for uniform international interpretation."[72]

The Convention needs to be interpreted in a manner consistent with the shared expectations of other treaty partners. Although the interpretation of the State Department should be given great weight, so should the interpretations of treaty partner signatories. In both *Abbott* and *Lozano* the U.S. Supreme Court relied heavily on the case law from other treaty countries when deciding the cases before it.

5.2 Petitioner Commences the Action

The petitioner may submit an application for return through a Central Authority (either the U.S. Central Authority (OCI) or the Requesting State's Central Authority), which will forward the application to OCI.

Alternatively, a petitioner may file a petition for return directly with the court, bypassing both countries' Central Authorities.

Depending on where a petitioner chooses to file a petition, state and federal civil procedure rules will apply respectively in each court. In New York, the Federal Rules of Civil Procedure ("FRCP") will apply in federal court and the New York Civil Practice Law and Rules ("CPLR") will apply in state court.

U.S. 392, 404 (1985) ("In determining precisely what causes can be considered accidents, we find the opinions of our sister signatories to be entitled to considerable weight." (internal quotation marks omitted)).

[70] *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1233 (2014); *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). *See also* 22 U.S.C.A. § 9001(b)(3)(B) (recognizing the need for uniform international interpretation).

[71] *Abbott*, 560 U.S. at 16 (internal quotations omitted).

[72] *Lozano*, 134 S. Ct. at 1233–34 (internal quotations omitted).

Take Note: Commencing an Action

✓ A Return Action does not actually commence within the meaning of the Convention until the petition is filed with the court.[73]

Article 8 of the Convention governs the content of an application for return of a child:

The application shall contain –

a) information concerning the identity of the applicant, of the child, and of the person alleged to have removed or retained the child;
b) where available, the date of birth of the child;
c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated[74] copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g) any other relevant document.[75]

[73] 22 U.S.C.A. § 9003(f)(3); *see also Wojcik v. Wojcik*, 959 F. Supp. 413, 418 (E.D. Mich. 1997) (finding contact with the Central Authority does not commence the proceedings).

[74] The Convention does not define "authenticate." Rule 901 of the Federal Rules of Evidence governs authenticating or identifying evidence in federal courts and provides: "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). *See also* N.Y. C.P.L.R. §§ 4540-4543 (McKinney) (governing authentication in New York state court of relevant decisions or agreements). Importantly, Article 8 of the Convention permits inclusion of "an authenticated copy of any relevant decision or agreement," but under Article 30, any application in accordance with the terms of the Convention and any documents or other information attached to the application are admissible with no reference to authentication. *See also* 22 U.S.C.A. § 9005 ("[N]o 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."). For more on Authentication see Part I, § 5.9.1 *infra*.

[75] Convention at art. 8.

Take Note: Respondent's Answer

- ✓ There is no prescribed time within the Convention or ICARA for a respondent to file an answer to a petition for return.
- ✓ Courts commonly defer to local court rules to govern the time for filing a response.
- ✓ In New York, the time for response will be governed by the FRCP or the CPLR, but in many cases, the time for submissions will depend upon expedited dates set by courts.
- ✓ For example, in cases where a notice of motion or order to show cause is filed simultaneously with the petition for return, courts will set an expedited timeframe for the respondent to appear in court and file his or her response.[76]

5.3 Expedited Nature of Proceedings

The Convention directs Contracting States to "use the most expeditious procedures available"[77] and courts to "act expeditiously in proceedings for the return of children."[78]

The Convention permits the petitioner or the Central Authority of the Requesting State to seek an explanation of "reasons for the delay" if the judicial or administrative authority in the Requested State has not reached a decision within **six weeks** from **the date proceedings commenced**.[79]

This has been interpreted to imply a six-week time frame from commencement to completion.[80] Generally, courts have broad discretion to expedite Convention cases,[81] but expediency should not take priority over a party's due process rights.[82] The Convention's expediency requirement has not been construed as a license to conduct full hearings *ex parte*.[83]

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[76] *See e.g.*, *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013) (petition filed March 30, 2012 in combination with order to show cause, respondents' answer to petition ordered to be filed two weeks later on April 16, 2012 and show cause hearing set for April 30, 2012).

[77] Convention at art. 2.

[78] *Id.* at art. 11. *See also Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013) ("[W]hether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible . . . .").

[79] Convention at 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.").

[80] The Convention does not specifically require proceedings to be completed within six weeks.

[81] *See Souratgar v. Lee*, 720 F.3d 96, 101 (2d Cir. 2013) (noting court had "imposed an expedited briefing schedule"); *Onrust v. Larson*, No. 15 Civ. 122, 2015 WL 6971472, at *1 (S.D.N.Y. Nov. 10, 2015) ("set[ting] a prompt discovery and trial schedule, and h[olding] a number of conferences to resolve disputes and organize trial"); *see also West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013) (interpreting Articles 11 and 18 to mean that the court has a "substantial degree of discretion in determining the procedures necessary" to resolve a Hague Convention case); *Dionysopoulou v. Papadoulis*, No. 8:10-CV-2805-T-27, 2010 WL 5439758, at *2 n.1 (M.D. Fla. Dec. 28, 2010) ("In keeping with the mandate to expedite ICARA petitions, the Court, in its discretion, denied Respondent's request for discovery.").

[82] *See Velez v. Mitsak*, 89 S.W.3d 73, 84 (Tex. App. 2002) ("It was surely not contemplated by the drafters of the Convention that the provision requiring contracting states to use the most expeditious procedures available to

Frequently, return cases involve two hearings:

- ***First Hearing***: typically the respondent's first appearance before the court, after the petition has been served.
    - In some cases, the respondent may be served with the petition and ordered to appear in court the same day or shortly thereafter.
    - The respondent may request time to secure an attorney or legal advice and prepare for any impending evidentiary hearing. To assure a fair hearing, requests for more time are frequently granted.
    - The court may also choose to set a timeline for the case at this time.
    - The court will determine where the child will remain while the matter is pending. (*See* Part I, § 5.4 *infra*).
- ***Second Hearing***: often the evidentiary hearing or trial on the merits.
    - Due to the expedited nature of these proceedings, many courts try to conduct a full evidentiary hearing in one day.
    - However, the length of the case will vary with the complexity of the issues. For example, the parties may stipulate as to the child's habitual residence in one case and contest it in another.
    - If more time is necessary for each party to present their evidence, the court may conduct the evidentiary hearing over multiple days.
    - Courts are encouraged to give priority to Hague Convention cases and adjust their calendars accordingly.[84]

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implement the objectives of the Convention would override a party's right to present evidence on possible defenses….").

[83] *See Brooke v. Willis*, 907 F. Supp. 57, 60 (S.D.N.Y. 1995) (noting that "due process requirements dictate that proper notice of the proceedings be given," but finding that, although service was unsuccessful, respondent received "actual notice" where attempts by Federal Marshals and petitioner to personally serve respondent and to effectuate service by mail "were apparently unsuccessful because of [r]espondent's evasive tactics. In light of the circumstances, it does not appear that [p]etitioner could have done any more to notify [r]espondent. Furthermore, [p]etitioner claims to have given [r]espondent particular details regarding the proceedings over the phone, including the case number and the location of the Court."); *see also Livanos v. Livanos*, 333 S.W.3d 868, 880 (Tex. App. 2010) (rejecting the argument that neither the Convention nor ICARA's emphasis on prompt return abdicate the notice requirement); *Morgan v. Morgan*, 289 F. Supp. 2d 1067, 1071 (N.D. Iowa 2003) (issuing an *ex parte* temporary restraining order under state law that prevented the respondent mother and her significant other from removing the child named in the petition from the state and ordering the respondent to "provide for the appearance and the physical presence of the minor child" at the show-cause hearing); *Wanninger v. Wanninger*, 850 F. Supp. 78, 79 (D. Mass 1994) (denying a request to issue an *ex parte* order in place of a writ of habeas corpus, instead issuing an order compelling attendance).

[84] Pérez-Vera, Explanatory Report at 458 (construing Article 11); *see also Onrust v. Larson*, No. 15 Civ. 122, 2015 WL 6971472, at *1 (noting "the priority that the Convention places on prompt resolution of claims of abduction").

5.4 Case Management and Provisional Remedies

Docket Control or Scheduling Conferences and creating a timetable for discovery and/or motions can help ensure the matter moves quickly.[85]

Before a hearing on the merits of the case, a petitioner may file an *ex parte* motion or application seeking immediate physical custody of the child. The motion may be filed at the same time the petition is filed or immediately preceding the petition and may request that the child be picked up by the U.S. Marshal or local law enforcement before or at the time the respondent is served with the petition.[86]

ICARA empowers the court to "take or cause to be taken measures . . . 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."[87]

ICARA **limits the court's authority to remove a child from the person with physical control over that child** by requiring that "the applicable requirements of State law [be] satisfied" before ordering removal.[88]

For cases in which the court is concerned that the respondent is a flight risk, the court may employ several tools to ameliorate the risk that the parent will abscond with the child. The Court may order respondents to surrender passports for themselves and their children. Additionally, the court may restrain or prohibit removal of the children from the forum while the case is pending or require respondents to post an appropriate bond.[89]

If the child's safety in the respondent's care is an issue, the court must consider alternate placement for the child while the case is pending. The child can be placed with the petitioner if the petitioner is in the United States and the child is not at risk in the petitioner's care. If the court chooses to place the child with the petitioning parent, measures should be taken to ensure the petitioning parent does not simply flee with the child before the petition is resolved.[90]

If the child cannot be placed with the petitioner, the parties may be able to identify a safe, local, willing and able alternative placement option pending the case's resolution. Before placing the child, the court should confirm that any person under consideration would be an appropriate

[85] See Part I, §5.9, *infra*, for additional information about discovery.
[86] *See, e.g. Souratgar v. Fair*, No. 12 Civ. 7797(PKC), 2012 WL 6700214, at *1 (S.D.N.Y. Dec. 26, 2012), *aff'd sub nom. Souratgar v. Lee*, 720 F.3d 96 (2d Cir. 2013).
[87] 22 U.S.C.A. § 9004(a).
[88] 22 U.S.C.A. § 9004(b). *See* N.Y. Fam. Ct. Act §§ 1027, 1028.
[89] *See Souratgar*, 2012 WL 6700214, at *1 ("Petitioner was ordered to surrender his passport and post a $10,000 bond.").
[90] *See Id*.

placement option. If no safe placement options exist, the court may need to involve the County Department of Social Services or the New York City Administration for Children's Services.

Key Points: Transferring Physical Custody of Child

- ✓ As noted above, the child should not be removed from the respondent's custody while the Hague Convention case is pending unless removal would be required for some independent reason, including under state law.[91] (*For example*: removal pursuant to Article 10 of the N.Y. Family Court Act.)
- ✓ If transferring physical custody of the child is necessary, it should be done with as little trauma to the child as possible.
- ✓ U.S. Marshals and local law enforcement may be engaged to securely transfer physical custody of the child when necessary.

5.5 Notice and Service

The Convention is silent as to procedures for notice and service. Under ICARA, "[n]otice of an action . . . shall be given in accordance with the applicable law governing notice in interstate child custody proceedings."[92] The UCCJEA requires that notice be given in a manner reasonably calculated to give actual notice but allows for notice by publication when other means are not effective.[93] The UCCJEA further provides that notice may be given "in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made" and "[p]roof of service may be made in the manner prescribed by the law of this State or by the law of the State in which the service is made."[94]

In New York, proof of service is governed by Rule 306 of the Civil Practice Law and Rules.

Take Note: Notice to Whoever has Physical Custody of Child

- ✓ If the respondent does not have physical custody of the child, notice shall be given not only to the parent but also to whoever has physical custody of the child—child protective services or other contracting foster care service.

[91] 22 U.S.C.A. § 9004(b).
[92] 22 U.S.C.A. § 9003(c).
[93] UCCJEA § 108. *See also* N.Y. Dom. Rel. Law § 75-g.
[94] UCCJEA § 108. *See also* N.Y. Dom. Rel. Law § 75-g.

5.6 Intervention

Intervention by the child may be allowed in Hague Convention cases, although certain courts have not been favorably inclined to grant it.[95] In *Walsh v. Walsh*, the First Circuit held that some cases might require intervention on behalf of children, even at late stages in the proceedings.[96] The court noted *in dicta* that it doubted very many cases would require intervention on behalf of the children involved, but "refuse[d] to endorse a blanket rule . . . that intervention is impermissible in Hague Convention cases."[97] The *Walsh* court also held that it is within the district court's discretion to limit the scope of the intervention.[98]

In *Sanchez v. R.G.L.*, the Fifth Circuit rejected the assertion of the children whose return was at issue in the case that they should be permitted to intervene.[99] The court stated that its concern was to ensure the children's interests were represented, which could be achieved by appointing a guardian *ad litem* and did not require intervention.[100]

In federal courts, intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. In New York state courts, intervention is governed by New York Civil Procedure Practice Law and Rules §§ 1012-1013.

5.7 Appointing an Attorney or Guardian *ad Litem*

Courts have appointed attorneys and guardians *ad litem* for children in Hague Convention cases.[101]

The court may appoint an attorney or guardian *ad litem sua sponte* or a party may request that an attorney or guardian *ad litem* be appointed. If the court is concerned about the presence of

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[95] *See In re D.T.J.*, 956 F. Supp. 2d 523, 527 (S.D.N.Y. 2013) (appointing counsel for child and then granting child's motion to intervene as a party to the case); *see also Walsh v. Walsh*, 221 F.3d 204, 213 (1st Cir. 2000). *But see Sanchez v. R.G.L.*, 761 F.3d 495, 508 (5th Cir. 2014) (finding children were entitled to appointment of guardian *ad litem* but not entitled to intervene).

[96] *Walsh*, 221 F.3d at 213.

[97] *Id.*

[98] *Id.* (limiting intervention to a discrete issue—application of the fugitive disentitlement doctrine—which did not require additional fact finding).

[99] *Sanchez*, 761 F.3d at 508.

[100] *Id.*

[101] *Souratgar v. Lee*, 720 F.3d 96, 101 (2d Cir. 2013); *O.A. v. D.B.*, 52 Misc. 3d 1208(A), 41 N.Y.S.3d 720 (N.Y. Fam. Ct. Bronx Cty. 2016) (appointing attorney for children subject to Hague Convention petition). *See also Sanchez v. R.G.L.*, 761 F.3d 495, 508 (5th Cir. 2014) (noting that "[g]ranting the children representation in appropriate situations is consistent with the [U.S.] Supreme Court's view that 'courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through the familiar judicial tools'" and ordering appointment of guardian *ad litem* on remand because it found that children's interests were unrepresented) (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1026-27 (2013)). *But see Haimdas v. Haimdas*, 401 F. App'x 567, 568 (2d Cir. 2010) (finding district court did not abuse discretion by denying respondent's request to appoint guardian *ad litem* for children).

domestic violence in a particular case, the court should consider appointing a professional with training in the dynamics of domestic violence and experience with domestic violence cases.

New York state law distinguishes between a "guardian *ad litem*," an individual (who need not be an attorney) appointed by the court to protect the best interests of a litigant who is under a legal disability,[102] and an "attorney[] for the child[]," an attorney appointed to serve as the child's legal counsel and who is responsible for advocating for the child's wishes.[103]

Only "[w]hen the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, [is the attorney] justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position."[104]

The New York Family Court Act "declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel."[105] A court *must* appoint an attorney for a child involved in certain proceedings, such as juvenile delinquency actions; in other circumstances, a court may exercise its discretion in appointing counsel for a child.[106] While the appointment of an attorney for the child is not required in custody cases, it is the "strongly preferred practice."[107]

It is important to note, however, that the Hague Convention does not include a best interests standard, and although courts may look to family law statutes to guide them in appointing an attorney or guardian *ad litem*, **such an appointment does not expand the return inquiry to the best interests of the child**. However, the attorney for the child or guardian *ad litem* may

[102] N.Y. C.P.L.R. § 1202(a) (McKinney) ("The court in which an action is triable may appoint a guardian *ad litem* at any stage in the action upon its own initiative.").
[103] N.Y. Fam. Ct. Act § 241; 22 N.Y.C.R.R. 7.2(d) (stating that "the attorney for the child must zealously advocate the child's position"). *See also Mark T. v. Joyanna U.*, 64 A.D.3d 1092, 1095, 882 N.Y.S.2d 773 (N.Y. App. Div. 3d Dep't 2009) ("[T]he appellate attorney herein should have met with the child and should have been directed by the wishes of the child, even if he believed that what the child wanted was not in the child's best interests.").
[104] 22 N.Y.C.R.R. 7.2(d)(3). *See Michael H. v. April H.*, 34 Misc.3d 519, 934 N.Y.S.2d 685 (N.Y. Fam. Ct. Clinton Cty. 2011) (declaring mistrial in custody case where attorney for the child advocated a disposition which contradicted child's wishes).
[105] N.Y. Fam. Ct. Act § 241.
[106] N.Y. Fam. Ct. Act § 249.
[107] *Ames v. Ames*, 97 A.D.3d 914, 916, 947 N.Y.S.2d 836 (N.Y. App. Div. 3d Dep't 2012); *accord Miller v. Bush*, 141 A.D.3d 776, 777, 34 N.Y.S.3d 724, 726 (N.Y. App. Div. 3d Dep't 2016). *But see Monaco v. Monaco*, 116 A.D.3d 452, 453, 984 N.Y.S.2d 311, 312 (N.Y. App. Div. 1st Dep't 2014) ("Having properly determined that a hearing on custody was not warranted, the court also properly denied the requests to appoint a neutral forensic evaluator and an attorney for the children."); *Musacchio v. Musacchio*, 107 A.D.3d 1326, 1328, 968 N.Y.S.2d 664 (N.Y. App. Div. 3d Dep't 2013) (court did not abuse discretion by declining to appoint attorney for child).

facilitate the court's assessment of defenses, such as grave risk, the well-settled exception, and the mature child's objection.[108]

Best Practices

- ✓ Courts should use clear language specifying the attorney or guardian *ad litem's* role.
- ✓ Courts should be sure to limit the role to issues raised under the Convention.
- ✓ Clear language and articulated limitations will help avoid a best interests analysis or custody and parenting-time recommendations from the attorney or guardian *ad litem*, neither of which are relevant under the Convention.

In New York, the attorney for the child is generally paid by the State, unless the court orders parties with means to pay or contribute to payment of the fees.[109] In contrast, there is no provision for State payment of guardians *ad litem*.[110]

In federal court, the litigants' ability to pay for a guardian *ad litem's* services is an important consideration because cost may be a practical barrier to appointment of an attorney or guardian *ad litem* in a particular case. To ameliorate financial barriers, courts have made *pro bono* appointments of guardians *ad litem*, as well as *pro bono* appointments of counsel for the parties.[111]

With respect to counsel for the parties, courts have ordered non-prevailing respondents to pay those costs as part of an award of attorney's fees and costs, as authorized by ICARA section

[108] *See, e.g. Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 JG, 2005 WL 67094, at *7 (E.D.N.Y. Jan. 13, 2005) ("The guardian ad litem, having interviewed both children on several occasions, and in consultation with its own psychiatric expert . . . concurred in the conclusion[that the children would be at great risk of severe psychological damage if returned to Mexico].").

[109] N.Y. Fam. Ct. Act § 248; N.Y. Judiciary Law § 35(7). As noted, in some circumstances, a judge may appoint a "private pay" attorney for the child—for example, in circumstances where appointment of attorney for the child is not statutorily mandated—and order the parties to pay the attorney for the child's fees. *See Stefaniak v. NFN Zulkharnain*, 119 A.D.3d 1418, 1418, 991 N.Y.S.2d 188, 188 (N.Y. App. Div. 4th Dep't 2014) ("Under the circumstances of this case, we conclude that there was good cause to appoint [an] . . . Attorney for the Children pursuant to 22 NYCRR part 36, which governs the appointments of attorneys for children 'who are not paid from public funds,' and that Supreme Court erred in failing to do so. . . . In addition we conclude that the court should have ordered defendant, the monied spouse, to pay [attorney's] fees. . . .") (internal citation omitted); *Plovnick v. Klinger*, 10 A.D.3d 84, 781 N.Y.S.2d 360 (N.Y. App. Div. 2d Dep't 2004) (concluding that Family Court could appoint a "private pay" attorney for the child in custody case and upholding Family Court decision ordering the father to pay attorney); *but see Redder v. Redder*, 17 A.D.3d 10, 792 N.Y.S.2d 201 (N.Y. App. Div. 3d Dep't 2005) (concluding that Family Court may not direct a parent to pay the fees of the attorney for the child).

[110] N.Y. C.P.L.R. § 1204 (McKinney).

[111] *Reyes Olguin* , 2005 WL 67094, at n.1 ("[c]ounsel for both sides are serving *pro bono*"); *see also Wasniewski v. Grzelak-Johannsen*, 549 F. Supp. 2d 965, 977 (N.D. Ohio 2008); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1343 n.5 (S.D. Fla. 2002).

9007.[112] If a court is considering costs and fees pursuant to ICARA, it must first determine that the costs are necessary and appropriate.[113]

5.8 Preemptive Stay or Dismissal

If the court has reason to believe the child at issue has been taken out of the state, the proceedings may be stayed or the petition for return of the child dismissed.[114]

5.9 Discovery, Evidence, and the Evidentiary Hearing

Take Note: Applicable Rules

- ✓ In federal court, federal evidentiary and procedural rules govern Hague Convention cases.
- ✓ In state court, state evidentiary and procedural rules govern Hague Convention cases.[115]

The rules of evidence and civil procedure apply in Hague Convention cases.[116] Due to the expedited nature of the proceedings, however, the rules of evidence may be relaxed.[117] Thus, a petitioner or respondent may not be afforded all the discovery tools and procedures that are provided in the Federal Rules or the CPLR. Courts may limit discovery or relax the evidentiary

[112] *See Castro v. Martinez*, 872 F. Supp. 2d 546, 558 (W.D. Tex. 2012); *Taylor v. Hunt*, No. 4:12CV530, 2013 WL 620934, at *10 (E.D. Tex. Jan. 11, 2013), *report and recommendation adopted*, No. 4:12CV530, 2013 WL 617058 (E.D. Tex. Feb. 19, 2013). Note, ICARA does not provide similarly for a non-prevailing petitioner to pay attorney fees and costs.

[113] 22 U.S.C.A. § 9007(b)(3); *see also* Convention at art. 26. For more on Attorney Fees and Costs, see Part I, § 5.10 *infra*.

[114] Convention at art. 12. Unlike custody cases brought family court, the court in a Hague Convention case loses jurisdiction if the child is no longer present in the district or county where the court is located. For best practices to avoid removal of a child from the court's jurisdiction after the petition has been filed, *see* Part I, § 5.4, *supra*.

[115] An example of how federal and New York state evidentiary rules differ can be seen in the different tests for the admissibility of expert testimony. The test articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which requires a judge to scrutinize evidence more rigorously, applies in federal court. The test in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which is a more flexible test for admissibility based on a general acceptance in the scientific community, still governs in New York state court. *See Sean R ex rel Debra R v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 809, 48 N.E.3d 937, 937 (2016) ("This 'general acceptance' test, also known as the *Frye* test, governs the admissibility of expert testimony in New York.").

[116] *See, e.g. Luedtke v. Luedtke-Thomsen*, No. 1:12-cv-750-WTL-TAB, 2012 WL 2562405, at *1 (S.D. Ind. June 29, 2012) (holding that the Federal Rules of Evidence apply to Hague Convention hearings); *Avendano v. Smith*, No. Civ 11-0556 JB/CG, 2011 WL 3503330, at *1 (D.N.M. Aug. 1, 2011) ("The United States Court of Appeals for the Third Circuit has also suggested that the Federal Rules of Evidence apply in adjudications of petitions for return of children under the Hague Convention.").

[117] *See* Convention at art. 30; 22 U.S.C.A. § 9005; *see also Danaipour v. McLarey*, 386 F.3d 289, 296 (1st Cir. 2004) (noting that summary proceedings may occur under the Convention, but that the applicability of the Federal Rules of Evidence were not directly raised on appeal in this case).

standards *to some degree*.[118] Even with relaxed evidentiary standards courts, however, will typically attempt to adhere to the rules to the greatest extent possible.[119]

If discovery is necessary, the petitioners or the respondents may need to request expedited discovery and set a timetable for discovery with a shortened time table. Courts handle these requests differently depending on the needs of the case. In New York, courts have granted expedited discovery and given litigants an opportunity to prove their case with supporting scientific evidence, while still bearing in mind the need for prompt resolution.[120]

In federal cases, a magistrate judge may handle the evidentiary hearing, making findings of fact and providing a recommendation to the district court.[121]

Key Points: Due Process

- ✓ Expedited proceedings should not come at the expense of a party's right to due process.
- ✓ Although expedited, Hague Convention proceedings still require the court to make findings of fact to support legal conclusions or orders.

5.9.1 Article 30: Authentication

Article 30 of the Convention provides that "documents and any other information appended [to an application or petition] or provided by a Central Authority" are admissible in court.[122]

ICARA, reflects this provision, stating:

> 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**

[118] Courts have taken varied approaches to relaxed evidentiary standards. For examples, see Part VI, Case Notes, Procedure: Relaxed Evidentiary Standards, *infra*.
[119] *See In re Lozano*, 809 F. Supp. 2d 197, 235 (S.D.N.Y. 2011) (qualifying experts with reference to Federal Rules of Evidence and *Daubert* standards), *aff'd sub nom. Lozano v. Montoya Alvarez*, 697 F.3d 41 (2d Cir. 2012), *aff'd*, 134 S. Ct. 1224 (2014); *Haimdas v. Haimdas*, No. 09-CV-02034, 2010 WL 652823, at *2 (E.D.N.Y. Feb. 22, 2010) (same); *see also Danaipour v. McLarey*, 386 F.3d 289, 296 (1st Cir. 2004) (referring to district courts application of the Federal Rules of Evidence even after finding that the Convention does not require their application).
[120] *See e.g.*, *Ermini v. Vittori*, No. 12 Civ. 6100, 2013 WL 1703590, at *1 (S.D.N.Y. Apr. 19, 2013), *aff'd as amended*, 758 F.3d 153 (2d Cir. 2014) (expedited discovery on grave risk of harm to child with autism if returned to Italy, where special resources are lacking, and a return would severely disrupt and impair his development).
[121] *See Holder v. Holder*, 392 F.3d 1009, 1021-22 (9th Cir. 2004).
[122] Convention at art. 30.

application, petition, document, or information shall be required in order for the application, petition, document, or information to be *admissible* in court.[123]

The U.S. State Department Report, however, citing Pérez-Vera's Explanatory Report, provides that "private documents" may still need to be authenticated to be admissible.[124]

Take Note

- ✓ Public documents that ordinarily do not require additional authentication include birth certificates, notarials, court orders, or any other document issued by a public authority.
- ✓ A document generated by a private party will likely require authentication.

Best Practices

- ✓ Authenticate the documents that require certainty; if the court is relying on a document to make a finding and the document is a copy or not from a public authority, the best practice is to require authentication of the document in accordance with the applicable rules of evidence.

5.9.2 Expert Witnesses[125]

Courts in Hague Convention cases have allowed testimony from expert witnesses on a variety of issues, including matters of foreign law[126]; whether a child is of sufficient age and maturity to have his or her objections to return considered[127]; how settled the child is in the new country[128]; and the impact of domestic violence or exposure to domestic violence on children in the context of the grave risk exception.[129]

[123] 22 U.S.C.A. § 9005 (emphasis added).
[124] Text and Legal Analysis, 51 Fed. Reg. 10,508.
[125] As noted previously, admissibility of expert testimony is governed by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in federal court and by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in state court.
[126] *See Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 269 (3d Cir. 2007). For more on Foreign Law *see* Part I, § 5.9.3 *infra*.
[127] *See Tsai-Yi Yang*, at 499 F.3d at 279.
[128] *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1230 (2014) (considering testimony of therapist who diagnosed child with post-traumatic stress disorder after first arriving in the United States and then described the child as "completely different" after being in the United States for a period of time).
[129] *Davies v. Davies*, 16 Civ. 6542, 2017 WL 361556, at *16 (S.D.N.Y. 2017) (finding expert testimony of psychiatrist credible and accepting her conclusions regarding the serious risk of trauma and development delay to the child from the domestic violence, the diagnosis of post-traumatic stress disorder as to the respondent parent, and the likelihood of continued abuse if the child was returned); *see also Acosta v. Acosta*, 725 F.3d 868, 873-75 (8th Cir. 2013) (considering testimony from expert witness on exposure to domestic violence and grave risk).

5.9.3 Foreign Law

Under Rule 44.1 of the Federal Rules of Civil Procedure, when determining ***issues of foreign law***, courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."[130] Additionally, a "court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found,"[131] including information in the public domain.

Common examples of "relevant material" considered by courts when determining issues of foreign law include:

- English translations of foreign law;[132]
- An attorney affidavit identifying and analyzing applicable foreign law;[133] and
- Expert testimony.[134]

An analysis of foreign law is necessary to determine if the petitioner had rights of custody at the time of removal, which is an element of petitioner's *prima facie* case.[135]

[130] Fed. R. Civ. P. 44.1; *see also A.A.M. v. J.L.R.C.*, 840 F. Supp. 2d 624, 629 (E.D.N.Y. 2012) (applying this rule in a Hague Convention case), *aff'd sub nom. Mota v. Castillo*, 692 F.3d 108 (2d Cir. 2012).

[131] Fed. R. Civ. P. 44.1 Advisory Committee's Note; *see also Saldivar v. Rodela*, 879 F. Supp. 2d 610, 621 (W.D. Tex. 2012) ("Recognizing the peculiar nature of the issue of foreign law, Federal Rule of Civil Procedure 44.1 liberalizes the evidentiary rules for determining such law.").

[132] *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venez.*, 575 F.3d 491, 498 n.8 (5th Cir. 2009).

[133] *A.A.M.*, 840 F. Supp. 2d at 629 ("The parties were invited to present evidence on Mexican law, by experts and otherwise."); *see also Northrop Grumman Ship Sys., Inc.*, 575 F.3d at 498 n.8 (considering affidavit from Venezuela's Attorney General explaining the content of Venezuelan law); *see also Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron, Inc.*, 623 F. Supp. 2d 518, 534 (D. Del. 2009) ("One common source that judges rely upon in determining foreign law are the affidavits of lawyers who practice law in the country at issue, or who are from the country at issue and are familiar with its laws.").

[134] *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001); *c.f. Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 JG, 2005 WL 67094, at *4 (E.D.N.Y. Jan. 13, 2005) (relying on expert testimony regarding the availability of social services in Mexican municipality to combat domestic violence).

[135] A court may also consider the degree to which particular laws are enforced in a foreign country, for example, when considering whether a child faces a grave risk upon return. *See, infra* Part IV, § 4.4 (discussing undertakings).

Key Points: Proving Custody Rights in the Context of Foreign Law

- ✓ Petitioners bear the burden of establishing their rights of custody under the law of the habitual residence.
- ✓ Any law relied on to prove rights of custody must have been in effect **at the time of** removal or retention.
- ✓ That law must also be in effect in the specific state or province where the parties resided within the country of habitual residence.

A court "may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."[136]

In *Reyes Olguin v. Cruz Santana*, the court considered the expert report of an attorney who had extensive experience with domestic violence in Mexico and had drafted portions of the Mexican Criminal Code on gender violence crimes.[137] In *A.A.M. v. J.L.R.C.*, the court relied on secondary sources interpreting and explaining principles of custody law and contract law in Mexico.[138]

5.10 Attorney Fees and Costs

ICARA requires the court to award attorney fees and costs to a successful petitioner **unless the court in its discretion finds an award "clearly inappropriate."**[139]

- Expenses may include "court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child."[140]
- Costs must be necessary and related to the child's return and are not unlimited.[141]

[136] Convention at art. 14; *see also Chechel v. Brignol*, No. 5:10-cv-164-Oc-10GRJ, 2010 WL 2510391, at *3 n.15 (M.D. Fla. June 21, 2010) (citing to ICARA section 9005 and Article 14 of the Convention when considering document written by a government "Custody Commission").
[137] *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 JG, 2005 WL 67094, at *4, n.7 (E.D.N.Y. Jan. 13, 2005); *see also Saldivar v. Rodela*, 879 F. Supp. 2d 610, 621 (W.D. Tex. 2012) (allowing into evidence an affidavit of a Mexican attorney explaining relevant Mexican laws).
[138] *A.A.M. v. J.L.R.C.*, 840 F. Supp. 2d 624, 634-635 (E.D.N.Y. 2012) (quoting José Antonio Márquez González, FAMILY LAW IN MEXICO 80 n.1 (2011), Patricia Begné, *Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527, 527–28 (2005), and Rona R. Mears, *Contracting in Mexico: A Legal and Practical Guide to Negotiating and Drafting*, 24 ST. MARY'S L.J. 737, 742 (1993)), *aff'd sub nom. Mota v. Castillo*, 692 F.3d 108 (2d Cir. 2012).
[139] 22 U.S.C.A. § 9007(b)(3).
[140] *Id.*
[141] *Ozaltin v. Ozaltin*, 708 F.3d 355, 374-75 (2d Cir. 2013).

Take Note: In the Case of Settlement

- ✓ An adjudication on the merits is not required to trigger provision awarding attorney fees and costs.[142]
- ✓ A petitioner who prevails through settlement may be entitled to attorney fees and costs.[143]

The burden of proving an award of fees is "clearly inappropriate" rests with the party opposing the award.[144]

- Courts have interpreted "clearly inappropriate" on a case-by-case basis.
- In determining the "appropriateness" of fees, courts have considered:
  - The reasonableness of respondent's actions;[145]
  - Respondent's ability to pay fees;[146]
  - Acts of family violence;[147] and
  - Petitioner's financial neglect of the children.[148]

[142] *Onrust v. Larson*, No. 15 Civ. 122, 2015 WL 6971472, at *7 (S.D.N.Y. Nov. 10, 2015); *see also Salazar v. Maimon*, 750 F.3d 520, 522 (5th Cir. 2014).
[143] *Onrust*, 2015 WL 6971472, at *7; *see also Salazar*, 750 F.3d at 522.
[144] *Ozaltin v. Ozaltin*, 708 F.3d 355, 375 (2d Cir. 2013); *see also Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004).
[145] *Ozaltin*, 708 F.3d at 375–76 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 (1994)).
[146] *Poliero v. Centenaro*, No. 09-CV-2682 (RRM)(CLP), 2009 WL 2947193, at *22 (E.D.N.Y. Sept. 11, 2009) ("Here, respondent has established that an award of legal fees and expenses would be clearly inappropriate and unjust here, given that petitioner controls all of the finances, and that respondent has no appreciable assets of her own, is not employed, and lives on the money that petitioner transfers to her bank account."), *aff'd*, 373 F. App'x 102 (2d Cir. 2010); *see also Rydder v. Rydder*, 49 F.3d 369, 373-74 (8th Cir. 1995) (decreasing award to a "more equitable" amount); *Larrategui v. Laborde*, No. 2:13–cv-01175 JAMF_EFB, 2014 WL 2154477, at *3 (E.D. Cal. May 22, 2014) ("[C]ourts have recognized that they have discretion to reduce any potential award to allow for the financial condition of the respondent."); *Montero-Garcia v. Montero*, No. 3:13–cv-00411-MOC, 2013 WL 6048992, at *4 (W.D.N.C. Nov. 14, 2013) (reaffirming order denying fees where respondent "had no ability to pay and was completely indigent"); *Vale v. Avila*, No. 06–cv-1246, 2008 WL 5273677, at *2 (C.D. Ill. Dec. 17, 2008) ("The financial position of the respondent is a factor a court may consider in determining whether it would be clearly inappropriate to award costs and attorney fees in an ICARA action.").
[147] *Souratgar v. Lee Jen Fair*, 818 F.3d 72, at *1 (2d Cir. 2016) ("Because [respondent] established that [petitioner] had committed multiple, unilateral acts of intimate partner violence against her, and that her removal of the child from the habitual country was related to that violence, an award of expenses to [petitioner], given the absence of countervailing equitable factors, is clearly inappropriate."); *see also Guaragno v. Guaragno*, Civil Action No. 7:09-CV-187-O, 2011 WL 108946, at *2 (N.D. Tex. Jan. 11, 2011) ("Acts of family violence perpetrated by a parent is an appropriate consideration in assessing fees in a Hague case."); *Silverman v. Silverman*, No. Civ.00-2274 JRT, 2004 WL 2066778, at *4 (D. Minn. Aug. 26, 2004) (in denying award of fees, the court noted that "respondent has also established that petitioner has been physically and psychologically abusive toward her").
[148] *See Whallon*, 356 F.3d at 140 ("Our focus remains on the question whether respondent has clearly established that it is likely that her child will be significantly adversely affected by the court's award."); *Silverman*, 2004 WL 2066778, at *4 ("The ability to care for dependents is well-established as an important consideration in awards of fees and costs in Hague Convention cases.").

- **Neither *pro bono* representation nor representation by a publicly funded legal aid organization precludes an award of attorney fees or costs to a successful petitioner**.[149]

Courts regularly use the lodestar method to calculate an award of attorney fees in Hague Convention cases.[150]

The Lodestar Method of Calculating Attorney's Fees

- ✓ Multiply a reasonable number of hours worked by a reasonable hourly rate (this number is referred to as the lodestar).[151]
- ✓ Increase or decrease the lodestar based on the particular circumstances of a specific case.[152]

There is no provision in either the Convention or ICARA providing for an award of attorney fees to a prevailing respondent. Some courts, however, **have awarded costs to prevailing respondents** pursuant to Rule 54 of the Federal Rules of Civil Procedure, which allows a prevailing party to receive costs other than attorney fees.[153] Presumably, a state court could fashion a similar result pursuant to New York Civil Practice Law and Rules § 8101.[154]

[149] *See Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 209 (E.D.N.Y. 2010) ("Further, the fact that the petitioner in this case was represented by *pro bono* counsel does not provide a basis for disregarding the Convention's fee provision."), *aff'd*, 401 F. App'x 567 (2d Cir. 2010); *see also Saldivar v. Rodela*, 894 F. Supp. 2d 916, 930-31 (W.D. Tex. 2012) ("[T]he Court concludes that under ICARA, an award of expenses, including legal fees and costs, is not inappropriate where the petitioner is represented by a publicly funded legal aid entity . . . ."); *see also Cuellar v. Joyce*, 603 F.3d 1142, 1143 (9th Cir. 2010) ("Withholding fees from *pro bono* counsel would also discourage *pro bono* representation and undermine the Convention's policy of effective and speedy return of abducted children."). *But see Cillikova v. Cillik*, Civil Action No. 15-2823 (MCA) (LDW), 2016 WL 541134, at *5, n.2 (D.N.J. Feb. 9, 2016) (noting that when attorney fees and costs are excessive, the court can consider whether petitioner would have permitted counsel to expend the same amount of resources if she had been required to actually pay for the services).

[150] *Saldivar*, 894 F. Supp. 2d at 933; *see also Norinder v. Fuentes*, 657 F.3d 526, 536-37 (7th Cir. 2011); *Neves v. Neves*, 637 F. Supp. 2d 322, 339 (W.D.N.C. 2009).

[151] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[152] *Id.*

[153] *White v. White*, 893 F. Supp. 2d 755, 758 (E.D. Va. 2012) ("Rule 54(d)(1), Fed.R.Civ.P., provides that '[u]nless a federal statute . . . provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party.' Because ICARA does not prohibit cost shifting, Rule 54(d)(1) gives rise to a 'presumption that costs are to be awarded to the prevailing party.' . . . A district court should deny costs only if 'there would be an element of injustice in a presumptive cost award.'" (internal citations omitted)); *Thompson v. Gnirk*, Civil No. 12-cv-220-JL, 2012 WL 3598854, at *17 (D.N.H. Aug. 21, 2012) ("[ICARA] makes no such provision for a prevailing *respondent* . . . . [Respondent] may, however, seek his other costs in accordance with Rule 54(d)(1) of the Federal Rules of Civil Procedure and Local Rule 54.1."); *Broda v. Abarca*, Civil No. 11-cv-00286-REB, 2011 WL 900983, at *7 (D. Colo. Mar. 15, 2011) ("[R]espondent is AWARDED her costs, to be taxed by the Clerk of the Court under FED. R. CIV. P. 54(d)(1) and D.C.COLO.LCivR 54.1….").

[154] In New York, however, the amount of such costs would be limited pursuant to New York Civil Practice Law and Rules § 8201.

5.11 Appeals

5.11.1 Emergency Motion to Stay Return

Generally, stays are allowed in the case of an appeal despite the Convention's expediency mandate.[155] However, a stay is not a matter of right; it is instead an exercise of judicial discretion.[156]

In *Chafin v. Chafin*, the U.S. Supreme Court, rejecting the argument that the child's return rendered respondent's appeal moot, held that "courts can achieve the ends of the Convention and ICARA . . . through the familiar judicial tools of expediting proceedings and granting stays where appropriate" rather than as a matter of course.[157] Thus, the Court directed lower courts to "apply the four traditional stay factors in considering whether to stay a return order: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'"[158] In weighing these factors, a stay will generally be granted if the balance of equities supports doing so.[159] These factors are not to be applied mechanically and, when a serious legal question is involved, a stay may be granted if the moving party presents a substantial case on the merits and shows that the balance of equities weighs heavily in his or her favor.[160]

5.11.2 Standard of Review: Federal Courts

The Second Circuit reviews factual findings for clear error and conclusions of law *de novo*.[161] "Legal conclusions include interpretations of the Convention and applications of the appropriate legal standards to the facts."[162]

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[155] *See Diorinou v. Mezitis*, 237 F.3d 133, 138 (2d Cir. 2001) (noting that, after granting Hague Convention petition, district court had "helpfully stayed its order" of return for a period of two days to permit respondent to seek a stay pending appeal from the Court of Appeals); *Walsh v. Walsh*, 221 F.3d 204, 213-14 (1st Cir. 2000); *cf. Souratgar v. Fair*, No. 12 Civ. 7797(PKC), 2012 WL 6700214, at *18 (S.D.N.Y. Dec. 26, 2012) (granting limited stay of return to permit a stay application to be made to the Court of Appeals, but otherwise denying a stay pending appeal), *aff'd sub nom. Souratgar v. Lee*, 720 F.3d 96 (2d Cir. 2013).

[156] *See Nken v. Holder*, 556 U.S. 418, 433 (2009).

[157] *Chafin v. Chafin*, 133 S. Ct. 1017, 1026-27 (2013); *see id.* at 1020 ("If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal.").

[158] *Id.* at 1027 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 771 (1987)).

[159] *See* § 2904 Injunction Pending Appeal, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.).

[160] *See United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983), *aff'd in part, vacated in part*, 736 F.2d 1039 (5th Cir. 1984).

[161] *See, e.g., Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013).

[162] *Ozaltin v. Ozaltin*, 708 F.3d 355, 368 (2d Cir. 2013); *but see Lozano v. Alvarez*, 697 F.3d 41, 50 n.5 (2d Cir. 2012) (suggesting "an abuse of discretion standard might be more apt where, as here, the treaty provision being

In the Second Circuit, "a determination of habitual residence under Article 3 of the Hague Convention is a mixed question of law and fact, under which [the court] review[s] essentially factual questions for clear error and the ultimate issue of habitual residence *de novo*."[163] The issue of shared parental intent, a heavily weighted factor in the habitual residence analysis, is a question of fact reviewed for clear error.[164] Similarly, "well-settled" determinations and "grave risk" findings present mixed questions of law and fact.[165]

5.11.3 Standard of Review: New York State Courts

In New York, the appellate division effectively has *de novo* review power for both questions of law and fact.[166] The appellate division can also make new findings of fact. The New York Court of Appeals, however, "shall review questions of law only," except where the appellate division court has found new facts and a final judgment is entered based on those facts.[167]

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applied requires the district court to engage in an equitable balancing of a multitude of factors," but ultimately not reaching issue), *aff'd sub nom. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014).

[163] *Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013) (citations omitted); *see also Larbie v. Larbie*, 690 F.3d 295, 306 (5th Cir. 2012).

[164] *Hofmann v. Sender*, 716 F.3d 282, 292 (2d Cir. 2013); *see also Berezowsky v. Ojeda*, 765 F.3d 456, 466 n.7 (5th Cir. 2014).

[165] *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001); *see also Simcox v. Simcox*, 511 F.3d 594, 601 (6th Cir. 2007).

[166] *See* N.Y. C.P.L.R. § 5501(c) (McKinney) ("The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order . . . .").

[167] N.Y. C.P.L.R. § 5501(b) (McKinney).

PART II. CONSIDERING DOMESTIC VIOLENCE IN A HAGUE CONVENTION CASE

This section provides non-exhaustive guidance and some context on the impact family violence has in a Return Case under the Hague Convention.

Although the Hague Convention neither defines domestic violence nor expressly recognizes domestic violence as an exception to mandatory return, any psychological and physical abuse is relevant when analyzing the "grave risk" or "intolerable circumstances," "well-settled," and objection of a "mature child" exceptions to a return claim under the Convention. Domestic violence may also be taken into consideration when determining the parties' shared intent regarding the child's habitual residence and in making a decision about assessing attorneys' fees and costs against a victimized parent. Although not bound by state law definitions of domestic violence, courts adjudicating Hague Convention cases may consult state law for guidance when conducting a domestic violence analysis. Relevant social science and expert testimony can also provide courts with valuable information about domestic violence and its impact on children.[168]

The State of New York defines domestic violence as "a pattern of coercive tactics, which can include physical, psychological, sexual, economic and emotional abuse, perpetrated by one person against an adult intimate partner, with the goal of establishing and maintaining power and control over the victim."[169] Over the past three decades, New York has enacted multiple legislative reforms to increase protection and services for domestic violence victims, including a mandatory arrest policy that strengthens criminal justice response, the expansion of family offenses[170] to include a wide array of crimes inflicting economic, sexual, and/or psychological harm to victims, concurrent jurisdiction of criminal and family court over domestic violence offenses, and funding for housing and other services for victims of domestic violence.[171]

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[168] Expert testimony can be particularly useful for courts in evaluating the "grave risk" and human rights exceptions with respect to domestic violence. *See, e.g.*, *Davies v. Davies*, 16 Civ. 6542 (VB), 2017 WL 361556, at *16 (S.D.N.Y. 2017) (considering expert testimony of psychiatrist regarding impact of domestic violence on child's (delayed) development, respondent parent's diagnosis of post-traumatic stress disorder, and the likelihood of continued abuse and serious risk of trauma if the child was returned); *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 JG, 2005 WL 67094, at *7 (E.D.N.Y. Jan. 13, 2005).

[169] *See The Law – Domestic Violence*, NYCourts.Gov (Nov. 10, 2016), http://www.nycourts.gov/topics/domesticviolence.shtml.

[170] A "family offense" refers to any act under the Penal Law that would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree or coercion in the second degree. *See* N.Y. Fam. Ct. Act § 812(1).

[171] *See, e.g.*, Domestic Violence Prevention Act (Article 6-A §459 of the New York State Social Services law); The Family Protection DV Intervention Act of 1994; N.Y. Fam. Ct. Act § 812.

The New York State court system has undertaken extensive parallel reforms, from the intensive training of "judges and court personnel about the myriad of issues surrounding domestic violence so that courts are better able to address and mitigate problems" to specialized domestic violence problem-solving courts "instituted with the three goals of promoting victims['] safety, increasing defendant accountability, and encouraging better coordination among institutions in the criminal justice system already dealing with domestic violence."[172] One recent advance is the New York State Office of Court Administration's development and dissemination of the *New York Risk Guide* bench card, which assists judges in making informed risk assessments in domestic violence cases.

Key characteristics of batterers that correlate to a higher risk of harm or death for the victim and children are identified as follows:[173]

- *Access to firearms*. Women who are threatened or assaulted with guns are twenty times more likely to be murdered by their abuser;
- *A history of violence*, particularly with increased severity and/or frequency;
- *Past violation of orders of protection*, or *serving probation*;
- *Use of a weapon in a domestic violence incident in the past* or current threats to use;
- *Threats to kill the victim or others*. A woman whose partner has threatened to kill her is fifteen times more likely to meet her death at his hands;
- *Threats of suicide*;
- *Sexual violence including forced sex*;
- *Drug or alcohol abuse*, which serve as an accelerant of an already abusive partner, releasing inhibitions; nearly 80% of the men who killed a partner were problem drinkers in the year prior;
- *Extreme jealousy, stalking behavior, obsession* with victim;
- *Physical abuse of a child*, particularly if not biologically related;
- *Threats to harm, or cause injury to, a pet* or domestic animal;
- *Unemployment* or loss of employment;
- *History of violent crime* outside the family; and
- *Strangulation attempts* (also described as "choking," "cutting off air," "arm across neck," and "passing out")—one quarter of women killed by their partners are strangled to death.

[172] Hon. Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, Lawyer's Manual on Domestic Violence (2015 6th ed.), available at https://www.nycourts.gov/ip/womeninthecourts/pdfs/DV-Lawyers-Manual-Book.pdf.

[173] Hon. Janice M. Rosa, *Assessing Lethality and Risk: What Do We Know, How Can We Help?*, Lawyer's Manual on Domestic Violence (2015 6th ed.), available at https://www.nycourts.gov/ip/womeninthecourts/pdfs/DV-Lawyers-Manual-Book.pdf.

A special focus of both the legislature and the courts has been the harmful impact of domestic violence on children. In 1996, the New York State Legislature made these specific findings in its legislative history to a statute requiring courts to consider proof of domestic violence in custody and visitation cases.[174]

> [T]here has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases. . . . The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse. . . . Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore . . . great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family.[175]

§1.00 Patterns and the Domestic Context

Social scientists define domestic violence as a pattern of abusive and threatening behavior that may include physical, emotional, economic, and sexual violence as well as intimidation, isolation, and coercion.[176] There is a growing consensus among researchers that the hallmark of domestic violence is the attempt of one individual in an intimate relationship to establish and exert power and control over the other individual.[177] A widely used method of identifying patterns of power and control in domestic violence cases is the Power and Control wheel developed by staff at the Domestic Abuse Intervention Project (DAIP), a special interest group that focuses on criminal justice system reform.[178] The Power and Control wheel does not attempt to give a broad understanding of violence for all genders; its focus is on the experience of

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[174] L 1996, ch 85; *see* N.Y. Dom. Rel. Law § 240(1) (where there are allegations of domestic violence in any action for custody or visitation, "and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interest of the child").

[175] L 1996, ch 85 at 273-74.

[176] Advocates for Human Rights, *What Is Domestic Violence?*, Stop Violence Against Women, http://www.stopvaw.org/What_Is_Domestic_Violence2 (last updated August 2013) (citing Anne L. Ganley & Susan Schechter, *Domestic Violence: A National Curriculum for Family Preservation Practitioners*, 17-18 (1995)).

[177] *Id.*; *see also* Jeffrey L. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing for Safety to the United States: A Study of Hague Convention Cases*, FINAL REP., 17 (2010), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf [hereinafter Edleson et al., *Multiple Perspectives*]; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007).

[178] Domestic Abuse Intervention Project, Power and Control Wheel, *available at* https://www.theduluthmodel.org/pdf/PowerandControl.pdf. The Power and Control wheel has been scientifically validated by research. Donald G. Dutton & Andrew J. Starzomski, *Personality Predictors of the Minnesota Power and Control Wheel*, 12 J. OF INTERPERSONAL VIOLENCE 70 (1997).

women because of the common context in which male violence against women frequently occurs. Domestic violence in the context of same-sex intimate relationships has been studied by other specialists in that field.[179]

Understanding Domestic Violence: Power and Control Wheel

In *U.S. v. Castleman*, a criminal case that did not involve the Hague Convention, the Supreme Court noted *in dicta* that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[180] The Court recognized that in the context of domestic violence, acts of force that may be

[179] *See e.g.*, www.nwnetwork.org, "The Northwest Network of Bi, Trans, Lesbian and Gay Survivors of Abuse."
[180] *United States v. Castleman*, 134 S. Ct. 1405, 1411 (2014).

interpreted as minor in isolation are more severe because the "accumulation of such acts over time can subject one intimate partner to the other's control."[181]

Key Points: Understanding Domestic Violence

- ✓ Domestic violence may include:
  - (1) pattern of verbal abuse
  - (2) physical abuse
  - (3) threats
  - (4) isolation of victim
  - (5) economic control
  - (6) passport control and immigration-related threats
  - (7) rape and sexual assault
  - (8) stalking
  - (9) cyber sexual abuse ("revenge porn")
  - (10) impairment of breathing/strangulation
- ✓ **Coercive control is a pattern of behavior** used to dominate a partner in ways that subvert the victim's autonomy and isolate the victim; violence can be used as a way to enforce psychological control.[182]
- ✓ The court may hear testimony from an expert witness regarding the dynamics of domestic violence and its impact on the respondent and children.[183]
- ✓ Similarly, the court may consult social science literature for guidance on the dynamics of domestic violence and its impact on the respondent and children.[184]

§2.00 Effects on Children

Social science research has shown that children who are exposed to domestic violence may develop psychological and emotional problems such as depression, post-traumatic stress disorder, and behavioral problems.[185] A 2003 study showed that exposure to domestic violence

[181] *Id.*; *see also Hernandez v. Ashcroft*, 345 F.3d 824, 836-37 (9th Cir. 2003) (noting that "lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes,' and that . . . although a relationship may appear to be predominantly tranquil and punctuated only infrequently by episodes of violence, 'abusive behavior does not occur as a series of discrete events,' but rather pervades the entire relationship . . . . The effects of psychological abuse, coercive behavior, and the ensuing dynamics of power and control mean that the 'pattern of violence and abuse can be viewed as a single and continuing entity'" (quoting H.R. REP. 103-395 and Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993))).

[182] Edleson et al., *Multiple Perspectives*, *supra* note 178, at 17.

[183] *See Acosta v. Acosta*, 725 F.3d 868, 873 (8th Cir. 2013); *Davies v. Davies*, No. 16 CV 6542 (VB), 2017 WL 361556, at *17 (S.D.N.Y. Jan. 25, 2017); *cf. Wissink v. Wissink*, 301 A.D.2d 36, 40–41, 749 N.Y.S.2d 550, 552–53 (N.Y. App. Div. 2d Dep't 2002) (remanding for a new custody hearing following an in-depth forensic examination of the parties and child because of a history of domestic violence perpetrated by the father against the mother).

[184] *See Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000).

[185] Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, 1 TRAUMA, VIOLENCE & ABUSE 321, 328 (2000); *see also* Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCHIVES OF PSYCHIATRY & CLINICAL NEUROSCIENCE 174 (2006); Shanta R. Dube et al., *Childhood Abuse, Neglect, and Household Dysfunction and the Risk of Illicit Drug Use: The Adverse Childhood Experiences Study*, 111 PEDIATRICS 564 (2003).

tripled a child's odds of perpetrating violence in his or her own relationships.[186] The same study also found that a child exposed to violence between parents is more likely to become a victim of partner violence, more so even than a child who is the victim of direct abuse.[187] In fact, according to the study, exposure to domestic violence as a child seems to be the greatest independent risk factor for victimization by a partner.[188] On the other hand, physical injury by a caretaker may directly increase a child's odds of perpetrating abuse.[189]

Additionally, research reveals that exposure to domestic violence can have deeply negative effects on children's neurological development.[190] Research has indicated that exposure to domestic violence can lower a child's IQ, contribute to premature aging, and increase a child's vulnerability to psychopathology.[191] One study found that exposure to domestic violence coupled with child maltreatment was associated with "heightened neural activity in children's brains similar to that of soldiers exposed to violent combat situations."[192]

In looking at how to protect children from the harms of exposure to domestic violence, "[t]rauma-informed approaches recognize that supporting children's healthy attachment to the survivor-parent is crucial to their development and resiliency following exposure to domestic violence."[193] Children's relationships with their non-battering parent and siblings are central to their ability to recover from exposure to domestic violence.[194]

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[186] Miriam K. Ehrensaft et al., *Intergenerational Transmission of Partner Violence: A 20-Year Prospective Study*, 71 J. OF CONSULTING & CLINICAL PSYCHOL. 741, 747 (2003). *See also* Charles L. Whitfield, *Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults*, 18 J. OF INTERPERSONAL VIOLENCE 166, 176 (2003) (concluding that witnessing domestic violence increased the risk of victimization among women and the risk of perpetration by men more than two-fold).
[187] Ehrensaft, *Intergenerational Transmission of Partner Violence: A 20-Year Prospective Study*, at 749.
[188] *Id.*
[189] *Id.*
[190] *See* Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, 53 THE JUDGES J. 32, 32-37 (2014).
[191] Linda Baker & Marcie Campbell, *Exposure to Domestic Violence and its Effects on Children's Brain Development and Functioning* (2012).
[192] *Id.*
[193] Carole Warshaw, *Thinking About Trauma in the Context of Domestic Violence: An Integrated Framework*, 17 SYNERGY 2, 4 (2014).
[194] Lundy Bancroft, *The Batterer as Parent*, 6(1) SYNERGY 8 (2002).

PART III. PETITIONER'S CASE FOR RETURN

The petitioner has the burden of proving by a preponderance of the evidence[195] that the child was *wrongfully* removed or retained from his or her country of habitual residence.

Removal or retention is wrongful within the meaning of the Convention when it violates the petitioner's rights of custody and those rights were actually being exercised at the time of the removal or retention or would have been exercised but for the removal or retention.[196]

Before making any findings in the *prima facie* case, the court may "request that [petitioner] obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State."[197] Each country's Central Authority must assist "so far as practicable" in obtaining this decision or determination.[198] The Convention provides no further guidance as to the mechanism or time limits for a petitioner to obtain this decision or determination from the child's habitual residence. Use of Article 15 is discretionary and the mechanics of its application have been determined on a case-by-case basis.[199]

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[195] 22 U.S.C.A. § 9003(e)(1)(A).
[196] Convention at art. 3.
[197] *Id.* at art. 15.
[198] *Id.*
[199] *See generally Ozaltin v. Ozaltin*, 708 F.3d 355, 369 (2d Cir. 2013) (relying on letter from Turkish Ministry of Justice regarding parties' custody status in determining that respondent's removal of children was wrongful); *In re Application of Adan*, 437 F.3d 381, 394 (3d Cir. 2006) ("[P]ursuant to Article 15 of the Convention, the District Court may request that the parties obtain from the Argentine courts a determination of whether the removal of [child] from that country was wrongful under the Convention, which would necessarily include an adjudication of [petitioner]'s custody rights under Argentine law at the time she was removed . . . . Although such a request is within the District Court's discretion, we are of the opinion that a determination of [petitioner]'s custody rights at the time of removal by an Argentine court (provided, of course, that the Argentine courts have authority under Argentine law to make such a determination at this stage) would be very helpful in properly determining the wrongfulness of [child]'s removal."); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1148 (E.D. Wash. 2007) ("Although the typical procedure under Article 15 would be for this Court to request a determination of wrongfulness by a German court, because the Bayreuth Local Court has already made a determination, this Court must determine whether to give the decision full faith and credit under ICARA, [22 U.S.C.A. § 9003(g)]."); *Kufner v. Kufner*, 480 F. Supp. 2d 491, 504 (D.R.I. 2007) ("[T]he Court asked the parties to submit joint questions to be sent, pursuant to Article 15 of the Convention, to the Central Authority in Germany for an advisory opinion concerning German custody law."), *aff'd*, 519 F.3d 33 (1st Cir. 2008); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 636 (E.D.N.Y. 2000) ("By letter . . . the Principal Legal Officer in the Australian Central Authority for the Hague Convention, set forth the Australian law concerning Petitioner's rights in regard to their children pursuant to the procedures under Article 15 of the Convention."); *Viragh v. Foldes*, 612 N.E.2d 241, 247 n.11 (Mass. 1993) ("We reject [petitioner]'s argument that the judge erred by not formally requesting a determination from the Hungarian authorities concerning the wrongfulness of the children's removal or retention under Hungarian law. Article 15 provides that the judicial authorities of a contracting nation have the discretion to request such a determination . . . .").

§ 1.00 Elements of Petitioner's *Prima Facie* Case

To determine whether the petitioner has made a *prima facie* case for return, the court must consider:

(1) The date of removal or retention;[200]

(2) The child's habitual residence immediately prior to removal or retention;[201]

(3) The petitioner's rights under the law of the child's habitual residence at that time;[202]

(4) Whether those rights amount to "rights of custody" within the meaning of the Convention;[203] and

(5) Whether the petitioner was actually exercising those rights or would have been exercising those rights but for the removal or retention.[204]

If the petitioner fails to prove the child was removed from his or her habitual residence, the Convention **does not apply** and **the petition for return must be dismissed**.

If the petitioner fails to prove the existence of custody rights or that he or she was actually exercising those rights, the remedy of return is not available and the petition for return must be dismissed.[205]

§ 2.00 Removal, Retention, and Habitual Residence

Determining the child's habitual residence at the time of removal or retention is considered the threshold issue in a Hague Convention case.[206] Thus, this section breaks down the habitual residence analysis into two steps: (1) determining the date of removal or retention, and (2) determining whether the child was removed from his or her habitual residence immediately prior to that date. If the child was not taken from his or her country of habitual residence, the analysis

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[200] Convention at art. 3(a). Note, the date of removal or retention is relevant to both the habitual residence analysis and the "well-settled" exception, discussed in Part IV, *infra.*

[201] *Id.*

[202] *Id.* The petitioner's rights need not be established by formal court order but may arise by operation of law or by agreement. For more on custody rights *see* Part III, § 3.00 *infra*.

[203] *Id.* at art. 5(a).

[204] *Id.* at art. 3(b).

[205] In this case, the petitioner may amend the petition to request enforcement of access rights in lieu of the remedy of return or file a new petition for access rights.

[206] *See Guzzo v. Cristofano*, 719 F.3d 100, 106 (2d Cir. 2013) ("[D]etermining the child's country of habitual residence is a threshold issue in nearly all Hague Convention cases . . . ."); *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005) (beginning analysis by considering meaning and application of habitual residence); *Ermini v. Vittori*, No. 12 Civ. 6100, 2013 WL 1703590, at *11 (S.D.N.Y. Apr. 19, 2013) ("Determination of a child's habitual residence immediately before the alleged wrongful removal or retention is . . . a threshold question in deciding a case under the Hague Convention." (alteration in original) (quoting *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3d Cir. 2006))), *aff'd as amended*, 758 F.3d 153 (2d Cir. 2014); *see also Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012) ("Because wrongful-retention analysis depends on first determining [child's] country of 'habitual residence,' we begin there.").

ends there—the removal or retention was not wrongful, thus the Convention does not apply, and the petition must be dismissed.[207]

As a practical matter, the habitual residence analysis will not necessarily involve discrete analytical steps requiring the court to determine the date of removal or retention before moving to the next issue of habitual residence. Courts will often hear the entire case presented by the petitioner and respondent, depending on the issues raised or motions brought in a particular instance, and then make its ruling. In some cases the court may make an initial ruling with regard to the *prima facie* case after the petitioner rests, and consider the respondent's defenses only if necessary. If petitioner fails to prove the *prima facie* case, the petition for return must be dismissed without consideration of any defenses. However, understanding the elements of a Convention case as involving a multi-step process will enable the court to clearly articulate the requisite findings when ruling on the petition.

Take Note: Transnational Requirement

✓ To be considered a removal within the meaning of the Convention, the respondent and child must actually cross an international border.

2.1 Removal

Removal refers to a parent, relative, or other person physically taking a child out of a country without the permission of a party with custodial rights.

The date on which the respondent and child left the Requesting State is a factual determination to be made by the court. Although this date may be a fact in contention, in most cases the date of removal will be unambiguous.

2.2 Retention

Retention refers to a parent, relative, or other person keeping a child outside of a country beyond a previously agreed-upon time period. In such cases, initial removal of the child from the Requesting State would not have been wrongful.

[207] *Mota v. Castillo*, 692 F.3d 108, 113 (2d Cir. 2012) (noting "the child must have been removed to or retained in a Contracting State other than her State of habitual residence for the Convention to apply"); *Diorinou v. Mezitis*, 237 F.3d 133, 141 (2d Cir. 2001) (stating that district court judge "correctly began his analysis of the parties' competing contentions by focusing first on the issue of the children's habitual residence . . . just prior to the removal"); *see also Larbie*, 690 F.3d at 312 (rendering judgment in respondent's favor based in part on finding that Requesting State was not child's habitual residence).

The date on which the child's absence from the Requesting State becomes wrongful can be less obvious and may be a fact in dispute between the parties.

Although the date of retention can be more difficult to pinpoint than the date of removal, **retention has been interpreted as a fixed, rather than a continuing, event**.[208]

To establish the specific date of retention, courts have looked to the date on which the petitioner was truly "on notice" that the respondent would not be returning with the child.[209] In some cases, this has been the date the respondent and child were supposed to return to the Requesting State but failed to do so.[210] In other cases, this has been the date the respondent communicated his or her intention not to return the child, either expressly or as manifested by his or her actions,[211] or the date the petitioner communicated a desire to have the child returned.[212]

2.3 Habitual Residence

The petitioner must prove that the Requesting State was the child's habitual residence immediately before removal or retention.

The habitual residence analysis is a fact-intensive determination that will depend heavily on the facts of a particular case.[213] It may be more straightforward in cases in which the only

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[208] *See Viteri v. Pflucker*, 550 F. Supp. 2d 829, 835 (N.D. Ill. 2008) ("[A]lthough there is little judicial authority on this issue, the judicial authority offered by the parties supports the interpretation of 'wrongful retention' as a solitary event."); *see also Yaman v. Yaman*, 730 F.3d 1, 13 (1st Cir. 2013) (finding Convention language indicates "clear trigger point" for date of retention); *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (determining a single date as date of retention); *De La Vera v. Holguin*, Civil Action No. 14-4372(MAS)(TJB), 2014 WL 4979854, at *7 (D.N.J. Oct. 3, 2014) (identifying range within which retention occurred and then setting specific date for the purpose of wrongful retention analysis).

[209] *See Hofmann v. Sender*, 716 F.3d 282, 295 (2d Cir. 2013); *see also Blanc v. Morgan*, 721 F. Supp. 2d 749, 762 (W.D. Tenn. 2010) ("Although [respondent] offered indications of her hesitancy to return with [child] before this point, the Court finds that March 2009 was the first point at which [petitioner] was truly on notice of [respondent]'s decision not to return or allow [child] to return."); *McKie v. Jude*, Civil Action No. 10-103-DLB, 2011 WL 53058, at *6 (E.D. Ky. Jan. 7, 2011) ("[T]o determine the date of wrongful retention courts will look to the date where the non-abducting parent was truly on notice that the abducting parent was not going to return with the child."); *Riley v. Gooch*, Civ. No. 09-1019-PA, 2010 WL 373993, at *8-9 (D. Or. Jan. 29, 2010) ("[T]he date of retention is that point when the noncustodial parent knows the custodial parent will not return the child.").

[210] *See Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at *6 (E.D.N.Y. May 7, 2008) (date of retention was date parties had agreed respondent would return the child, but did not); *see also Toren v. Toren*, 191 F.3d 23, 28 (1st Cir. 1999); *Falk v. Sinclair*, 692 F. Supp. 2d 147, 162 (D. Me. 2010); *Philippopoulos v. Philippopoulou*, 461 F. Supp. 2d 1321, 1323-24 (N.D. Ga. 2006).

[211] *See Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001); *Cabrera v. Lozano*, 323 F. Supp. 2d 1303, 1312-13 (S.D. Fla. 2004); *Zucker v. Andrews*, 2 F. Supp. 2d 134, 140 (D. Mass. 1998), *aff'd*, 181 F.3d 81 (1st Cir. 1999).

[212] *See Karkkainen v. Kovalchuk*, 445 F.3d 280, 290 (3d Cir. 2006); *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 270 (N.D. Iowa 1993), *dismissed*, 43 F.3d 1476 (8th Cir. 1994); *De La Vera*, 2014 WL 4979854, at *7. *But see Toren*, 191 F.3d at 28 (finding no remedy for "anticipatory retention" where there was an agreed upon date of return).

[213] *Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013); *A.A.M. v. J.L.R.C.*, 840 F. Supp. 2d 624, 636 (E.D.N.Y. 2012), *aff'd sub nom. Mota v. Castillo*, 692 F.3d 108 (2d Cir. 2012).

transnational "move" involves the alleged wrongful removal or retention. However, determining habitual residence when the family has relocated more than once can be difficult.

Key Points: Defining Habitual Residence

- ✓ Neither the Convention nor ICARA define habitual residence.[214]
- ✓ Courts interpret the phrase according to its ordinary meaning, rather than a legal definition that a particular jurisdiction has attached to the phrase.[215]
- ✓ Although habitual residence has been interpreted to be the same as an ordinary residence, it is not necessarily the same as domicile.[216]
- ✓ Likewise, the court should not employ a determination mirroring "home state" under the UCCJEA, though some of the same factors will be relevant.
- ✓ Judicial determinations regarding habitual residence lack uniformity across jurisdictions.[217]

There are three general approaches to the habitual residence analysis: (1) shared parental intent; (2) the child's perspective; and (3) a mixed approach. Each approach places different weight on the parent's intentions as compared to the child's experience.

The **shared parental intent approach** (also referred to as settled purpose or settled intent) presumes that a child's habitual residence is determined by the parents' intent for the child to either remain temporarily or settle in a particular location.[218] Courts focusing on the **child's perspective** look to whether the child has been in a place long enough to be "acclimatized" and whether the child's presence has a "degree of settled purpose" from the child's point of view.[219] The last methodology is a **mixed approach** looking to "the settled purpose of the move . . . from the child's perspective," along with other factors including parental intent, the passage of time, and the child's acclimatization to the new country.[220]

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[214] *Guzzo v. Cristofano*, 719 F.3d 100, 106 (2d Cir. 2013) ; *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001).
[215] *See Guzzo*, 719 F.3d at 106; *Mozes*, 239 F.3d at 1073.
[216] *See Guzzo*, 719 F.3d at 103, 106 n.5 (2d Cir. 2013) ("[T]he Hague Convention uses the terms 'habitual residence' and 'habitually resident' in a practical way, referring to the country where a child usually or customarily lives. The term is not equivalent to the American legal concept of 'domicile,' which relies principally on intent."); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995) (citing *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995)); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).
[217] *See Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012) ("Courts use varying approaches to determine a child's habitual residence, each placing different emphasis on the weight given to the parents' intentions.").
[218] *See, e.g. Gitter v. Gitter*, 396 F.3d 124, 132 (2d Cir. 2005) (following approach used in *Mozes* and focusing on intent of child's parents or others who may fix residence, as well as acclimatization); *Mozes*, 239 F.3d at 1076.
[219] *See, e.g. Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)).
[220] *See, e.g. Stern v. Stern*, 639 F.3d 449, 452 (8th Cir. 2011).

2.3.1 Habitual Residence in New York

When assessing habitual residence, New York state and federal courts consider (1) the parents' shared intent and (2) the child's acclimation. In *Gitter v. Gitter* (a case of first impression), the Second Circuit interpreted the phrase "habitual resident" within the meaning of the Convention.[221] The court articulated the following two-prong test:

> In sum, we conclude that in determining a child's habitual residence, a court should apply the following standard: First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.[222]

The court cautioned, however, that "courts should be 'slow to infer' that the child's acclimatization trumps the parents' shared intent" because "[p]ermitting evidence of acclimatization to trump evidence of earlier parental agreement could 'open children to harmful manipulation when one parent seeks to foster residential attachments during what was intended to be a temporary visit.'"[223] In subsequent decisions, the Second Circuit has continued to follow the test set forth in *Gitter*.[224]

New York state courts also look to the shared intent of the parents when determining habitual residence. In fact, since 2005 several New York trial and appellate courts have cited to or referenced *Gitter* (or other Second Circuit precedent) when evaluating habitual residence.[225]

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[221] *See Gitter v. Gitter*, 396 F.3d 124, 128 (2d Cir. 2005).
[222] *Id.* at 134.
[223] *Id.* at 134 (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001)).
[224] *See, e.g.*, *Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013) ("We 'begin an analysis of a child's habitual residence by considering the relevant intentions,' because '[f]ocusing on intentions gives contour to the objective, factual circumstances surrounding the child's presence in a given location.' . . . We 'presume that a child's habitual residence is consistent with the intention of those entitled to fix the child's residence at the time those intentions were mutually shared.' . . . This presumption can be overcome, however, if the evidence shows that a child is settled into (or, 'acclimated' to) the new environment—a burden that is more easily satisfied the longer a child has lived in that country. When considering these two steps, the court must not lose sight of the fact that the framework is designed simply to ascertain where a child usually or customarily lives." (quoting *Hofmann v. Sender*, 716 F.3d 282, 291 (2d Cir. 2013))).
[225] *See, e.g.*, *Squicciarini v. Oreiro*, 99 A.D.3d 605, 606, 953 N.Y.S.2d 182, 182 (N.Y. App. Div. 1st Dep't 2012) (affirming trial court decision granting petition "since petitioner met his burden of establishing by a preponderance of the evidence that the children had been wrongfully removed from their country of habitual residence"); *Lakhera-*

There are a few New York state decisions (prior to *Gitter*) that framed habitual residency as a question of where the child has a "settled purpose."[226] As part of the "settled purpose" analysis, these courts looked at the shared intent of the parents, but focused on the child.[227]

2.4 Habitual Residence and Domestic Violence

In cases of domestic violence, the court should take into account the coercive and controlling nature of abuse and consider how such abuse may have impacted any purported "shared intent" as to habitual residence.[228] If one party was coerced into moving, the court may find the parties lacked the requisite shared intent to establish a new habitual residence.[229]

Whether or not there was coercion impacting the parties' shared intent as to habitual residence depends on the unique circumstances of each case.

Bonnefoy v. Lakhera-Bonnefoy, 14 Misc. 3d 1214(A), 836 N.Y.S.2d 486 (N.Y. Sup. Ct. Kings Cty. 2006) (concluding that the "settled purpose of the subject child's residence has been clearly exhibited as evidenced by his education, religious and family involvement, since his birth in Brooklyn, Kings County"); *MG v. WZ*, 46 Misc. 3d 372, 380, 998 N.Y.S.2d 563 (N.Y. Fam. Ct. Bronx Cty. 2014) (determining that child's habitual residence was in the United States because "the last time the parties shared their intent for the Child's place of residence, they conditionally agreed that it would be in the United States.").

[226] *See, e.g.*, *People ex rel. Ron v. Levi*, 279 A.D.2d 860, 862, 719 N.Y.S.2d 365 (N.Y. App. Div. 3d Dep't 2001); *Brennan v. Cibault*, 227 A.D.2d 965, 966, 643 N.Y.S.2d 780 (N.Y. App. Div. 4th Dep't 1996).

[227] *See People ex rel. Ron*, 279 A.D.2d at 862 ("Courts interpreting [habitual resident] have held that it refers to a 'degree of settled purpose,' as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there . . . . The focus is on the child rather than the parents, and on past experience rather than future intentions . . . ." (quoting *Brennan*, 227 A.D.2d at 966)) (concluding that the trial court properly held that petitioner failed to prove by preponderance of the evidence that the children were habitual residents of Israel when children had spent equal time in U.S. and Israel and there was no evidence that "the parties intended the family's stay in the United States to be temporary" but rather "the proof showed the parties came to the United States together, found housing and obtained employment, and lived here for more than a year and a half before petitioner left this country without any attempt to take the children. [This supports] a finding of 'a settled purpose on the part of the parties to establish [a life for the children in the United States]'"); *see also Brennan v. Cibault*, 227 A.D.2d 965, 966, 643 N.Y.S.2d 780 (N.Y. App. Div. 4th Dep't 1996) ("Because the Hague Convention does not define the term 'habitual resident', its interpretation has been left to the courts. Courts interpreting that term have held that it refers to a 'degree of settled purpose', as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there . . . . The focus is on the child rather than the parents, and on past experience rather than future intentions." (citations omitted)) (concluding that the child's habitual residence was France because her "parents were married there and had established professions and a home there, and [the child] was born in France and lived there for the first 16 months of her life, before she left for what was to be a six-week visit with her grandmother in New York. Those facts reflect a settled purpose on the part of the parties to establish [the child's] life in France.").

[228] *See* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007) (explaining that in an abusive relationship, the decision on where to live may not be a mutual decision, but another factor in a broader pattern of coercive control). *See generally* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000-2001).

[229] *See Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001) ("Where the Court finds verbal and physical abuse of a spouse of the kind and degree present in this case, the conduct of the victimized spouse asserted to manifest 'consent' must be carefully scrutinized."); *In re Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993) (finding habitual residence never changed to [Requesting State] where respondent and child were detained in [Requesting State] against respondent's will).

Coercive and controlling factors may include:

- Control over access to passport or destruction of passport;
- Control over immigration paperwork, legal status in the new country, or ability to work in the new country;
- Deception causing relocation;
- Being forced to relocate or to remain in a country by potentially life-endangering threats;[230] or
- Forced isolation from family, friends, and support network.

Coercion to Achieve Forum Shopping

✓ Failing to consider how coercion may have impacted a family's "shared choice to relocate" would thwart the Convention's objective of discouraging forum shopping by allowing a batterer to employ coercive tactics to achieve adjudication in a chosen forum.

2.5 Conditional Moves

If a move is conditioned on certain factors, courts may determine those conditions impact the habitual residence analysis. A battered partner, for example, may agree to relocate on the condition that the abuse will stop or under the belief that he or she will be protected from the abusive spouse in the new country.

The Second Circuit recognized the concept of contingent consent and habitual residence in *Mota v. Castillo*.[231] The court upheld the district court's determination that Mexico remained the child's habitual residence despite the respondent's contention that it was the parties' shared intent that the child move to the United States.[232] Specifically, the district court noted that "[t]he agreement for the mother, child, and father to create a new marital abode in New York was conditional on all of the family members entering the United States."[233] As a result, the district court concluded that the mother, who was apprehended attempting to cross the Mexican border, did not consent to the retention of the child in the United States.[234] The Second Circuit affirmed, stating that "Asuncion Mota's intention that Elena live in the United States only if she, as

[230] Edleson et al., *Multiple Perspectives*, *supra* note 178, at 84-85 (finding that battered respondents have reported experiencing a combination of many of these tactics).
[231] *Mota v. Castillo*, 692 F.3d 108 (2d Cir. 2012).
[232] *Id.* at 114–15.
[233] *A.A.M. v. J.L.R.C.*, 840 F. Supp. 2d 624, 637–38 (E.D.N.Y. 2012).
[234] *Id.* at 638.

mother, were able to join Elena there is dispositive of our determination of Elena's habitual residence."[235]

§ 3.00 Rights of Custody

"For the purpose of this Convention 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." [236]

Courts interpret rights of custody broadly.[237] This inquiry does not require a custody determination; rather, the petitioner must prove that his or her rights under the law of the child's habitual residence amount to "rights of custody" within the Convention's meaning.[238] Relatedly, the petitioner does not have to have had "custody" of the child; the violation of a single right of custody suffices to make the removal or retention of a child wrongful.[239] These rights may arise by operation of law, judicial or administrative decision, or agreement having legal effect.[240]

The Convention does not differentiate between adopted and biological children.[241]

If the petitioner does not possess rights of custody, removal is not wrongful within the Convention's meaning, and the remedy of return is not available.[242]

Access Cases Distinguished

- ✓ "Rights of Access" are defined as the right to take a child for a *limited period of time* to a place other than the child's habitual residence.
- ✓ This Guide does not include an in-depth analysis of access cases.
- ✓ For a brief summary of access rights compared to rights of custody, *see* Part III, § 3.4 *infra*.

3.1 Under the Law of the Habitual Residence

The "rights of custody" analysis requires an examination of foreign law.

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[235] *Mota v. Castillo*, 692 F.3d 108, 115 (2d Cir. 2012). *See also Guzzo v. Cristofano*, 719 F.3d 100, 111 (2d Cir. 2013); *Ruiz v. Tenorio*, 392 F.3d 1247, 1254 (11th Cir. 2004). *But see Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (criticizing the Ninth Circuit's habitual residence analysis established in *Mozes* and citing *Ruiz* as an example of the problematic results reached under *Mozes* as inconsistent with the aims of the Convention).
[236] Convention at art. 5.
[237] *Abbott v. Abbott*, 560 U.S. 1, 19-20 (2010).
[238] Convention at art. 3(a).
[239] *In re Skrodzki*, 642 F. Supp. 2d 108, 115 (E.D.N.Y. 2007).
[240] Convention at art. 3.
[241] *See* Convention at art. 1.
[242] *Abbott*, 560 U.S. at 9.

If the petitioner's rights under the law of the habitual residence are not clear from the letter of the law, the court may require additional explanation. In *Abbott*, the U.S. Supreme Court relied on a letter from a Chilean agency in determining the petitioner's rights under Chilean law.[243] A declaration or affidavit by an attorney from the country of habitual residence as to that country's law is also an "acceptable form of proof in determining issues of foreign law."[244] On rare occasions, the court may require an expert to explain the petitioner's rights under the law of the country of habitual residence.

Thus, the court must first determine the nature and extent of the petitioner's custody rights in the country of habitual residence and may then determine whether those rights amount to "rights of custody" as defined in the Convention.

Foreign Law Establishing Custody Rights

- ✓ Petitioner's rights must have been in effect *at the time of the removal*; and
- ✓ Petitioner's rights must be from the state or province where the child resided *within* the habitual residence country, notwithstanding any habitual residence choice of law rules that dictate otherwise.[245]

Article 7(e) of the Convention permits Central Authorities "to provide information of a general character as to the law of their [country] in connection with the application of the Convention."[246]

3.2 Chasing Orders

In some cases, the petitioner may seek a custody order from the court of habitual residence after the child has been removed or retained. These orders are referred to as "chasing orders" and cannot change a permissible removal into a wrongful retention after the fact.

The Fourth Circuit held that "the only reasonable reading of the Convention is that a removal's wrongfulness depends on rights of custody *at the time of removal*."[247]

Similarly, the Seventh Circuit held that the Convention "is not a jurisdiction-allocation or full-faith-and-credit treaty. It does not provide a remedy for the recognition and enforcement of

[243] *Id.* at 10.
[244] *Whallon v. Lynn*, 230 F.3d 450, 458 (1st Cir. 2000) (relying on Federal Rules of Civil Procedure and the Pérez-Vera Report).
[245] *See Shalit v. Coppe*, 182 F.3d 1124, 1129-30 (9th Cir. 1999).
[246] Convention at art. 7(e).
[247] *White v. White*, 718 F.3d 300, 306 (4th Cir. 2013). *See also Madrigal v. Tellez*, No. EP-15-CV-181-KC, 2015 WL 5174076, at *14 (W.D. Tex. Sept. 2, 2015) ("Given the Convention's goal of restoring the pre-abduction status quo, 'the only reasonable reading of the Convention is that a removal's wrongfulness depends on rights of custody *at the time of removal.*'").

foreign custody orders or procedures for vindicating a wronged parent's custody rights more generally."[248] The Court emphasized that in such cases the UCCJEA provides the appropriate vehicle for relief.[249]

3.3 *Ne Exeat* Rights

A *ne exeat* right confers the authority to consent before the other parent may take the child to another country.[250] In *Abbott v. Abbott*, the U.S. Supreme Court held that a *ne exeat* right is a custody right within the meaning of the Convention.[251]

3.4 Rights of Custody vs. Rights of Access

Article 5 of the Convention distinguishes between "rights of custody" and "rights of access." Rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence."[252] U.S. courts, including the Supreme Court, have found that rights of access do not confer custodial rights upon a parent and thus do not invoke the remedy of return under the terms of the Convention.[253]

When rights of access are at issue, Article 21 of the Convention authorizes submission of an application for access to the Central Authority of the States involved "in the same way as an application for the return of the child."[254]

§ 4.00 Rights Actually Exercised

Finally, the petitioner must prove that he or she was actually exercising his or her rights of custody at the time of the removal or retention, or would have exercised his or her rights of custody but for the removal or retention.[255]

Courts have interpreted "exercise of custody" liberally.[256] Courts have found that a parent is "exercising" rights of custody when that parent "keeps, or seeks to keep, any sort of regular contact" with the child.[257]

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[248] *Redmond v. Redmond*, 724 F.3d 729, 741 (7th Cir. 2013).
[249] *Id.*
[250] *Abbott v. Abbott*, 560 U.S. 1, 5 (2010).
[251] *Id.* at 11-12.
[252] Convention at art. 5(b).
[253] *See Abbott*, 560 U.S. at 13.
[254] Convention at art. 21.
[255] *Id.* at art. 3(b).
[256] *See Kosewski v. Michalowska*, No. 15 CV 928 (KAM)(VVP), 2015 WL 5999389, at *14 (E.D.N.Y. Oct. 14, 2015) ("Courts in this Circuit have recognized that the standard for evaluating whether a petitioner is exercising custody at the time of removal is fairly lenient."); *Reyes Olguin v. Cruz Santana*, No. 03 CV. 6299(JG), 2004 WL 1752444, at *4 (E.D.N.Y. Aug. 5, 2004) (quoting Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,507); *see also*

PART IV. EXCEPTIONS TO RETURN: RESPONDENT'S DEFENSES

§ 1.00 Evaluating the Exceptions without Engaging in a Best Interests Analysis

The best interests of a child is the legal standard in domestic custody cases. **The Hague Convention does not call for a determination on the merits of custody, regardless of whether the case is being heard in state or federal court.**[258] Therefore a Hague Convention hearing should not involve a best interests analysis.

To avoid evaluating the merits of any underlying child custody claims, courts presiding over a Convention case must distinguish between facts relevant under the Convention and "best interests" factors.

Although some overlap may exist, the distinction ultimately comes down to relevance: if evidence is relevant to an element of the Hague Convention case, that evidence can be considered even if it would also be pertinent to a best interests analysis. Evidence having no bearing on an element of a Hague Convention case must not be considered in ruling on a petition for the child's return.

As the First Circuit has explained in a discussion of the grave risk analysis:

> The Convention assigns the duty of the grave risk determination to the country to which the child has been removed. It is not a derogation of the authority of the habitual residence country for the receiving U.S. courts to adjudicate the grave risk question. Rather, it is their obligation to do so under the Convention and its enabling legislation. Generally speaking, where a party makes a substantial allegation that, if true, would justify application of the Article 13(b) exception, the court should make the necessary predicate findings.[259]

The Convention presumes that prompt return to the child's habitual residence is in the child's best interests.[260] The exceptions to return, however, indicate that the Convention drafters

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Friedrich v. Friedrich, 78 F.3d 1060, 1063-65 (6th Cir. 1996) ("The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child").

[257] *Friedrich*, 78 F.3d at 1065; *see also Kosewski*, 2015 WL 5999389, at *15 ("The fact that petitioner's visits with the child were irregular at times and that respondent was the child's primary caregiver since her birth do not mandate a finding that petitioner failed to exercise custodial rights under the Convention. . . .").

[258] 22 U.S.C.A. § 9001(b)(4). *See also* Text and Legal Analysis, 51 Fed. Reg. 10,510.

[259] *Danaipour v. McLarey*, 286 F.3d 1, 18 (1st Cir. 2002).

[260] *See* Pérez-Vera, Explanatory Report at ¶ 25.

understood this presumption to be rebuttable.[261] "For the most part, the[] exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area."[262] The Convention's exceptions to mandatory return—often referred to as affirmative defenses—acknowledge that, depending on the circumstances, the child's interest in a particular case may outweigh any interest in prompt return.[263]

§ 2.00 Article 12: The "Well-Settled" Exception

"The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, **unless it is demonstrated that the child is now settled in [his or her] new environment**."[264]

The respondent must prove this exception by a preponderance of the evidence.[265]

2.1 One-Year Requirement

The period of one year is from the date of wrongful removal or retention to the date of the commencement of the proceedings.[266]

The proceedings "commence" when the petition for return is filed in a court with jurisdiction over the case.[267]

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[261] *Id.*
[262] *Id.*
[263] *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234-35 (2014) ("[T]he expiration of the 1-year period opens the door to consideration of a third party's interests, *i.e.* the child's interest in settlement."); *Yaman v. Yaman*, 730 F.3d 1, 10 (1st Cir. 2013) (upholding lower court's decision to deny return where lower court reasoned that return focused on the interest of the child and not just on what is equitable between petitioner and respondent); *see also* Pérez-Vera, Explanatory Report at ¶ 29 ("[T]he interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.").
[264] Convention at art. 12 (emphasis added).
[265] 22 U.S.C.A. § 9003(e)(2)(B).
[266] *Id.*
[267] 22 U.S.C.A. §§ 9003(b), (f)(3) (defining "commencement of proceedings" from Article 12 as "filing a petition for the relief sought in any court which has jurisdiction . . . and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."). *See also Blondin v. Dubois*, 189 F.3d 240, 247–48 (2d Cir. 1999) (referring to date petition was filed); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (the one-year period is measured from when the petition was filed in court); *Belay v. Getachew*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) (the filing of the petition in court commences the judicial proceedings); *Wojcik v. Wojcik*, 959 F. Supp. 413, 418 (E.D. Mich. 1997) (finding contact with the Central Authority does not commence the proceedings). *But see In re A.V.P.G.*, 251 S.W.3d 117, 124 (Tex. App. 2008) (finding petitioner filed within one year even though he failed to file with the court until two weeks after the one-year mark because he filed with the Central Authority and the Department of Protective Services notified the court before the one-year period had expired).

Equitable tolling does not apply to the one-year time period because it is not a statute of limitations;[268] a petition for return can be filed beyond the one-year period set forth in Article 12.[269] The court may consider the reasons for a petitioner's delay in filing the petition (for example, the respondent's successful concealment of the child's whereabouts) in determining whether the child is well-settled in his or her new environment.[270] But reasons for the petitioner's delay do not bar respondent from raising the defense.

Determining whether one year has passed will require the court to determine the date of wrongful removal or retention (if it has not already done so as part of the habitual residence analysis).[271]

2.2 "Well-Settled" in New Environment

Even if the case is commenced after the one-year period, courts are still mandated to order return, unless the court finds the child is "now settled in [the] new environment."[272]

Neither the Convention nor ICARA defines "settled." The U.S. State Department Report advises that "nothing less than substantial evidence of the child's significant connections to the new country" will satisfy this exception.[273]

Key Point: Opening the Door

✓ This exception allows the court to "open[] the door to consideration of . . . the child's interest in settlement."[274]

Factors considered in determining whether a child is "well-settled" in the new environment have included:

- The child's age;
- Stability of the new residence;
- Consistent schooling or daycare;
- Having close friends and relatives in the new environment;
- Consistent participation in a religious community or extracurricular activities;

[268] *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1226 (2014). In *Lozano*, the Supreme Court rejected petitioner's argument that the child should be returned because the one–year period in Article 12 should be equitably tolled during the period that respondent concealed the child. *Id.*
[269] *Id*. at 1231.
[270] *Id*. at 1236.
[271] *See supra*, The Date of Removal or Retention, Part III, §§ 2.1, 2.2.
[272] Convention at art. 12.
[273] Text and Legal Analysis at 10,509.
[274] *Lozano*, 134 S. Ct. at 1234-35. *See also* Pérez-Vera, Explanatory Report at ¶ 107 ("it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it . . . .").

- The child's aptitude in learning a new language (when relevant);
- The respondent's ability to maintain stable housing and employment in the new environment; and
- The child's and respondent's immigration statuses.[275]

With regard to immigration status, the Second Circuit, as with the Fifth and Ninth Circuits, has noted that whether the "well-settled" exception applies "is a 'fact-specific multi-factor' test, in which no factor, including immigration status, is dispositive."[276] Thus, immigration status alone cannot undercut a finding of "well-settled" where the other factors weigh in favor of such.[277]

Courts may also compare the child's connections in the Requested State with those in the Requesting State.[278] Courts have been clear that having a "more 'comfortable material existence'" in the new environment will not be enough to establish the child is settled under Article 12 of the Convention.[279]

"Well-Settled" and Domestic Violence

✓ If a child clearly exhibited distress and trauma due to domestic violence exposure or direct abuse by the petitioner and removal from that environment has resulted in positive changes in the child's behavior, such circumstances are relevant to the child's "settledness" within the meaning of the Convention.[280]

[275] *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012), *aff'd sub nom. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014).
[276] *Broca v. Giron*, 530 F. App'x 46, 47 (2d Cir. 2013); *Lozano*, 697 F.3d at 57.
[277] *Lozano*, 697 F.3d at 57; *see also Hernandez v. Garcia Pena*, 820 F.3d 782, 788 (5th Cir. 2016) ("[I]mmigration status is neither dispositive nor subject to categorical rules, but instead is one relevant factor in a multifactor test."); *In re B. Del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009) ("[Child]'s current immigration status-a status similar to that of many millions of undocumented immigrants-cannot undermine all of the other considerations which uniformly support a finding that she is 'settled' in the United States."). *But see Cabrera v. Lozano*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004) (considering immigration status of both respondent and child and noting the child's illegal immigration status undermines any stability in the new country); *In re Koc*, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001) (noting, among other factors, the uncertainty of both the respondent and child's immigration status in the United States), *report and recommendation adopted* (Apr. 3, 2001).
[278] Text and Legal Analysis, 51 Fed. Reg. 10,509. *See also Wojcik v. Wojcik*, 959 F. Supp. 413, 421 (E.D. Mich. 1997) ("[T]he father has shown no evidence that the children have maintained any ties to France.").
[279] *In re Koc*, 181 F. Supp. 2d at 152 (quoting *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998)).
[280] *In re Lozano*, 809 F. Supp. 2d 197, 231 (S.D.N.Y. 2011), *aff'd sub nom. Lozano v. Montoya Alvarez*, 697 F.3d 41 (2d Cir. 2012), *aff'd*, 134 S. Ct. 1224 (2014).

2.3 Discretion to Return

Unlike other exceptions to return, Article 12 does not explicitly confer discretion to return a child despite the court's finding that the child is "well-settled" in the new environment.[281]

Courts, however, have generally held that they have discretion to return a child to his or her country of habitual residence if the circumstances warrant ordering return regardless of whether the child is "well-settled."[282]

§ 3.00 Article 13(a): Consent and Acquiescence

If the petitioner consented or subsequently acquiesced to the removal or retention of the child, the court is not required to order return.[283] The respondent must prove this exception by a preponderance of the evidence.[284]

Courts differentiate between consent and acquiescence.[285] Therefore *either* the petitioner's consent to removal or retention *or* subsequent acquiescence will be sufficient under this exception.[286] Consent involves petitioners' actions before the removal or retention, whereas acquiescence connotes agreement after the fact.[287]

Consent is generally inferred from informal action[288] while acquiescence requires a level of formality.[289] Thus, informal statements may suffice to establish consent, but formal acts or statements, such as "testimony in a judicial proceeding, a convincing written renunciation of

[281] *Compare* Convention at art. 12 ("The judicial or administrative authority . . . shall also order the return . . . unless . . .") *with* Convention at art. 13 ("the judicial or administrative authority of the requested State *is not bound* to order the return of the child if . . ." and "*may also refuse to order the return* of the child if . . .") (emphasis added).
[282] *See e.g. In re Lozano*, 809 F. Supp. 2d 197, 234 (S.D.N.Y. 2011) ("[A] finding that the child is settled does not end the analysis. The Court must consider whether to exercise its discretion and repatriate the child even though she is now settled. . . ."), *aff'd sub nom. Lozano v. Montoya Alvarez*, 697 F.3d 41 (2d Cir. 2012), *aff'd*, 134 S. Ct. 1224 (2014); *Mendez-Lynch v. Mendez-Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002) ("[E]ven if [the children] are well-settled, the Court finds that the goals of the Hague Convention would be furthered under the circumstances of this case by returning the boys to Argentina."). *See also* Convention at 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.").
[283] Convention at art. 13(a).
[284] 22 U.S.C.A. § 9003(e)(2)(B).
[285] *Kosewski v. Michalowska*, No. 15-CV-928 (KAM) (VVP), 2015 WL 5999389, at *15 (E.D.N.Y. Oct. 14, 2015) ("The defense of acquiescence is 'analytically distinct' from the defense of consent." (quoting *In re Kim*, 404 F. Supp. 2d 495, 516 (S.D.N.Y. 2005))).
[286] *See Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996).
[287] *In re Kim*, 404 F. Supp. 2d at 516 (quoting *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005)).
[288] *See Baxter*, 423 F.3d at 371.
[289] *In re Kim*, 404 F. Supp. 2d at 516.

rights, or a consistent attitude over a significant period of time" will be required to establish subsequent acquiescence.[290]

Both consent and acquiescence are questions of the petitioner's subjective intent.[291]

3.1 Consent

Since consent may be established by informal actions or statements, courts must consider the specific facts and circumstances of each case to determine whether the petitioner consented to the child's removal or retention. The Fifth Circuit has cautioned, "[i]n examining a consent defense, it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside [his or her] home country."[292] Evidence of the petitioner's consent may be introduced through e-mails, text messages, social media postings, letters, or other writings. Even if the petitioner did not explicitly or impliedly assent in writing, the court may find consent was given if the petitioner maintained an attitude and behavior consistent with consent. For example, if the petitioner assisted the respondent in making extensive travel arrangements, obtaining travel documents for the children, or packing substantial belongings, these actions may be construed as consent.[293]

Take Note: Apparent Consent

- ✓ The petitioner's failure to pursue the child may be considered circumstantial evidence of consent.[294]
- ✓ The opposite is also true: a petitioner's hot pursuit tends to undermine a claim that the petitioner consented to the child's removal or retention and evidence that removal was "deliberatively secretive" may undercut the argument that the petitioner assented.[295]
- ✓ Although inaction could amount to consent to removal or retention, inaction is not necessarily indicative of consent. The petitioner may not have known about the Hague Convention or the available remedies, or may have lacked the resources to seek help.

[290] *Friedrich*, 78 F.3d at 1070.
[291] *In re Kim*, 404 F. Supp. 2d at 516 (holding consent defense requires showing subjective intent); *In re A.V.P.G.*, 251 S.W.3d 117, 126 (Tex. App. 2008) ("[A]cquiescence is a subjective test.").
[292] *Larbie v. Larbie*, 690 F.3d 295, 309 (5th Cir. 2012) ("The nature and scope of the petitioner's consent, and any conditions or limitations, should be taken into account." (internal quotation marks omitted)).
[293] *See Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001) .
[294] *In re Application of Ponath*, 829 F. Supp. 363, 368 (D. Utah 1993) ("This conclusion [that petitioner consented to removal] is further supported by petitioner's failure, for almost six months, to make any meaningful effort to obtain return of the minor child.").
[295] *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996). *See also Saldivar v. Rodela*, 879 F. Supp. 2d 610, 628 (W.D. Tex. 2012) (citing *Friedich*, 78 F.3d at 1069); *Vazquez v. Vazquez*, No. 3:13-CV-1445-B, 2013 WL 7045041, at *25 (N.D. Tex. Aug. 27, 2013) ("Petitioner also presented credible, compelling, and consistent evidence . . . of the events surrounding [child]'s removal and all that she did after realizing that [child] was gone.").

3.2 Acquiescence

Acquiescence is more difficult to prove than consent because of the requirement that *post hoc* assent be formally expressed. Continued contact and even visits with the child after removal or retention are not typically interpreted as acquiescence.[296]

Attempts to reconcile are normally not interpreted as acquiescence within the meaning of the Convention,[297] nor are the parties' efforts to mediate or negotiate a settlement prior to the petition being filed with the court.[298]

In *Ostevoll v. Ostevoll*, an Ohio district court found the petitioner had acquiesced in the removal of the children to the United States because he "demonstrated a consistent attitude of acquiescence over the year and a half [period]" the children resided in the United States.[299] Though the petitioner filed a petition for return shortly after the respondent and children left the country of habitual residence, the petitioner "consistently engaged in delaying tactics which belie[d] his stated intentions of seeking the return of his children."[300] Among other failures to participate in the legal system, the court observed that the petitioner never formally instituted custody or visitation proceedings in a court of either the United States or the habitual residence and, instead, sent the respondent a letter through his attorney stating he "would permit her to keep the children in the United States if he was paid the sum of $1.5 million."[301]

As the decision in *Ostevoll* demonstrates, a finding of acquiescence requires a consideration of the petitioner's subjective intent and is generally driven by the particular facts of a case.

§ 4.00 Article 13(b): Grave Risk and Intolerable Situation

A court "is not bound to order the return of the child" where "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."[302]

Unlike the preceding exceptions, the respondent must prove this exception by **clear and convincing evidence**[303]; however, **subsidiary facts** need only be proven by a **preponderance of the evidence**.[304]

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[296] *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1350 (S.D. Fla. 2002).
[297] *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1289 (S.D. Fla. 1999).
[298] *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1361 (M.D. Fla. 2002).
[299] *Ostevoll v. Ostevoll*, No. C-1-99-961, 2000 WL 1611123, at *19 (S.D. Ohio Aug. 16, 2000).
[300] *Id.*
[301] *Id.* The court does note that while, as a general rule, courts should not infer acquiescence from negotiations, the evidence in this case suggested that this was not the type of negotiations contemplated by the general rule.
[302] Convention at art. 13(b).
[303] 22 U.S.C.A. § 9003(e)(2)(A).

Neither "grave risk" nor "intolerable situation" is defined by the Convention, but Article 13 provides that "[i]n considering the circumstances referred to in this Article, the judicial or administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."[305]

In discussing Article 13(b), Pérez-Vera's Explanatory Report confirms that "the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."[306]

Although the grave risk exception is commonly raised by respondents, considerable inconsistency exists among courts in their interpretation and application of the defense. In a case where the respondent has raised the grave risk exception, courts are often concerned about extending the inquiry beyond the scope of the Convention and into elements relevant to the child's best interests or the underlying merits of a custody case.[307]

In *Friedrich v. Friedrich*, the Sixth Circuit articulated two guiding principles embodied in the Convention: (1) the merits of an underlying custody dispute must not be adjudicated as part of an abduction claim, and (2) the pre-abduction status quo should be restored to deter parents from international forum shopping.[308] In this vein, the grave risk exception was not intended to be used as a vehicle to litigate the child's best interests, and a court should not deny return based on where the child would be happiest, who would be the better parent, or the merit of respondent's reasons for leaving.[309] Following this approach, in *Blondin v. Dubois*, the Second Circuit agreed that the grave risk exception is limited to two scenarios: sending a child to "a zone of war,

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[304] *See Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013).
[305] Convention at art. 13.
[306] Pérez-Vera, Explanatory Report at ¶ 29.
[307] *See* best interests discussion *supra*, Part IV, § 1.00.
[308] 78 F.3d 1060, 1063-64 (6th Cir. 1996); *accord Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir. 1999), *aff'd*, 238 F.3d 153 (2d Cir. 2001). *See also Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 344 (5th Cir. 2004) ("The Convention was designed to 'restore the pre-abduction status quo.'" (quoting *Friedrich*, 78 F.3d at 1064)).
[309] *See e.g.*, *Friedrich*, 78 F.3d at 1068 ("The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest."); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) ("It is not relevant to this Convention exception who is the better parent in the long run, or whether [respondent] had good reason to leave her home in Mexico . . ."). *See also* Text and Legal Analysis, 51 Fed. Reg. 10,510 ("This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."); *Castro v. Martinez*, 872 F. Supp. 2d 546, 556 (W.D. Tex. 2012) (citing Text and Legal Analysis, 51 Fed. Reg. 10,510); *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at *5 (N.D. Tex. Jan. 19, 2011) (stating the grave risk defense is not intended to encompass "situations such as the return to a home where money is in short supply or where educational opportunities are more limited").

famine, or disease," or "**in cases of serious abuse or neglect**, or extraordinary emotional dependence."[310]

Although identified as a scenario triggering the grave risk exception, respondents rarely rely on the argument that the habitual residence is a war zone, and even when the issue is raised courts are reluctant to deny a petition for return based on a finding that the child would be returned to a "zone of war, famine, or disease."[311]

Though "serious abuse or neglect" is a basis to deny return pursuant to the grave risk exception, courts have cited different factors when considering what constitutes abuse or neglect that is serious enough to either pose a grave risk of physical or psychological harm to the child or qualify as an otherwise intolerable situation.

The Second Circuit, in *Blondin v. Dubois,* characterized the grave risk exception as a spectrum:

> [A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.[312]

Similarly, in *Simcox v. Simcox*, the Sixth Circuit identified three broad categories of abuse cases:

> First, there are cases in which the abuse is relatively minor . . . at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect . . . . Third, there are those

[310] *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001) (emphasis added) (quoting *Friedrich*, 78 F.3d at 1069); *see also Silverman v. Silverman*, 338 F.3d 886, 900 (8th Cir. 2003). Note, however, that in a Hague Convention case, a finding of grave risk does not require a finding of child abuse or neglect as defined by state law.

[311] *See Silverman*, 338 F.3d at 901 ("the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel. This is not sufficient to establish a 'zone of war' which puts the children in 'grave risk of physical or psychological harm' under the Convention."); *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996) ("[w]ith respect to Respondent's anxiety and fear about the ongoing tension in the country, it must be noted that she has lived there for a number of years, raised children there for some fourteen years and that her parents have spent extended periods of time there as well."); *Vazquez*, 2011 WL 196164, at *5 (finding that [respondent] failed to establish that returning the child to Mexico would expose her to a grave risk of physical harm based on "spiraling violence and surge in murders in Monterrey" and "specific violent acts that have been committed in the school [the child] attended . . . and in the neighborhood where Petitioner resides.").

[312] *Blondin*, 238 F.3d at 162.

> cases that fall somewhere in the middle, where the abuse is substantially more than minor, but less obviously intolerable. Whether, in these cases, the return of the child would subject it to a "grave risk" of harm or otherwise place it in an "intolerable situation" is a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings[313] that would sufficiently ameliorate the risk of harm to the child caused by its return.[314]

To further underscore the narrowness of the exception, the Second Circuit mandated that, even after concluding that a grave risk of serious abuse or harm exists, a court must inquire into the existence of remedies in the child's country of habitual residence that would protect the child upon his or her return.[315]

Key Points: Spousal Abuse is a Distinct Consideration

- ✓ Child abuse and spousal abuse both pose a grave risk of harm or an otherwise intolerable situation for the child; evidence of either is therefore relevant to the merits of this exception.
- ✓ To deny return under the grave risk exception based on allegations of spousal abuse, the court must find the abuse (1) occurred and (2) creates a grave risk that return would expose the child to physical or psychological harm or an otherwise intolerable situation.

4.1 Past Physical Abuse to the Child

Courts will more readily find a "grave risk" of exposure to harm if there is evidence *the child* has been the target of direct physical or sexual abuse by the petitioner.[316]

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[313] Undertakings are discussed in full, *infra* Part IV, § 4.4.

[314] *Simcox v. Simcox*, 511 F.3d 594, 607-08 (6th Cir. 2007).

[315] *Blondin*, 238 F.3d at 163, n.11 (reviewing district court's application of standard articulated in previous appellate decision); *see also Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999). For further information, see "Undertakings," *infra* Part IV, § 4.4.

[316] *Compare Souratgar v. Lee*, 720 F.3d 96, 104 (2d Cir. 2013) ("The Article 13(b) inquiry is not whether repatriation would place the respondent parent's safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm.") *and Broca v. Giron*, No. 11 CV 5818(SJ)(JMA), 2013 WL 867276, at *5 (E.D.N.Y. Mar. 7, 2013) ("While the record is replete with evidence that her relationship with Petitioner disintegrated amidst physical and psychological incidents of abuse, there exists little to suggest that the same applies to the children."), *aff'd*, 530 F. App'x 46 (2d Cir. 2013), *with Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001) ("[T]he children face an almost certain recurrence of traumatic stress disorder on returning to France because they associate France with their father's abuse and the trauma they suffered as a result.") *and Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 408 (E.D.N.Y. 2005) ("[R]eturning the children to their father's residence during the pendency of custody proceedings would surely expose them to a grave risk of both physical and psychological harm given the abject physical abuse they experienced when living with their father [and] their witnessing their father's abuse of their mother, as well as each other . . . .").

The grave risk exception focuses on future harm.[317] Past abuse indicates a risk of continuing abuse if the child is returned. There is also a risk that return would trigger the trauma of past abuse, exposing the child to psychological harm or an otherwise intolerable situation. These risks are not mutually exclusive; both should be considered when evaluating the 13(b) exception in a case with evidence of past physical abuse.

4.2 Exposure and Co-Occurrence

The grave risk exception requires evidence to support the conclusion of future harm to the child. **Proving future harm, however, does not require evidence of past abuse directly to the child.**[318]

Evidence of past domestic violence against the respondent can, on its own, support a finding under the grave risk exception.[319] Evidence of past domestic violence indicates a risk of exposure to future violence, either in continuation against the battered parent[320] or against the batterer's

[317] *See* Convention at art. 13(b) ("return ***would*** expose the child to physical or psychological harm . . .") (emphasis added). *See also Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) ("The gravity of a risk involves not only the ***probability*** of harm, but also the magnitude of the harm if the probability materializes.") (emphasis added).

[318] *See In re D.T.J.*, 956 F. Supp. 2d 523, 543 (S.D.N.Y. 2013) ("The Court is persuaded that [child] will experience psychological trauma . . . [because] evidence at trial convincingly showed that [father] can be a brutal, violent, jealous and possessive man. It established that, while [mother] resided in [country of habitual residence], [father] repeatedly engaged in horrific acts of violence towards [mother]. These incidents were recalled most vividly by [mother], but [child] recalled a number of them as well."); *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 409 (E.D.N.Y. 2005) ("Even though [child] has yet to be physically abused by her father, and is not suffering from post-traumatic stress disorder, returning her to [country of habitual residence] would also expose her to a grave risk of physical and psychological harm. In respect to physical harm, she is not insulated from the likelihood of future abuse, given [her father's] inability to control his temper, his pattern of domestic abuse and his threats to use the 'small sword' to hurt her."); *see also Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013); *Khan v. Fatima*, 680 F.3d 781, 796 (7th Cir. 2012) ("If the mother's testimony about the father's ungovernable temper and brutal treatment of her was believed, it would support an inference of a grave risk of psychological harm to the child if she continued living with him."); *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570; *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000). *But see Souratgar v. Lee*, 720 F.3d 96, 104 (2d Cir. 2013) (finding that while respondent was subjected to domestic abuse on certain occasions, the incidents were too sporadic or isolated to constitute grave risk and at no time was the child harmed or targeted); *Poliero v. Centenaro*, 373 F. App'x 102, 106 (2d Cir. 2010) (holding that district court did not err in precluding the introduction of evidence relating to petitioner's alleged physical abuse of respondent because whether or not petitioner had engaged in domestic violence was not directly relevant to the question of the habitual residence of the children).

[319] *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 554 (E.D. Pa. 2010) ("Respondent's evidence of spousal abuse compels a finding that the grave risk of harm affirmative defense applies here.").

[320] *See* Douglas A. Brownridge, *Violence against Women Post-Separation*, 11 AGGRESSION AND VIOLENT BEHAVIOR 514, 516-19 (2006) (reviewing studies shows increased risk for both lethal and non-lethal violence post-separation).

future partners.[321] Also, evidence of past domestic violence may be evidence of propensity for direct physical harm to the child.[322]

4.2.1 Relevant Social Science

a. Exposure

Exposure to domestic violence is often defined as witnessing or observing the abuse, which may be understood to mean "direct visual observation of the incident"; however, in social science the definition of child exposure to domestic violence has been expanded to include "multiple experiences of children living in homes where an adult is using physically violent behavior in a pattern of coercion against an intimate partner."[323] Exposure may include hearing the violence and witnessing its aftermath, for example, seeing bruises on a parent's body, moving with the victim parent to a shelter, or becoming directly involved in the violence by intervening in an incident or trying to distract the perpetrator during an incident.[324] Moreover, separation does not necessarily decrease a child's exposure to domestic violence—research suggests that children may witness violence more often after a separation than before.[325]

Research has shown that children who suffer direct abuse or maltreatment and those who are exposed to domestic violence in their households both suffer negative psychological, developmental, emotional, and behavioral problems.[326] Child custody statutes and court rulings in the United States also recognize that exposure to domestic violence against a parent raises grave risks of both psychological and physical harm to the child.[327]

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[321] *See* Lundy Bancroft et al., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS, 197 (2012) ("Post-separation, children run the risk that their father will abuse a new partner, as it is common for batterers to abuse women serially.").

[322] *See Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) ("[B]oth state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser.").

[323] *See* TARYN LINDHORST & JEFFREY L. EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW: THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION, 106-08 (2012).

[324] *See id.* (citing Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCHOL. 339-52 (2003) , Garcia O'Hearn et al., *Mothers' and Fathers' Reports of Children's Reactions to Naturalistic Marital Conflict*, 36 J. OF THE AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 1366-1373 (1997), and Einat Peled, *The Experience of Living with Violence for Preadolescent Children of Battered Women*, 29 YOUTH AND SOCIETY 395-430 (1998)). Please note that this is not to suggest that moving to a shelter is itself the harm, rather it is often a necessary safety measure victims and their children must take due to the perpetration of domestic violence.

[325] *See* Jennifer L. Hardesty & Grace H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, FAM. REL., 55, 200–10 (2006).

[326] *See e.g.*, Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, 1 TRAUMA, VIOLENCE & ABUSE 321 (2000); B.B. ROBBIE ROSSMAN ET. AL., CHILDREN AND INTER-PARENTAL VIOLENCE: THE IMPACT OF EXPOSURE, (2000).

[327] *See e.g.*, N.Y. Dom. Rel. Law § 240(1)(a) (McKinney) (stating that, in fashioning custody orders, "the court *must* consider the effect of such domestic violence upon the best interests of the child" (emphasis added)); *Dean v. Crane*,

Take Note: Abuse Need not Rise to Level Required in Abuse and Neglect Cases

✓ Finding abuse or neglect in a Hague Convention case does not require a finding of abuse or neglect as defined by state law.

Studies confirm that children exposed to domestic violence suffer psychological effects similar to those suffered by children victimized directly. In fact, children victimized by exposure to domestic violence scored as low on emotional health measures as did children who were themselves physically abused.[328] Studies also report an association between exposure to domestic violence and current child problems or later adult problems, even when a child has not been directly abused.[329] For instance, several studies report that children exposed to adult domestic violence exhibit more aggressive and antisocial behaviors, as well as fearful and inhibited behaviors, when compared to non-exposed children.[330] Children who are bystanders to domestic abuse also show lower social competence,[331] poorer academic performance, and are found to show higher than average anxiety, depression, trauma symptoms, and temperament problems than children who were not exposed to family violence.[332]

The magnitude of the impact depends on the degree of violence, extent of exposure, the presence of additional risk factors, such as substance abuse by caregivers, and the existence of characteristics that ameliorate a risk factor or are otherwise associated with a lower likelihood of negative outcomes, such as a protective parent or other adult.

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183 Misc. 2d 255, 260, 702 N.Y.S.2d 544, 548 (Fam. Ct. Kings Cty. 2000) ("There is little question that, if true, such exposure [to acts of serious domestic violence visited upon the mother] places the child's physical and emotional well-being at substantial and immediate risk."); *J.D. v. N.D.*, 170 Misc. 2d 877, 884, 652 N.Y.S.2d 468, 472 (Fam. Ct. Westchester Cty. 1996) ("In the case at bar, both parents are able to provide for the child's physical and material needs. However, a parent's duty involves much more than just clothing, feeding and sheltering a child. The overwhelming evidence of psychological and other forms of abuse inflicted by Petitioner upon the Respondent, the mother of his child, shows that it would not be in the child's best interests to place him in Petitioner's care and custody."); NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, DOMESTIC VIOLENCE: FINDING SAFETY & SUPPORT 28-30 (2014) (discussing negative effects of domestic violence on children).

[328] Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCHOL. 339-52 (2003).

[329] *See* Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. OF INTERPERSONAL VIOLENCE 839-70 (1999); Gayla Margolin, *Effects of Witnessing Violence on Children*, VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 57-101 (1998).

[330] Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence*, 11 VIOLENCE AGAINST WOMEN 115-138, 120 (2005) (citing John W. Fantuzzo et al., *Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children*, 59 J. OF CONSULTING AND CLINICAL PSYCHOL. 258-65 (1991)); H.M. Hughes, *Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims*, 58 AM. J. OF ORTHOPSYCHIATRY 77-90 (1988).

[331] *Id.* (citing Jackie L. Adamson & Ross A. Thompson, *Coping With Interparental Verbal Conflict by Children Exposed to Spouse Abuse and Children from Nonviolent Homes*, 13 J. OF FAM. VIOLENCE 213-32 (1998)).

[332] *Id.*

b. Co-Occurrence

Studies indicate that children exposed to adult domestic violence are at a greater risk of physical harm than children who are not, which is referred to as co-occurrence. Reviews of the co-occurrence of documented child maltreatment in families where adult domestic violence is present have found almost half the families experienced both forms of violence.[333] The majority of studies found a co-occurrence of 30 percent to 60 percent.[334] Thus, children exposed to domestic violence face a higher risk of direct physical or sexual abuse, as well as the psychological harm discussed above.

Co-occurrence is relevant in a Hague Convention case because Article 13(b) specifically requires the court to consider the possibility of future harm. The social science research regarding co-occurrence indicates that a child is at a greater risk of future physical harm in cases involving domestic violence, which may impact the court's analysis under the grave risk exception even when that child has not been the direct target of past physical abuse.[335]

4.3 Intolerable Situation

Article 13(b) gives courts discretion to deny return of a child where there is a grave risk that return would expose the child to physical or psychological harm **or otherwise place the child in an intolerable situation**.[336]

Though Article 13(b) of the Convention expresses two separate exceptions to return—(1) where return presents a grave risk of exposure to harm and (2) where return presents an otherwise intolerable situation—few decisions have parsed out the distinction between these two elements

[333] Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. OF FAM. PSYCHOL. 578-99 (1998).
[334] Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134-54 (1999).
[335] *See Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013) (affirming that past abuse was not required under the grave risk exception and finding that "[t]he evidence presented to the district court supports its finding that [petitioner's] inability to control his temper outbursts presents a significant danger that he will act irrationally towards himself and his children"); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (indicating that under the grave risk exception the court should give weight to petitioner's propensity for violence); *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (relying on credible social science, the court noted "that serial spousal abusers are also likely to be child abusers"); *see also Davies v. Davies*, No. 16 CV 6542 (VB), 2017 WL 361556, at *18 (S.D.N.Y. Jan. 25, 2017) ("In sum, the evidence at trial showed beyond any doubt that [father's] behavior towards both [mother] and [child], and in [child's] presence, was extremely violent, unpredictable, outrageous, menacing, and dangerous. It was a pervasive, manipulative violence that left few physical scars, but which was nonetheless severely damaging to [mother], and runs an almost certain risk of continuing to negatively affect [child].").
[336] Convention at art. 13(b).

of the 13(b) exception.[337] Instead, courts have largely found that where grave risk of exposure to harm exists, return would also present an intolerable situation.

Conflation of the grave risk and intolerable situation exceptions may derive, at least in part, from the U.S. State Department's Text and Legal Analysis:

> "[I]ntolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.[338]

At least one federal district court has acknowledged a distinction between risk of harm and an intolerable situation.[339] However, even in that case, both of the 13(b) exceptions were established, with the court separately finding that (1) returning the petitioner's two older children would pose a grave risk of harm due to prior child and spousal abuse, (2) separating those children from their mother and a younger sibling would constitute an intolerable situation, and (3) separating the youngest child from his mother and siblings would likewise constitute an intolerable situation.[340]

4.4 Ameliorative Measures and the Court's Discretion

If the court exercises discretion to return the child despite the existence of a grave risk or intolerable situation, the court may consider whether the petitioner or the Requesting State can implement measures to ensure the child's safe return. Those measures include assessing the Requested State's ability to protect the child with restraining or protective orders, conditioning return on certain agreements or concessions by the petitioning party ("undertakings"), and "mirror orders" to ensure the country of habitual residence will enforce the petitioning party's promises.[341]

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[337] *See e.g.*, *Blondin v. Dubois*, 19 F. Supp. 2d 123, 128 (S.D.N.Y. 1998) (finding that return "would present a grave risk of psychological harm or an intolerable situation," but not distinguishing between the two), *vacated*, 189 F.3d 240 (2d Cir. 1999).
[338] Text and Legal Analysis, *supra* 51 Fed. Reg. 10,510.
[339] *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1061 (E.D. Wash. 2001).
[340] *Id.*
[341] See § 4.4.2, *infra*, for more information on undertakings and mirror orders.

Jurisdictions differ as to the scope of a court's discretion once a respondent has proven the grave risk exception. Some courts have held that an inquiry into ameliorative measures—examination of the Requested State's ability to protect the children, alternative care arrangements, and other undertakings that would facilitate safe return, as well as the ability of the Requested State's authorities to enforce any such arrangement—is required before a court can deny return. Jurisdictions requiring an analysis of ameliorative measures, however, vary in the extent of the analysis required. Other courts have held that while ameliorative measures may be utilized by a court, inquiry and the extent of the analysis is also at the court's discretion.

Ameliorative measures that take effect after the child has been returned are essentially unenforceable by U.S. courts.

4.4.1 Requested State's Ability to Protect Child

In *Friedrich v. Friedrich*, the Sixth Circuit *in dicta* narrowed discretion to deny return under Article 13(b), explaining that "there is a grave risk of harm in cases of serious abuse or neglect when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[342] Some courts have followed *Friedrich*, citing this language and holding that return may be denied only if the country of habitual residence is not willing or able to protect the child.[343]

In the first appeal of *Blondin v. Dubois*, the Second Circuit remanded the case "for further consideration of the range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm."[344] The appellate court instructed the lower court to consider ameliorative measures available through the French government, including alternate placement options.[345] On remand, the district court found France offered resources to protect the children from future physical harm; however, due to severe abuse they had previously suffered at the hands of their father while residing in France and the progress the children were making in their settled environment in the United States, return to France under any circumstances would cause severe psychological harm.[346] The appellate court affirmed.[347]

Although the ultimate decision in *Blondin* was to deny return of the children to France, cases following the first *Blondin* appeal are often cited to support a two-pronged approach to the Article 13(b) exception, requiring children be returned unless the court finds that (1) return

[342] *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).
[343] *See e.g.*, *In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006) (requiring respondent to establish on remand that the courts in Requested State cannot or will not protect the child).
[344] *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999), *aff'd*, 238 F.3d 153 (2d Cir. 2001).
[345] *Id.*
[346] *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 298 (S.D.N.Y. 2000), *aff'd sub nom. Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001) .
[347] *Blondin*, 238 F.3d at 161.

would pose a grave risk of exposure to physical or psychological harm or otherwise place the child in an intolerable situation and (2) the country of habitual residence is unwilling or unable to protect the child from that harm.[348]

Take Note: Additional Considerations

- ✓ Courts should consider the possible psychological harm to a child who, after experiencing severe emotional distress or trauma, is then separated from his or her protective parent as a result of return.[349]
- ✓ The court should also consider whether there would be risk to *the respondent* following the child's return. If so, the court should evaluate whether there would be a corresponding risk that the child would be exposed to physical or psychological harm and how that corresponding risk might impact the efficacy of any ameliorative measures.[350]
- ✓ Courts may look to the laws of the habitual residence when determining whether return would be safe; however, the touchstone is whether the children will be protected "in fact, and not just in legal theory."[351]
- ✓ A number of courts in other jurisdictions, however, refuse to consider the ability of the country of habitual residence to ameliorate risk if an Article 13(b) exception has been established.[352]

4.4.2 Undertakings and Mirror Orders

An undertaking is a commitment from the petitioner. In cases across international borders, undertakings before the child is returned—*e.g.*, payment of transportation costs, dismissal of criminal charges—can be enforced because return may be contingent upon such undertakings. Undertakings that are implemented after return, however, are unenforceable by the U.S. court. Thus, undertakings after return are taken in good faith because on their own there is no

[348] *See e.g.*, *In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006). *But see Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 557 (E.D. Pa. 2010) ("Similar to *Blondin*, in light of the sole, unimpeached and uncontroverted testimony of Dr. Davison that [the child's] return to Cyprus would trigger post-traumatic stress disorder, there is no need for the Court to consider alternative living arrangements or reach out to the Cyprus authorities for their input.").

[349] *See* J. Erickson & A. Henderson, *Diverging Realities: Abused Women and Their Children*, EMPOWERING SURVIVORS OF ABUSE: HEALTH CARE FOR BATTERED WOMEN AND THEIR CHILDREN, 138-55 (1998).

[350] *See Abbott v. Abbott*, 560 U.S. 1, 22 (2010).

[351] *Van De Sande v. Van De Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as domestic violence relations.").

[352] *See, e.g.*, *Danaipour v. McLarey*, 386 F.3d 289, 303-04 (1st Cir. 2004) ("The district court['s] . . . finding of the existence of sexual abuse and that the return of the children to Sweden would result in a grave risk of psychological harm was adequate to satisfy the Article 13(b) exception, and no further inquiry into remedies available to the Swedish courts was required.").

mechanism for enforcement. The court can, however, ask the petitioner to make a good faith effort towards complying with the undertakings to which he or she has agreed.

A mirror order is a foreign court order from the country of habitual residence that mirrors a U.S. order. The purpose of a mirror order is to ensure post-return undertakings are enforceable. However, mirror orders are not enforceable by U.S. courts, and the enforceability of such orders will be up to the courts in the habitual residence.

Neither the Convention nor ICARA address undertakings or mirror orders. The use of undertakings and mirror orders in Hague Convention cases has developed through case law and has no statutory foundation. The use of undertakings to ensure that the process of return is handled safely and appropriately is good practice when done properly. The Second Circuit has expressly recognized the availability of undertakings to "alleviate specific dangers that might otherwise justify denial of the return petition."[353] However, relying on undertakings to ensure a child's safety from domestic violence is not without risk because a court's jurisdiction over a Hague Convention case ends when the child is either returned to his or her habitual residence or return is denied.

To avoid overstepping jurisdictional authority, undertakings should be limited to the circumstances attending the return of the child and should not extend to the child's living conditions in the habitual residence country thereafter. Similar jurisdictional concerns exist with mirror orders.

Take Note: Safety without Undertakings

✓ The court can deny return if it is concerned that the child cannot be returned safely.

Although the court cannot order the petitioner to do anything outside of the United States, courts inclined to use ameliorative measures can ask the petitioner to agree to provisions that would help ensure the safety of the respondent and child upon return. These provisions include, but are not limited to:

- An agreed restraining or protective order;
- Withdrawal of any criminal charges against the respondent to ensure the respondent may return and care for the child without arrest;

[353] *Blondin v. Dubois*, 238 F.3d 153, n.8 (2d Cir. 2001). Other courts have gone further and recognized that, even when a grave risk of harm is not present, undertakings should be used "to ensure that a potential harm does not manifest when a child returns to his or her country of habitual residence." *Krefter v. Wills*, 623 F. Supp. 2d 125, 138 (D. Ma. 2009). *See also Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (if "a qualified return order would be detrimental," "the court should investigate the adequacy of undertakings . . . to ensure that [the child] does not suffer short term harm").

- Monetary arrangements for the petitioner to provide support or housing for the respondent and child upon return; or
- Making arrangement or paying for return transportation.

a. Undertakings and Domestic Violence

Domestic violence is relevant when determining whether undertakings are appropriate. Undertakings can be difficult to enforce, particularly across international borders and in situations involving domestic violence: "[I]n cases of child abuse, the balance may shift against return plus conditions."[354] Accordingly, courts should be mindful and wary about the adequacy of undertakings to address domestic violence concerns. In *Blondin*, the Second Circuit considered that even though the petitioner agreed to several undertakings and the French authorities would be willing to enforce these arrangements, the children would still face an almost certain recurrence of traumatic stress disorder on returning to France because they associated France with their father's abuse.[355]

The effectiveness of protective measures across international borders is highly dependent on the petitioner's willingness to make a good faith effort to follow through on undertakings. Courts should therefore consider a history of refusing to follow court orders, particularly those involving civil protective orders or criminal domestic violence, as weighing against the adequacy of those measures to address safety concerns. For example, in *Reyes Olguin v. Cruz Santana*, the district court in the Eastern District of New York found that, given the petitioner's record of reverting to his earlier habits of abusing alcohol and beating the respondent, there was no reason to think that he would not resume his abusive behavior if the children were repatriated, and there were no significant ameliorative measures available under the circumstances of the case that would mitigate the grave risk that the children would be exposed to psychological harm if repatriated.[356]

However, a district court in the Southern District has also considered undertakings in the context of domestic violence and found that, where undertakings did appear to be sufficient and the petitioner did appear to be willing to make good faith efforts, the risk of harm to the child was not grave.[357]

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[354] *See Van De Sande v. Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005). *See also Simcox v. Simcox*, 511 F.3d 594, 610-11 (6th Cir. 2007) (remanding for the lower court to consider appropriate undertakings but acknowledging that "no such arrangement" may be feasible in which case the petition should be denied).
[355] *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001).
[356] *Reyes Olguin v. Cruz Santana,* No. 03 CV 6299 (JG), 2005 WL 67094, at *12 (E.D.N.Y. 2005). *See also Walsh v. Walsh*, 221 F.3d 204, 220-21 (1st Cir. 2000).
[357] *See Rial v. Rijo*, No. 1:10-cv-01578-RJH, 2010 WL 1643995, at *3 (S.D.N.Y. Apr. 23, 2010) (although evidence demonstrated that petitioner had been verbally, and sometimes physically, abusive to the respondent, the petitioner's

In *Baran*, the Eleventh Circuit acknowledged that undertakings could be useful in some situations, but cautioned against using them where parental violence is alleged: "When grave risk of harm to a child exists as a result of domestic abuse . . . courts have been increasingly wary of ordering undertakings to safeguard the children."[358] Attorneys in Hague Convention cases have described undertakings as being of limited usefulness, and mirror orders, although preferable to undertakings alone, as seldom enforced.[359]

Few studies have been conducted to evaluate the degree to which undertakings or mirror orders are enforced. The Hague Secretariat[360] has not conducted follow-up studies on this subject. Reunite International (a UK based charity specializing in international parental child abduction) conducted a study of 22 families with 33 children located in the United Kingdom and returned to other countries in Europe following Hague Convention proceedings.[361] Twelve of the cases involved court-stipulated undertakings that were to be implemented upon return of the child, half of which involved protecting the child from violence.[362] In two-thirds of these cases, court-stipulated undertakings were not implemented in the other country—including all six cases in which the undertakings focused on protecting the child.[363] Reunite International concluded in their study of European cases that, "although the giving of undertakings by the applicant parent is often considered as a token of good faith by the courts of the requested State, the frequent failure to honor such undertakings must call into question whether such an assumption is supportable."[364] This study also found that mirror orders provided no greater guarantee of enforceability.[365] A Department of Justice funded study (*Multiple Perspectives*) of 22[366] mother respondents and 23 attorneys (15 representing mother respondents and 8 representing father petitioners) in Hague cases adjudicated in U.S. courts found that none of the undertakings ordered by U.S. judges were enforced on return of the child.[367] While both of these studies are of

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behavior was not so egregious as to suggest he would not comply and the court believed undertakings would ensure the child's safe and speedy return to Spain).

[358] *Baran v. Beaty*, 526 F.3d 1340, 1351 (11th Cir. 2008).

[359] Edleson et al., *Multiple Perspectives*, *supra* note 178, at 255.

[360] The Permanent Bureau is a multinational Secretariat located in The Hague. Activities of the Hague Conference on Private International Law is coordinated by the Secretariat, including carrying out the basic research required for any subject taken up by the Conference and engaging in activities that support the effective implementation and operations of the Conventions.

[361] Reunite Int'l Child Abduction Centre, *The Outcomes for Children Returned Following an Abduction*, 30-34 (2003) *available at* http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf [hereinafter *Outcomes for Children*].

[362] *Id.*

[363] *Id.*

[364] *Id.* at 6.

[365] *Id.*

[366] Although both this study and the Reunite International study involved 22 participants (22 mothers in Multiple Perspectives and 22 families in Reunite International) these studies are not related and the similarity is a coincidence.

[367] Edleson et al., *Multiple Perspectives*, *supra* note 178, at 169, 309.

small samples, they both have independently established that undertakings are seldom enforced on return of the child. No other data is available to contradict these two independent findings in two different countries.

The failure of mirror orders and undertakings to provide more than theoretical protections internationally in cases involving domestic violence is significant because their provisions are intended to protect children where return would otherwise present a grave risk or intolerable situation. Courts that order return based on presumed protections of ameliorative measures should consider the likelihood of their actual effectiveness before relying on such measures to mitigate an established risk of harm.

§ 5.00 Article 13: Mature Child's Objection to Return

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 views."[368] The respondent must prove this exception by a preponderance of the evidence.[369]

The Convention does not indicate at what age a child becomes sufficiently mature for his or her view to be taken into account, nor does it specify ages at which the child would be considered too young to trigger consideration of the exception.[370]

In New York, courts hear from children in a variety of ways, including through: (i) testimony via video conferencing,[371] (ii) appointing an independent client-directed lawyer to represent the child's perspective,[372] (iii) interviews *in camera*,[373] and (iv) reports submitted to a court by a child's guardian ad litem representing the concerns of the child.[374]

[368] Convention at art. 13.
[369] 22 U.S.C.A. § 9003(e)(2)(B).
[370] *See Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001).
[371] *See In re Arlenys B.*, 70 A.D.3d 598, 896 N.Y.S.2d 321 (N.Y. App. Div. 1st Dep't 2010).
[372] *See* Linda D. Elrod, *Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L.REV. 663, 670 (2011) [hereinafter Elrod, *Please Let Me Stay*].
[373] *See Haimdas v. Haimdas*, 720 F. Supp. 2d 183 (E.D.N.Y. 2010), *aff'd*, 401 F. App'x 567 (2d Cir. 2010).
[374] *See Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634 (E.D.N.Y. 2000).

Take Note: Limit to what is Relevant to Convention

- ✓ Although the court may utilize any of the above as a means of hearing from a child in a Hague Convention case, this evidence should be limited to matters that are relevant under the Convention.[375]
- ✓ The court must not extend the inquiry into a best interests analysis that may be appropriate in a custody proceeding, but not in a Hague Convention case.

The mature child exception has multiple prongs. First, the court must determine whether the child objects to returning to the country of habitual residence, and, second, if the child does object, whether the child is "of sufficient age and maturity" for the court to afford weight to the child's preference.[376] If the court finds both prongs support consideration of the child's objections, the court must determine what weight the child's objections will carry and whether to deny the petition for return on that basis.[377]

5.1 Age and Level of Maturity

Courts have broad discretion in determining the sufficiency of the child's age and maturity and the extent to which a child's preference is viewed conclusively.

Courts vary greatly in determining sufficient age of maturity to consider a child's views.

In *Tann v. Bennett*, the Second Circuit affirmed the dismissal of a petition by a mother for return of her son to Northern Ireland, finding that the wishes of the son to remain in New York with his father and stepmother were properly respected where the 13-year-old was intelligent and appeared to be sufficiently mature for his desires to be appropriately considered, and the son expressed a specific objection to returning to Northern Ireland by stating that he did not always feel safe there, would feel "really bad" if returned, and might hurt himself or others if forced to return.[378]

The Western District of Arkansas found children ages 11, 13, and 15 sufficiently mature after they stated their wishes both in chambers and through letters to the court.[379] The court also noted that, even if the youngest had been too young or immature to state her wishes, the bond between

[375] The ways in which New York state courts apply the best interests analysis in family court matters are not directly applicable in Hague Convention cases. They may, however, provide some guidance as to the ways in which a court can hear from a child where appropriate under the Convention.
[376] Elrod, *Please Let Me Stay*, at 667.
[377] *Id.*
[378] *Tann v. Bennett*, 648 F. App'x 146 (2d Cir. 2016).
[379] *Kofler v. Kofler*, Civ No. 07-5040, 2007 WL 2081712, at *8-9 (W.D. Ark. July 18, 2007).

the children would have supported allowing the exception to apply to her as well.[380] In another case, the Ninth Circuit refused to find the child had reached an age of maturity when he had not yet completed kindergarten.[381]

Some courts, however, narrowly construe the defense. In *Tahan v. Duquette*, for example, the intermediate appellate court held the standard did not apply to a nine-year-old as a matter of law.[382]

In *England v. England*, the Fifth Circuit held that a 13-year-old child was not sufficiently mature because "[s]he ha[d] been diagnosed with Attention Deficit Disorder, ha[d] learning disabilities, [took] Ritalin regularly, and [was], not surprisingly, scared and confused by the circumstances producing this litigation."[383]

Key Point: Level of Maturity Depends on the Child

- ✓ A child's age is not determinative of maturity. Rather, determination of a child's level of maturity requires an individualized, fact-specific inquiry.

5.2 Weight of Child's Objection

The court can deny a petition based solely on the objection of a mature child.[384] But if the court denies return based *solely* on a mature child's objection, a "stricter standard" must be applied to consideration of the child's wishes than would apply if more than one exception has been established: for example, if the court is considering the objections of a mature child who has also been in the new country for over a year and is well-settled.[385] A child who is too young or immature to have his or her objections considered under the mature child exception alone may nevertheless have his or her objections considered "as one part of a broader analysis under Article 13(b)."[386]

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[380] *Id.* at *9; *cf. McManus v. McManus*, 354 F. Supp. 2d 62, 72 (D. Mass. 2005) (relying in part on the close relationship of younger siblings to older siblings in deciding to allow younger children to remain in the United States).
[381] *Holder v. Holder*, 392 F.3d 1009, 1017 (9th Cir. 2004).
[382] *Tahan v. Duquette*, 259 N.J. Super. 328, 335 (App. Div. 1992).
[383] *See England v. England*, 234 F.3d 268, 273 (5th Cir. 2000).
[384] *Tann v. Bennett*, 648 F. App'x 146 (2d Cir. 2016) (reiterating that precedent in the Second Circuit instructs, without qualification, that a court may refuse repatriation solely on the basis of a considered objection to returning by a sufficiently mature child); *see also De Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007) (quoting second *Blondin* appeal, 238 F.3d 153, 166 (2d Cir. 2001)).
[385] *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001) ("[I]t stands to reason that the standard for considering a child's testimony as one part of a broader analysis under Article 13(b) would not be as strict as the standard for relying solely on a child's objections to deny repatriation under Article 13."); *see also De Silva*, 481 F.3d at 1286; *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 278 (3d Cir. 2007).
[386] *Blondin*, 238 F.3d at 166 (finding an 8-year-old's views were properly considered as part of the analysis under the grave risk exception; the court rejected drawing arbitrary lines due to age and noted that each child's

The Ninth Circuit, in addressing maturity and weight of a child's objection, noted the importance of a court ensuring a child's statements reflect his or her "own, considered views."[387] Relatedly, the Fifth Circuit has cautioned that a child's objection may be afforded little if any weight if it is found to be the product of undue influence.[388] In cases of domestic violence, courts should consider whether domestic violence or child abuse bear on the child's ability to develop and articulate considered views[389] or whether any fear of the abuser has lead the child to give false statements.[390]

5.3 Relevant Evidence

Evidence must be presented to establish the child's maturity *and* the child's objection.

Testimony relating to the child's ability to make reasoned choices and to understand the consequences of his or her decisions from adults who have a close relationship to the child—such as teachers, coaches, pastors, caretakers, or relatives—is relevant to the child's maturity. The child's ability to articulate a preference and the logic the child uses in determining his or her preference, as well as the child's emotional, cognitive, and developmental level, may also be relevant to determining the child's level of maturity.[391]

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circumstances should be considered individually); *Poliero v. Centenaro*, No. 09-CV-2682 (RRM)(CLP), 2009 WL 2947193, at *21 (E.D.N.Y. Sept. 11, 2009), *aff'd*, 373 F. App'x 102 (2d Cir. 2010).

[387] *Gaudin v. Remis*, 415 F.3d 1028, 1037 n.3 (9th Cir. 2005).

[388] *E.g.*, *Dietz v. Dietz*, 349 F. App'x 930, 935 (5th Cir. 2009) ("'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.'" (citations omitted)).

[389] *See e.g.*, *Wissink v. Wissink*, 301 A.D.2d 36, 749 N.Y.S.2d 550 (N.Y. App. Div. 2d Dep't 2002), as discussed in Thomas E. Hornsby (Judge, ret.), *Do Judges Adequately Address the Causes and Impacts of Violence in Children's Lives in Deciding Contested Custody Cases*, 4 FAM. & INTIMATE PARTNER VIOLENCE Q. 209, 232-33 (2012) (discussing how the abuser in *Wissink* bonded with the child, and even enlisted her in physically abusing the mother, and that while the child preferred the abusive father's custody that did not mean the child should remain in his home). *See also State v. Moran*, 728 P.2d 248, 253-54 (Ariz. 1986) (allowing expert testimony to explain why an abused child would say she wants to return to her abuser's home); John Meyers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. OF FAM. L. 1, 18 (1989/1990) (arguing that courts should be skeptical if children prefer the batterer, as it may well be a psychological coping mechanism); Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 J. OF CHILD ABUSE & NEGLECT 787, 803 (2010) (explaining that school age children may blame themselves for abuse in the home and may try to rationalize the abuser's behavior; most will hide their "secret" from everyone).

[390] *See Noergaard v. Noergaard*, 197 Cal. Rptr. 3d 546, 560 (Ct. App. 2015) (holding trial court was required to afford respondent opportunity to present evidence where petitioner alleged, among other things, that petitioner had "exercised his position as an alleged custodial abuser to manipulate [child's] testimony" and the child's recanted allegation of abuse was at least in part because of her fear that her mother, the respondent, would be incarcerated if she told the court about the abuse).

[391] Elrod, *Please Let Me Stay*, *supra* note 372, at 679.

As noted above, the court may hear from the child in a manner of ways, including directly through testimony, which can be done *in camera*. This will allow the court to assess the child's level of maturity and may also establish the basis of the child's objections.

A court may also hear expert testimony as to a child's maturity level.[392]

Key Points: No Bright-Line Rules

- ✓ There are no bright-line rules on whether or at what age a child's testimony or other input may be considered by the court in a Hague Convention case.[393]
- ✓ The law does not mandate that the court take testimony from the child to determine his or her objection to return or level of maturity.
- ✓ If the court chooses to take testimony from the child, it should do so in the least traumatic manner.

§ 6.00 Article 20: Human Rights and Fundamental Freedoms

Finally, courts may refuse to return a child if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[394]

The respondent must prove by clear and convincing evidence that return of the child would violate fundamental principles of human rights of the United States.[395] In identifying "fundamental principles," the court can look at the range of domestic and international laws, including treaties, to which the United States is a party. The respondent must show that the "fundamental principle" not only exists in the United States, but also has international recognition, and that it is invoked and applied in wholly domestic matters in the United States and not only raised as an exception under the Convention.[396]

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[392] *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 195 (E.D.N.Y. 2010) (noting that expert in clinical and forensic psychology opined that "neither A.H. nor S.H. has attained a sufficient age and degree of maturity to be capable of forming a reasonable and rational opinion about whether to return to England or stay in the United States"), *aff'd*, 401 F. App'x 567 (2d Cir. 2010); *Andreopoulos v. Koutroulos*, Civil Action No. 09-cv-00996-WYD-KMT, 2009 WL 1850928, at *9 (D. Colo. June 29, 2009) (discussing therapist's testimony that the child had demonstrated age-appropriate maturity and morality levels). *But see Dietz v. Dietz*, Civil Action No. 07–1398, 2008 WL 4280030, *27-28 (W.D. La. Sept. 17, 2008) (declining to accept psychologist's testimony in determining whether either the grave risk of harm or mature child exceptions applied), *aff'd*, 349 F. App'x 930 (5th Cir. 2009).

[393] *See* Pérez-Vera, Explanatory Report at ¶ 30. *See also Blondin v. Dubois*, 238 F.3d 153, 167 (2d Cir. 2001).

[394] Convention at art. 20.

[395] 22 U.S.C.A. § 9003(e)(2)(A).

[396] Pérez-Vera, Explanatory Report at ¶ 118.

One court rejected this defense based on the absence of "clear evidence that the rights of the [parties] or, more importantly, the rights of the minor children, would not be protected in Mexico."[397]

The U.S. State Department maintains that Article 20 was meant to be "restrictively interpreted and applied" on the "rare occasion that return of a child **would utterly shock the conscience** of the court or **offend all notions of due process**."[398] Courts that have ruled against application of the Article 20 defense have cited the U.S. State Department's analysis to support a strict reading of Article 20.[399]

[397] *March v. Levine*, 136 F. Supp. 2d 831, 855 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001).
[398] Text and Legal Analysis, 51 Fed. Reg. 10,510-10,511. *See also Tokic v. Tokic*, CIVIL ACTION NO. 4:16-CV-1387, 2016 WL 4046801, at *9 (S.D. Tex. July 27, 2016) (internal citations omitted).
[399] *See, e.g.*, *Tokic*, 2016 WL 4046801, at *9; *Escaf v. Rodriquez*, 200 F. Supp. 2d 603, 614 (E.D. Va. 2002), *aff'd*, 52 F. App'x 207 (4th Cir. 2002); *Aldinger v. Segler*, 263 F. Supp. 2d 284, 290 (D.P.R. 2003).

PART V. CASE NOTES

This section provides a review of relevant case law, arranged by subject matter and court. It is not an exhaustive list of Hague Convention cases; rather, it serves to highlight frequently cited cases, as well as Second Circuit and New York State Court Hague Convention decisions.

Procedure: Discovery, Evidence, and the Evidentiary Hearing

National

West v. Dobrev, 735 F.3d 921 (10th Cir. 2013): The court, citing Article 11, found the trial court had discretion to determine procedures necessary under the Convention, including right to discovery or an evidentiary hearing. *Id.* at 929. The court also noted the respondent in this case had the opportunity to challenge the petitioner's assertion regarding the child's habitual residence but failed to do so. *Id.* at 930.

Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006): The Third Circuit held the district court properly applied the Federal Rules of Evidence, admitting hearsay testimony that fell under an exception and was properly limited. *Id.* at 289.

Van de Sande v. Van de Sande, 431 F.3d 567 (7th Cir. 2005): After the lower court granted summary judgment for the children's return, the Seventh Circuit held that the respondent had produced sufficient evidence of grave risk of harm and remanded the case for a hearing on the return issue: "[Respondent] presented at the summary judgment stage sufficient evidence of a grave risk of harm to her children, and the adequacy of conditions that would protect the children if they were returned to their father's country is sufficiently in doubt, to necessitate an evidentiary hearing in order to explore these issues fully." *Id.* at 572.

Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004): The Ninth Circuit upheld a district court's decision to utilize a magistrate judge to handle the evidentiary hearing and issue a report and recommendation on the matter. *Id.* at 1021-22.

March v. Levine, 249 F.3d 462 (6th Cir. 2001): The Sixth Circuit upheld the district court's decision to resolve the case without "resorting to a full trial on the merits or a plenary evidentiary hearing." *Id.* at 474 (quoting the lower court's decision, *March v. Levine*, 136 F. Supp. 2d 831 (M.D. Tenn. 2000)). The court agreed with the lower court's ruling that neither the Convention nor ICARA requires discovery or an evidentiary hearing and observed that Hague Convention cases are appropriate for resolution by summary judgment. *Id.* It should be noted, however, that even though the respondents argued on appeal that they should have been allowed to conduct discovery and have an evidentiary hearing to further develop their arguments pursuant to the treaty exceptions, due to procedural issues regarding their motion for discovery, the appellate court only considered the matters of discovery and an evidentiary hearing on the issue of habitual residence. *Id.* at 473. In addition, despite resolving the case on summary judgment without

discovery or an evidentiary hearing, the lower court admitted a "voluminous amount of evidence into the record in conjunction with the parties' briefs and independently sought information under the terms of the treaty." *Id.* at 468. In addition, with the assistance of a licensed clinical psychologist, both children were heard from by the court *in camera*. *Id.*

Avendano v. Smith, No. Civ. 11-0556, 2011 WL 3503330 (D.N.M. Aug. 1, 2011): The court reasoned that ICARA section 9005, which permits admission of documents attached or related to the petition without authentication, supports a finding that the Federal Rules of Evidence apply to Hague Convention cases because section 9005 carves out an exception that would not be necessary if the rules did not apply. *Id.*, at *1.

Velez v. Mitsak, 89 S.W.3d 73 (Tex. App. 2002): The court held the respondent was entitled to challenge elements of the petitioner's *prima facie* case and to be heard by the court on the defenses she raised. "It was surely not contemplated by the drafters of the Convention that the provision requiring contracting states to use the most expeditious procedures available to implement the objectives of the Convention would override a party's right to present evidence on possible defenses." *Id.* at 84.

Habitual Residence: The Date of Removal or Retention

National

Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006): The court declined to determine whether a child can be wrongfully retained without petitioner unequivocally communicating desire to have the child returned, and found that the petitioner had "clearly communicated her opposition" to the child remaining in the United States prior to filing petition for return, thereby trigging wrongful retention. *Id.* at 290.

Baxter v. Baxter, 423 F.3d 363 (3d Cir. 2005): The court distinguished between removal (the circumstances of departure) and retention (the decision to remain permanently). *Id.* at 369. The court concluded the lower court focused too narrowly by considering only the circumstances of departure and not the respondent's decision to remain in the United States beyond the petitioner's consent. *Id.*

Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001): The Ninth Circuit affirmed the lower court's determination that the date of wrongful retention was "the moment . . . when [respondent] asked the Los Angeles County Superior Court to grant her custody of [the children]." *Id*. at 1070.

Toren v. Toren, 191 F.3d 23 (1st Cir. 1999): The court found that the date of retention did not occur until the agreed upon time the respondent was to return the children had passed, even though the respondent had clearly communicated her intent not to return the children to Israel by filing for divorce and custody in the United States before the planned date of return. *Id.* at 28.

De La Vera v. Holguin, Civil Action No. 14-4372(MAS)(TJB), 2014 WL 4979854 (D.N.J. Oct. 3, 2014): "In determining the date of a wrongful retention, the Third Circuit has agreed that '[t]he wrongful retention does not begin until the noncustodial parent . . . *clearly* communicates her desire to regain custody and asserts her parental right to have [her child] live with her.'" *Id.*, at *6 (quoting *Karkkainen*, 445 F.3d at 290).

Determining Habitual Residence

New York

Hollis v. O'Driscoll, 739 F.3d 108 (2d Cir. 2014): The court affirmed the grant of a petition by a father to return his daughter back to New Zealand finding that: (1) lack of stable accommodations after parents separated did not affect clear establishment of their habitual residence in New Zealand, where parents had lived for approximately nine months prior to the child's birth and for first six months of the child's life, and they considered New Zealand home; (2) the parents' shared intent at time of removal was for mother to bring the child to New York for no longer than five months; and (3) the child's one-year relationship in New York with a nanny and enrollment in weekly play group did not amount to "acclimation." *Id.* at 112-13. A significant factor in determining shared intent was an email from the mother stating her intent to bring the child to New York for no longer than five months, indicating that the stay was temporary. *Id.* at 112.

Mota v. Castillo, 692 F.3d 108 (2d Cir. 2012): The court found that a father's retention of his daughter in the U.S. was wrongful because Mexico was the daughter's habitual residence, and because mother would have exercised rights to maintain physical custody under Mexican law but for the wrongful retention. *Id.* at 113-15. The court reiterated that the primary consideration in determining a child's habitual residence is the shared intention of the child's parents at the latest time that their intent was shared. *Id.* Because the mother's consent to her daughter's relocation from Mexico to the U.S. was conditioned upon her own ability to join the father in New York, failure of that condition annulled mother's consent. *Id.* at 117.

Guzzo v. Cristofano, 719 F.3d 100 (2d Cir. 2013): The court dismissed a father's appeal of the Southern District's dismissal of his petition to return his child to Italy, affirming that even if the child was previously habitually resident in Italy, the child's habitual residence had changed to the U.S. after the parties reached a settlement agreement. *Id.* at 103, 110. The agreement demonstrated the parents' shared intent for the child, who was then less than three years old and had been living with the mother in New York for several months, to live primarily in New York. *Id.* at 110. The parents had attempted to reconcile in Italy but the mother testified that her willingness to attempt a reconciliation was clearly premised on the understanding that, should the reconciliation prove unsuccessful, the parties would continue to abide by the terms of the separation agreement. *Id.* at 111.

Poliero v. Centenaro, 373 F. App'x 102 (2d Cir. 2010): The court affirmed the grant of a petition to return the children back to Italy finding that (1) the mother and father did not have shared intent to abandon Italy as habitual residence of the children where parties did not attempt to sell family home in Italy, maintained personal belongings in Italy, leased apartments in New York to coincide with the children's school year and maintained continuous contact with Italy, and father purchased airline tickets for the entire family to return to Italy; and (2) the children had not acclimatized to the U.S., though they had adjusted well to living in New York and expressed some preference for remaining in the U.S., they had maintained significant connections with Italy throughout their stay in the U.S., returned to Italy for lengthy periods of time at vacations, and remained in contact with friends and relatives there. *Id.* at 105-06.

Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005): The court held that when the child has moved to a new location and the parents intend that location to be the child's habitual residence, that location becomes the child's habitual residence if the child has acclimatized to the location. *Id.* at 134. The court further held the opposite is true: if the child moves to a new location but the parents do not intend his or her habitual residence to change, the child's habitual residence has not changed unless "the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted." *Id.*

Squicciarini v. Oreiro, 99 A.D.3d 605, 953 N.Y.S.2d 182 (N.Y. App. Div. 1st Dep't 2012): The court found that the mother, a United States citizen who shared custody of children with Italian father, had wrongfully removed children from their "habitual residence," where mother had left Italy with children and relocated to New York without father's knowledge or consent, and children had lived their entire lives in Italy. *Id.* at 606, 182.

MG v. WZ, 46 Misc. 3d 372, 998 N.Y.S.2d 563 (N.Y. Fam. Ct. Bronx Cty. 2014): The court found that the child's habitual residence was the U.S., precluding relief on the father's petition for return of the child to the Dominican Republic. *Id.* at 380, 563. The last time the parents shared their intent for the child's place of residence was when they conditionally agreed that it would be in the U.S., based on whether the child was granted permanent residency and was adjusting to and enjoying life in U.S., and those conditions, in fact, had occurred. *Id.*

National

Murphy v. Sloan, 764 F.3d 1144 (9th Cir. 2014): The court described the Ninth Circuit's approach to habitual residence as "tak[ing] into account the shared, settled intent of the parents and then ask[ing] whether there has been sufficient acclimatization of the child to trump this intent." *Id.* at 1150.

Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012): The court adopted the "last shared intent" approach and held that the habitual residence inquiry should begin with the parents' intent

regarding the child's residence, particularly when the child is very young. *Id.* at 310. "We join the majority of circuits that 'have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence.' . . . This approach does not ignore the child's experience, but rather gives greater weight to the parents' subjective intentions relative to the child's age. For example, parents' intentions should be dispositive where, as here, the child is so young that 'he or she cannot possibly decide the issue of residency.' . . . In such cases, the threshold test is whether both parents intended for the child to 'abandon the [habitual residence] left behind.'" *Id.* at 310-11 (internal citations omitted).

Papakosmas v. Papakosmas, 483 F.3d 617 (9th Cir. 2007): "[E]ven when the settled intent of a child's parent is not clear, a district court should 'find a change in habitual residence if "the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place."'"*Id.* at 622 (quoting *Mozes v. Mozes,* 239 F.3d 1067, 1078 (9th Cir. 2001)).

Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004): The court looked first to the subjective intent of the parents, not the children, and then considered whether the children had acclimatized. *Id.* at 1016-17.

Headifen v. Harker, No. A–13–CA–340–SS, 2013 WL2538897 (W.D. Tex. June 7, 2013), *aff'd*, 549 F. App'x 300 (5th Cir. 2013): When there is no shared parental intent to change the habitual residence and no unequivocal facts demonstrating the child has become acclimated to the new country the original habitual residence applies. *Id.*, at *10.

Saldivar v. Rodela, 879 F. Supp. 2d 610 (W.D.Tex. 2012): Because the parents never shared a settled intention about the child's habitual residence, the court considered whether the child was "highly acclimatized" to the country that she was residing in at the time of the alleged wrongful removal. *Id.* at 620.

Habitual Residence and Domestic Violence

National

Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003): The court stated *in dicta* that "[h]abitual residence is not established when the removing spouse is coerced involuntarily to move to or remain in another country." *Id.* at 900 (citing *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001) and *In re Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993), but distinguishing from the facts in those cases). In this particular case, however, the court found residence was not coerced because the abuse began two months after relocation. *Id.*

Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045 (E.D. Wash. 2001): The court found the respondent had been verbally and physically abused and acknowledged that the abuse, along with other factors, impacted the habitual residence analysis. *Id.* at 1056. "Where the Court finds verbal and physical abuse of a spouse of the kind and degree present in this case, the conduct of

the victimized spouse asserted to manifest 'consent' must be carefully scrutinized." *Id.* The court held that abuse of the respondent precluded the family from acclimatizing to Greece, and "[a]s a consequence, [the respondent] cannot be said to have made Greece the habitual residence of her children or to have joined [petitioner] in his intent to do so." *Id.*

In re Application of Ponath, 829 F. Supp. 363 (D. Utah 1993): The court ruled that habitual residence necessarily entails an element of voluntariness in "settled purpose." *Id.* at 367. The court found the respondent and her child were detained in Germany by means of verbal, emotional, and physical abuse, and such coercion "removed any element of choice and settled purpose" that may have been present in the family's decision to visit Germany. *Id.*

Custody Rights Actually Exercised

National

Rodriguez v. Yanez, 817 F.3d 466 (5th Cir. 2016): The court found that petitioner maintained "*some* sort of relationship" with the child, and held that is enough to demonstrate exercise. *Id.* at 473. The quality of the relationship is not relevant to this inquiry. *Id.* "This Court, like many others, has adopted the expansive interpretation of "exercise" articulated by the Sixth Circuit . . . 'Once [the court] determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of federal courts.'" *Id.* (internal citations omitted).

Article 12: "Well-Settled" in New Environment

New York

Hofmann v. Sender, 716 F.3d 282 (2d Cir. 2013): The court did not find the well-settled exception to apply when it was clear from the record that the children had "not become so acclimatized to life in New York that returning them to Canada would be tantamount to removing them from the environment where their lives have developed." *Id.* at 294. While the children had resided in New York for over a year, they had moved around and changed communities. *Id.* One child had close ties to friends and caretakers in Canada and the other was a toddler and unlikely to suffer significantly from a change in his environment. *Id.*

In re Filipczak, 838 F. Supp. 2d 174 (S.D.N.Y. 2011), *aff'd*, 513 F. App'x 16 (2d Cir. 2013): The court did not find the well-settled exception supported denial of a father's petition to return his children to Poland after they were wrongfully removed to the U.S. by their mother. *Id.* at 181-83. Although the children had become settled in their new country and the father had initiated action for return of the children a little over a year after they had been brought to the U.S., the father would have acted sooner had the mother communicated with him or disclosed the children's location. *Id.* at 183. Also, the court considered the guardian's report that the children

could readily adapt to change and were likely able to settle into any environment quickly. *Id.* at 182.

In re D.T.J., 956 F. Supp. 2d 523 (S.D.N.Y. 2013): The Southern District found that a child who had been wrongfully retained in the U.S. by her mother was "well-settled" in her new home so as to preclude the father's claim for child's return to Hungary. *Id.* at 533-39. Although the mother was unemployed and both the child and the mother were living as undocumented persons, the court found that the child, who was just under 15 years old, participated in activities with friends, had aspirations for her future, regularly attended school, had remained in one home for entirety of her time in the U.S., and had testified that she was extremely close with her relatives and friends in the U.S. *Id*.

In re Lozano, 809 F. Supp. 2d 197 (S.D.N.Y. 2011), *aff'd sub nom*. *Lozano v. Montoya Alvarez*, 697 F.3d 41 (2d Cir. 2012), *aff'd*, 134 S. Ct. 1224, 188 (2014): The district court relied on evidence from the respondent, the child's therapist, and the child's school records to conclude that the child was well-settled in her new environment. *Id.* at 231. The court did not make specific findings about physical abuse of the child or the bystander impact of domestic violence; however, it considered testimony from the child's therapist about the child's dramatic improvement from the time she first arrived in New York to the time of the hearing in finding that the child was settled in New York. *Id.* Ultimately, the court relied on the totality of the circumstances, finding "the description of the child's life, as presented to the Court, suggests stability in her family, educational, social, and most importantly, home life." *Id.* at 233.

Diaz Arboleda v. Arenas, 311 F. Supp. 2d 336 (E.D.N.Y. 2004): The court found that even if the petitioner had met the burden of showing that the children were wrongfully retained by mother in the U.S., the mother had established by a preponderance of the evidence that the children were well-settled in the U.S. *Id.* at 343. The factors considered were: the children had been in the U.S. over 30 consecutive months, the children had lived in the New York area during the entire period, the children were in their second year at the same school, the mother had stable employment, the children spoke English well and enjoyed school, and, while the children missed their relatives in Colombia, they spent time with relatives who were in the U.S., and they did not keep in contact with or miss old friends or neighbors in Colombia. *Id.*

National

Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013): The appellate court found no abuse of discretion in the lower court's finding that the child was well-settled and corresponding decision to deny the petition for return because the lower court had "looked at a great number of factors and gave meticulous attention to the concerns raised by the case." *Id.* at 22.

In re B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009): "We consider a number of factors that bear on whether the child has 'significant connections to the new country. . . .' These factors include:

(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. In some circumstances, we will also consider the immigration status of the child and the respondent.'" *Id.* at 1009 (quoting Text and Legal Analysis, 51 Fed. Reg. 10,509).

Although neither the respondent nor the child were legal residents of the United States, the court held the child's immigration status "[could not] undermine all of the other considerations which uniformly support[ed] a finding that [the child was] 'settled' in the United States . . . . Neither text nor history suggests that lawful immigration status is a prerequisite, or even a factor of great significance, for a finding that a child is 'settled' in a new environment." *Id.* at 1010. "In general, [immigration status] will be relevant only if there is an immediate, concrete threat of deportation." *Id.* at 1009. "Although all of these factors, when applicable, may be considered in the 'settled' analysis, ordinarily the most important is the length and stability of the child's residence in the new environment." *Id.*

Castellanos Monzon v. De La Roca, Civil Action No. 16-0058 (FLW)(LHG), 2016 WL 1337261 (D.N.J. Apr. 5, 2016): The court found that the child's age, the stability of the child's new residence, the child's regular attendance in school, the respondent's and the child's stepfather's employment status, and the respondent's and stepfather's level of involvement with the child all weighed in favor of finding the child settled in the United States. *Id.*, at *13-14. The court also considered the child's and respondent's uncertain immigration statuses in the United States, holding this factor weighs against a finding of settledness but is not alone determinative. *Id.*, at *14. In addition, the court declined to address the respondent's grave risk claim, but credited testimony from the respondent regarding her fear of the petitioner and from an expert regarding familial domestic violence in Guatemala, and relied on the same to support its decision not to exercise discretion to return. *Id.*, at *15.

Silvestri v. Oliva, 403 F. Supp. 2d 378 (D.N.J. 2005), *report and recommendation adopted* (Apr. 3, 2001): "In determining whether the 'settled' exception applies, the Court should consider any relevant factor informative of the child's connection with his or her living environment." *Id.* at 387-88 (citing *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001)).

Article 12: Mature Child Objection

New York

Tann v. Bennett, 648 F. App'x 146 (2d Cir. 2016): The Second Circuit affirmed the dismissal of a petition by a mother for return of her son to Northern Ireland. *Id.* at 148. The court found that the wishes of the son to remain in New York with his father and stepmother were properly

respected, where the 13 year old was intelligent and appeared to be sufficiently mature for his desires to be appropriately considered, and the son expressed a specific objection to returning to Northern Ireland by stating that he did not always feel safe there, would feel really bad if returned, and he might hurt himself or others if forced to return. *Id.* at 149. The court reiterated that precedent in the Second Circuit instructs, without qualification, that a court may refuse repatriation solely on the basis of a considered objection to returning by a sufficiently mature child. *Id.*

Article 13(b): Past Physical Abuse to the Child

New York

Kosewski v. Michalowska, No. 15 CV 928 (KAM)(VVP), 2015 WL 5999389 (E.D.N.Y. Oct. 14, 2015): The court found that the grave risk exception did not apply where testimony was put forth that the child was spanked on at least one occasion. *Id.*, at *16. This testimony, absent expert testimony or impartial assessment of the child's mental state, was insufficient to demonstrate grave risk of harm. *Id.*, at *17. The court noted that in the Second Circuit, undisputed evidence of a risk of harm will not satisfy the grave risk exception if the risk of harm proven lacks gravity—evidence of sporadic or isolated incidents have not been found sufficient to support application of the grave risk exception. *Id.*

Elyashiv v. Elyashiv, 353 F. Supp. 2d 394 (E.D.N.Y. 2005): The court found the petitioner physically abused the respondent and two of their three children. *Id.* at 399. The acts of violence included the petitioner "routinely us[ing] his belt, shoes or hand to hit [the children] approximately once or twice a week," often when they "interfered" with his sleep, and one incident in which the petitioner smothered his son's face with a pillow to stop him from crying. *Id.* Based on the evidence of abuse, the court concluded there was clear and convincing evidence to sustain the Article 13(b) defense to return. *Id.* at 408. Specifically, the court determined that returning the two children who had been physically abused by the petitioner would "surely expose them to a grave risk of both physical and psychological harm given the abject physical abuse they experienced when living with their father, their witnessing their father's abuse of their mother, as well as each other, and the uprooting from their 'well-settled' environment in the United States to the country where they were physically and emotionally abused, coupled with the relapse they would suffer of their post-traumatic stress disorders and the likelihood that [one child] would be suicidal." *Id.*

O.A. v. D.B., 52 Misc. 3d 1208(A), 41 N.Y.S.3d 720 (N.Y. Fam. Ct. Bronx Cty. 2016): The court found that the grave risk of harm defense did not apply, noting that grave risk is "something greater than would normally be expected." *Id.* at 720. Despite allegations of isolated instances, including hitting the children on their backside when they refused to eat, the court found that these actions did not rise to the level of grave risk. *Id.*

National

Sadoun v. Guigui, Case No. 1:16-cv-22349-KMM, 2016 WL 4444890 (S.D. Fla. Aug. 22, 2016): The court held that respondent had established that returning the children to their country of habitual residence would expose them to a grave risk of physical or psychological harm where petitioner physically abused his children, psychologically abused the children and respondent, and evinced an overall "reckless disregard for his family's safety," for example by driving while intoxicated. *Id.*, at *9.

Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045 (E.D. Wash. 2001): The court held that "[w]hen spousal and child abuse have been found by the Court, the Court must consider the effect of both forms of abuse on the children in determining whether the Article 13(b) exception applies." *Id.* at 1058. To sustain a finding of abuse, the court credited the testimony of the children's therapists and teacher, and concluded the middle child had "suffered sexual abuse which she associated with her father" and the oldest child "had been subjected to significant physical and emotional abuse which he associated with his father." *Id.* at 1059. Based in part on this evidence, the court found the respondent met her burden of proving that returning to Greece would present a grave risk of physical and psychological harm to the children. *Id.* at 1061.

Article 13(b): Exposure and Co-Occurrence

New York

Ermini v. Vittori, 758 F.3d 153 (2d Cir. 2014): The court concluded that "the facts found by the district court were sufficient to meet the Hague Convention's requirement, by clear and convincing evidence, that the children faced a 'grave risk' of harm because of [petitioner's] physical abuse" where petitioner repeatedly struck respondent, as well as the children, and one child testified to being afraid of petitioner. *Id.* at 165. The court held that "[t]hese findings evince a 'propensity' for violence and physical abuse and resulting fear in the children." *Id.*

Souratgar v. Lee, 720 F.3d 96 (2d Cir. 2013): The court found that the grave risk exception did not apply to a child taken by the mother from Singapore, notwithstanding prior instances of spousal abuse directed by the father against the mother; there was no showing that the child was ever physically disciplined by father or that he witnessed any spousal abuse. *Id.* at 103-06. This was distinguished from cases where the petitioning parent had actually abused, threatened to abuse, or inspired fear in the children in question. In addition, the court noted that the possible loss of access by a parent to the child upon repatriation does not constitute a grave risk of harm per se. *Id.* at 106.

Davies v. Davies, No. 16 CV 6542 (VB), 2017 WL 361556 (S.D.N.Y. Jan. 25, 2017): The court held that, although there were no allegations that the respondent had been physically abusive toward the child, the physical abuse experienced by the petitioner—often in front of the child—and the psychological abuse experienced by the child rose to such a level that the child was also

properly considered a victim of abuse, and was at grave risk of further abuse if ordered to return. *Id.*, at *16-18.

In re R.V.B., 29 F. Supp. 3d 243 (E.D.N.Y. 2014): The court found that the child would not face grave risk of harm if returned to Colombia, despite the mother previously making domestic violence allegations against the father prior to their divorce; the father and child shared a loving relationship. *Id.* at 258. Again, the court noted that spousal abuse is only relevant if it seriously endangers the *child*, not the parent. *Id.*

National

Abbott v. Abbott, 560 U.S. 1, (2010): The Supreme Court explained *in dicta* that if the respondent could show return would put her own safety at risk, a "court could consider whether this is sufficient to show that the child too would suffer 'psychological harm' or otherwise be placed in an 'intolerable situation.'" *Id.* at 22.[400]

Gomez v. Fuenmayor, 812 F.3d 1005 (11th Cir. 2016): Affirming the lower court's decision, the Eleventh Circuit held that threats and violence against a parent can pose a grave risk of harm to the child as well. *Id.* at 1010. "Although a pattern of threats and violence was not directed specifically at [the child], serious threats and violence directed against a child's parent can, and in this case did, nevertheless pose a grave risk of harm to the child." *Id.* at 1007.

Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013): The court opined that "[a]lthough there [was] little evidence that [the petitioner] physically abused the children, the lack of such evidence [did] not necessarily render Article 13(b) inapplicable." *Id.* at 876. The lower court had concluded that return would expose the children to grave risk based on evidence that the petitioner had assaulted others in the children's presence, including a taxi driver and the respondent; had shoved one of the children, demonstrating that he was "either unwilling or unable to shield the children from his rage"; and had made telephonic threats to kill the children and commit suicide. *Id.* The Eighth Circuit upheld the lower court's finding that petitioner's violent temper would expose the children to a grave risk of harm if returned because the evidence showed a high probability that [the petitioner] would "react with violence, threats, or other verbal abuse towards the children, [respondent], or others." *Id.* at 875 (quoting the district court).

Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008): The Eleventh Circuit held that "[t]o deny return, the district court was not required to find [the child] had previously been physically or psychologically harmed; it was required to find returning him to Australia would expose him to a

[400] Foreign courts have also considered petitioner's abuse of respondent under the grave risk exception and have denied return of the child, holding that the child's return would present a grave risk to the child. *See, e.g.*, *Pollastro v. Pollastro*, 43 O.R. (3d) 485 (Can. 1999) (holding that the child's interests are inextricably tied to the mother's psychological and physical security and citing a series of risks resulting from the child's exposure to domestic abuse).

present grave risk of physical or psychological harm, or otherwise place him in an intolerable situation." *Id.* at 1346. The court upheld the lower court's finding of grave risk based on evidence that the petitioner:

> abuses alcohol on a daily or near-daily basis . . . is only marginally able to care for his own basic needs, . . . has no close family members or friends that could reasonably be expected to have meaningful involvement in [the child's] day-to-day care and protection, . . . is emotionally unstable and prone to uncontrolled destructive outbursts of rage, . . . was physically and verbally abusive toward [respondent] in [the child]'s presence, . . . physically endangered [the child] (both intentionally and unintentionally) when [the child] lived under his roof, and . . . repeatedly and pointedly stated to [respondent] after [the child]'s birth that he did not want [the child], that [the child] should have been aborted, that [the child] would die if [the child] 'became an American,' and that [respondent] could not blame him if 'something happened to' [the child].

Id. at 1345-46.

Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007): The Sixth Circuit reversed and remanded the lower court's order for return of the children, concluding the respondent met her burden of proving return would present a grave risk of harm to the children. The court afforded equal weight to evidence that the children endured physical abuse by the petitioner—frequent belt whipping, spanking, pulling of their hair and ears—and evidence that the children were at risk of psychological harm after witnessing petitioner's abuse of their mother. *Id.* at 608-09. The court observed that the "'Convention's purposes [would] not . . . be furthered by forcing the return of children who were the direct or indirect victims of domestic violence.'" *Id.* at 605 (quoting Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RIGHTS L. REV. 275, 352-53 (2002)).

Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005): The Seventh Circuit reversed and remanded the lower court's order to return the children, noting that the district judge "was unduly influenced by the fact that most of the physical and all of the verbal abuse was directed to [the respondent] rather than to the children." *Id.* at 570. The court stated the lower court should have afforded weight to the petitioner's threats to kill the children, his propensity for violence, and the fact that much of the abuse of respondent was carried out in the children's presence. *Id.*

Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000): The First Circuit held that the district court erred in discounting the grave risk of harm to children exposed to domestic violence in light of evidence that the petitioner had an "uncontrollably violent temper;" credible social science literature acknowledging an established risk of co-occurrence, meaning "that serial spousal abusers are also likely to be child abusers"; and state and federal laws recognizing "that children

are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser." *Id.* at 219-20.

Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010): The court found that a child suffered post-traumatic stress disorder after exposure to spousal abuse and concluded that returning the child to her habitual residence would pose a grave risk of physical and psychological harm. *Id.* at 553-57. Despite a dearth of evidence that petitioner's second child was psychologically traumatized, the court similarly denied the petition to return that child due to the likelihood of co-occurrence. *Id.* at 557.

Tahan v. Duquette, 259 N.J. Super. 328 (App. Div. 1992): "To hold, as the trial court did, that the proper scope of inquiry precludes any focus on the people involved is, in our view, too narrow and mechanical. Without engaging in an exploration of psychological make-ups, ultimate determinations of parenting qualities, or the impact of life experiences, a court in the petitioned jurisdiction, in order to determine whether a realistic basis exists for apprehensions concerning the child's physical safety or mental well-being, must be empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there." *Id.* at 335.

Article 13(b): Requested State's Ability to Protect Child

New York

Ermini v. Vittori, No. 12 Civ. 6100, 2013 WL 1703590 (S.D.N.Y. Apr. 19, 2013), *aff'd as amended*, 758 F.3d 153 (2d Cir. 2014): The court found that the grave-risk defense applied when the record demonstrated by clear and convincing evidence that, because the child is severely autistic, he faced a grave risk of harm if he had to return to Italy, as the return will severely disrupt and impair his development. *Id.*, at *16. (It was proven that there is a significant lack of resources in Italy for treating autism as compared to those available in the U.S.). *Id.* In holding so, the court noted that in the Second Circuit, the courts have emphasized the severity of the psychological or physical harm required under the "grave risk of harm" affirmative defense. *Id.*

National

Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008): The court "decline[d] to impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return." *Id.* at 1348.

Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005): The Seventh Circuit reversed and remanded the lower court's decision to return despite that court's finding of severe abuse of the respondent and the children. *Id.* at 570-71. In so holding, the appellate court remarked that the law on the books may differ from the law as applied, particularly in domestic relations cases,

and held that a trial court "must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody . . . to define the issue not as whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregards the language of the Convention and its implementing statute . . . ." *Id.* The court criticized the "acknowledged dictum" in *Friedrich* that ostensibly created the "requirement" to consider the child's habitual country's ability to protect from grave risk. *Id.*

Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005): The Ninth Circuit, following the decisions in *Friedrich* and *Blondin*, explained that "the question is simply whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction for a custody determination, while avoiding the 'grave risk of psychological harm'" that would result from the harm or intolerable situation identified by the court. *Id.* at 1036.

Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000): The First Circuit, denying return, noted that it was confident Ireland would issue appropriate protective orders, but found the relevant issue to be the petitioner's history of violating court orders, and not whether Ireland would issue such orders. *Id.* at 221.

Article 13(b): Undertakings and Domestic Violence

New York

Application of Blondin v. Dubois, 78 F. Supp. 2d 283 (S.D.N.Y. 2000): On remand, the district court found that due to the severity of abuse and trauma the children suffered, no measures—neither undertakings by the petitioner nor state-based protections—would ameliorate the risk of harm to the children if returned to France. *Id.* at 298. The appellate court affirmed. *Blondin v. Dubois*, 238 F.3d 153, 168 (2d Cir. 2001).

Rial v. Rijo, No. 1:10-cv-01578-RJH, 2010 WL 1643995 (S.D.N.Y. Apr. 23, 2010): The court ordered the return of a child to Spain, despite evidence that the petitioner was abusive to the respondent, including at times in front of the child, because the court did not find grave risk of harm to the child. *Id.*, at *3. Petitioner agreed to numerous undertakings including: (i) agreeing to rent an apartment in the center of town for six months, where both the respondent and the child could feel secure upon return to Spain; (ii) agreeing not to press charges against the respondent for the abduction and to pursue the dismissal of any charges that may have been brought; and (iii) agreeing to pay child support. *Id.*

Reyes Olguin v. Cruz Santana, No. 03 CV 6299 (JG), 2005 WL 67094 (E.D.N.Y. 2005): The court found that there was a grave risk that returning children to Mexico would expose them to psychological harm or otherwise place them in an intolerable situation and this grave risk was present regardless of any ameliorative measures that might be put into place. *Id.*, at *6-12.

National

Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008): The Eleventh Circuit upheld the lower court's decision to deny return, concluding undertakings would be inappropriate due to the petitioner's violent temper, lengthy abuse of the respondent, and threats to the child. *Id.* at 1352.

Danaipour v. McLarey, 286 F.3d 1 (1st Cir. 2002): "Where substantial allegations are made and a credible threat exists, a court should be particularly wary about using potentially unenforceable undertakings to try to protect the child." *Id.* at 26.

Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000): The First Circuit reversed the lower court's decision to return the children to Ireland with undertakings to ensure their safety, holding the lower court had "underestimated the risks to the children and overestimated the strength of the undertakings." *Id.* at 221. The court emphasized that the petitioner in that case had repeatedly failed to obey prior court orders and had a well-documented history of violence and found undertakings would therefore be inadequate to protect the children. *Id.* at 220-21.

Simcox v. Simcox, No. 1:07CV96, 2008 WL 2924094 (N.D. Ohio July 24, 2008): After the court of appeals questioned whether any undertakings would mitigate the risk upon return, the district court found that no undertakings "would adequately protect the children" and the petition was denied. *Id.*, at *4.

PART VI. HYPOTHETICAL CASE SCENARIOS

The case scenarios below were first developed as part of the Hague Domestic Violence Project's work for a study commissioned by the National Institute of Justice. More detailed versions of the scenarios can be found in that study, available at haguedv.org.

These scenarios are designed for use as a self-training tool. They were drafted to contain myriad issues that a court may have to consider when determining the outcome of a petition for return involving allegations of domestic violence.

Following each scenario is a discussion of the issues raised in that scenario and commentary on how a court might evaluate the issues presented.

§ 1.00 No Physical Violence; Determining Habitual Residence

Mary-Lou and Luke met in high school and are now married. Mary-Lou, 23 years old, is the respondent in a Hague Convention case. She testified that after they were married Luke decided he wanted to move to France, where he had grown up. She reluctantly agreed to go to France, believing Luke would not like it and would want to return to the United States soon thereafter.

After a few months in Paris Mary-Lou became pregnant. She testified that after telling him that she was pregnant, Luke changed. Although Luke had always been controlling, Mary-Lou testified that his behavior toward her became more intense; he would not let Mary-Lou leave the house alone, and she was not allowed to answer the door or phone if he was not there. She told the court that as her pregnancy advanced, Luke's behavior became even more aggressive. He started threatening her, telling her that she was ugly, stupid, and that she would not be able to survive without him. She told the court that Luke's behavior upset her, but she stayed with him because she had nowhere else to go. Mary-Lou is not a French citizen, has no family in France, and does not speak the language.

Luke's threats continued and then worsened after Mary-Lou gave birth. Mary-Lou testified that Luke would yell at her for hours while she was holding the baby. At times, he threatened to have her deported if she ever told anyone she was unhappy with him. He also threatened to leave her, take custody of their son, and ensure she would never see the child again. Luke also threatened to make her and her son "disappear," stating no one would ever miss them. She testified that on one occasion, while she was feeding the baby, Luke became angry that she was not paying attention to him and threatened to throw their child out the window.

After the last threat Mary-Lou called her sister, who sent her a plane ticket back to the United States. After Mary-Lou fled the country with their son, Luke filed a petition under the Hague Convention for return of their son to France. Mary-Lou testified she is afraid of Luke, does not want to go back to France, and does not want her son returned to France without her.

Issue #1: Habitual Residence

The first issue for the court to consider is whether the child was removed from his country of habitual residence, and therefore the court must determine whether France was the child's habitual residence. Although this scenario involves multiple moves (Luke and Mary-Lou's move from the United States to France and then Mary-Lou and the child's move back to the United States), it is important to note that the child was born in France and had never lived in the United States prior to removal. For this reason the court may find that the child's habitual residence was France.[401] However, Mary-Lou testified she was reluctant to move to France and believed that the move might only be for a short period of time. Based on this testimony, the court may consider whether or not she intended for France to become her habitual residence or the habitual residence of her child.[402] Finally, the court might consider Luke's controlling and abusive behavior towards Mary-Lou in analyzing whether she or the child could be considered settled in France, thereby making it their habitual residence.[403]

Issue #2: Petitioner's Custody Rights

If the court determines France was the child's habitual residence, the petitioner's custody rights at the time of removal will be determined under French law. The court will then need to determine whether those rights amount to "rights of custody" under the Convention.

Issue #3: Article 13(b): Grave Risk

If the petitioner establishes a *prima facie* case of wrongful removal, the burden will shift to the respondent to prove that one or more of the Convention's exceptions to return applies.

To establish an exception pursuant to Article 13(b), the respondent must prove by clear and convincing evidence[404] that there is a grave risk that return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.[405]

In this scenario, Mary-Lou has testified to Luke's controlling behavior, his threats of violence toward both her and the child, and his yelling at her while she was holding the child. Although Mary-Lou has not alleged any incidents of past physical abuse to her or the child, the court can

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[401] A child's place of birth is not automatically the child's habitual residence, although a child born where both parents have their habitual residence would normally be regarded as a habitual resident of that country. *Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004) (citing *Delvoye v. Lee*, 329 F.3d 330, 334 (3d Cir. 2003)).

[402] *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001) (finding "that a settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one").

[403] *See Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001) (finding, in part, that petitioner's abusive and controlling behavior adversely affected any potential acclimatization to Greece).

[404] 22 U.S.C.A. § 9003(e)(2)(A).

[405] Convention at art. 13(b) (emphasis added).

still consider Luke's behavior in determining whether there was domestic abuse and if so, whether that abuse supports a grave risk finding under Article 13(b).[406]

Additionally, courts may consider whether grave risk exists when return would jeopardize the respondent's safety.[407]

§ 2.00 Adoptive Parent Takes Child across International Border

Beth is the respondent in a Hague Convention case. Beth has testified that after graduating from college she moved to Greece to teach English. While in Greece, Beth met Nick, the petitioner in this case.

Beth and Nick worked at the same school. They began dating very soon after Beth arrived in Greece. Beth testified that Nick was very jealous during their relationship. If she received praise from a colleague or student's parent, he would get angry. If she talked to other people at work, he would get angry. Nick's jealous behavior continued throughout their relationship. Beth, however, decided she wanted to stay with him in Greece.

Beth and Nick married and purchased a house together in Greece. Beth testified that during this time, she and Nick were "starting their life together."

Nick has a son from a previous marriage. Both parties testified that Nick's son has no contact with his biological mother and Beth has legally adopted him. Beth testified that when she started her own business, Nick's abusive behavior worsened. He continued to act jealously, taunting Beth about how she conducted herself around other men. This behavior then escalated to physical abuse. Beth testified that Nick began hitting her and would do so in front of their son.

Beth testified that she was considering leaving Nick when she found out that she was pregnant. By the time their daughter was born, the abuse had increased in frequency to almost daily. Next, Nick began threatening the children. Beth testified that she saw bruising on their infant daughter's legs. She said that it looked as if Nick had been twisting her legs, and she believed he was doing it during diaper changes when Beth was not watching.

Beth testified that she had wanted to leave Nick, but that she was too scared. She was afraid that if she tried to leave and Nick caught her, he would kill her.

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[406] *See Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008) (finding that petitioner's threats of harm to the child, even without past physical violence, can pose a grave risk of future harm to the child). In *Baran*, the court found that the father's temper, which had been thoroughly documented in the record, along with his threats of harm to the child, were enough to constitute a grave risk and denied return. *Id.*

[407] *Abbott v. Abbott*, 560 U.S. 1, 22 (2010) (explaining *in dicta* that if a respondent could show that return would put her own safety at risk, a "court could consider whether this is sufficient to show that the child too would suffer 'psychological harm' or otherwise be placed in an 'intolerable situation.'").

She testified that when she received a call from the hospital saying their son had come in with broken ribs and a broken arm, she knew Nick had done it. Beth tried to report this incident to the police but was told it was a "family matter" and "none of their business." Beth left the police station without filing a report.

Beth believed that if she did not take the children and leave, Nick would eventually kill them. She left Greece, taking both children to her parents' house in New York. She knew Nick would be furious with her and had worried about him filing a petition under the Hague Convention. However, she explained that when she spoke to him after arriving in the United States, he seemed more concerned that making an issue of her leaving would draw attention to his violent behavior than he was about Beth and the children returning to Greece.

Nick knew that if Beth were to go to the United States she would go to her parents' home. He called her there shortly after she left Greece. Both parties testified that Nick wanted to speak to the children over the phone and that Beth facilitated this. Nick neither called again nor asked either Beth or the children to return to Greece. Beth believed that he did not want to have any contact with her or the children after the initial phone call. Thereafter, the only contact Nick made was sending birthday cards to the children.

Beth testified that she and the children were doing well at her parents' house in New York and she was surprised to be served with the petition for return under the Hague Convention eight months after her only post-removal conversation with Nick.

Issue #1: Adopted Child vs. Biological Child

The Convention does not differentiate between adopted and biological children; rather it seeks "to ensure that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States."[408] Rights of custody under the Convention may result from judicial order, agreement, or by operation of law.[409] The analysis is the same as it would be if both parents were the child's biological parents, and this is true whether the adoptive parent is the respondent or the petitioner.

Issue #2: Habitual Residence

Because both children were born in Greece and, until Beth fled to the United States, both parents intended for the children's habitual residence to be in Greece, this issue is likely undisputed.

[408] Convention at art. 1.
[409] *Id*. at art. 3.

Issue #3: Article 12: "Well-Settled" in the New Environment

Assuming the court finds Nick has established a *prima facie* case for return under the Convention, the burden will shift to Beth to prove one or more exceptions to return. Although Beth testified that she and the children are doing well in New York, the Article 12 "well-settled" exception is not available to her because the petition was filed with the court less than one year from the date she removed the children from Greece.[410]

Issue #4: Article 13(a): Consent or Subsequent Acquiescence

If the petitioner consented or subsequently acquiesced to removal or retention of the child the court is not bound to order return to the country of habitual residence.[411] Consent and acquiescence are considered separate defenses, so the respondent need only prove either consent or acquiescence.[412] Both consent and acquiescence are questions of the petitioner's subjective intent.[413]

Although Beth left Greece without telling Nick she was leaving or where she was going, Nick knew she went to her parents' house with the children and contacted her there shortly after she arrived in the United States. He spoke to the children once and sent birthday cards, but never asked that they return to Greece. Despite knowing where the children were located, Nick did not try to stay in contact with Beth or the children and waited eight months before filing a petition for their return.[414] Based on these facts, the court may consider whether the petitioner's actions amounted to consent or subsequent acquiescence to the removal of the children from Greece to the United States.[415]

Issue #5: Article 13(b): Grave Risk

In this scenario, the respondent is alleging the petitioner physically abused her and both the children. Courts have held that past abuse of the child constitutes a grave risk of future physical or psychological harm or an otherwise intolerable situation if the child is returned.[416] In addition, the court may consider not only physical abuse of the children, but also the effect of the spousal abuse on the children.[417] With abuse as serious as that described in this scenario—prolonged

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[410] Convention at art. 12.
[411] *Id.* at art. 13(a).
[412] *See Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996).
[413] *In re J.J.L.-P.*, 256 S.W.3d 363, 375 (Tex. App. 2008) (holding consent defense requires showing subjective intent); *In re A.V.P.G.*, 251 S.W.3d 117, 126 (Tex. App. 2008) ("[A]cquiescence is a subjective test.").
[414] *See In re Application of Ponath*, 829 F. Supp. 363, 368 (D. Utah 1993) ("This conclusion [that petitioner consented to removal] is further supported by petitioner's failure, for almost six months, to make any meaningful effort to obtain return of the minor child.").
[415] Convention at art. 13(a).
[416] *See Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 399 (E.D.N.Y. 2005).
[417] *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1058 (E.D. Wash. 2001).

abuse of the mother and children culminating in broken bones to one child and bruises to the other child—a court could find the respondent has met her burden of proving the grave risk exception.

Although there is more evidence of abuse to the older child, even if a court did not credit the allegation of abuse to the younger child, the court could still deny return of both children on the grounds that both children would face a grave risk or intolerable situation if returned.[418]

Issue #6: Discretion to Return: Ameliorative Measures and Country's Ability to Protect

If the court is deciding whether to exercise its discretion to order return despite finding that return would pose a grave risk of exposure to physical or psychological harm to the child, the court should give weight to Beth's testimony regarding her attempts to report the abuse to the police. Considering Beth's attempts to protect herself and the children while still in Greece, the court may find that even with ameliorative measures it cannot protect the children from the grave risk, thus warranting a denial of the petition for return.[419]

§ 3.00 Alcohol and Drug Abuse; Extreme Physical Abuse; Some Children Left Behind

Tracy, a Canadian citizen living in Canada, is the respondent in this case. During the course of the hearing, Tracy testified to a long history of abuse. As a child, Tracy's father was sexually and physically abusive to both her and her mother. Subsequently, Tracy was abused by various partners beginning at the age of 14.

Tracy met Dave, the petitioner in this case, when she was 18 years old and has had a relationship with him for 10 years. Dave and Tracy are not married. They have four children together.

Tracy testified that Dave has been controlling and verbally abusive toward her from the beginning of their relationship. She stated that over time the abuse escalated to physical and sexual violence.

At 19, Tracy became pregnant with their first child. She testified that she was afraid to have a baby because she did not think she was prepared to be a mother, and feared that the stress of having a child would make Dave more violent. Tracy testified that after giving birth Dave's abuse worsened; the physical abuse became more regular and she often had to wear turtlenecks and long pants, even in the middle of summer, to cover the bruising.

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[418] *See Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (finding grave risk exception met in part based on physical and psychological abuse of two oldest children).

[419] *See Van De Sande v. Van De Sande*, 431 F.3d 567, 570-71 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as domestic relations.").

Tracy told the court that Dave would come home from work and drink alcohol or take drugs. When he was intoxicated he would hit her. She said that he often made her go out and get the alcohol or drugs for him. If she refused he would abuse her, but if she did get them for him the abuse would be even worse after he was intoxicated. Tracy testified that she felt completely alone. She did not have any friends or family who could help her. She testified that after every incidence of abuse Dave apologized and promised that the abuse would stop. Tracy believed him every time, despite the repeated abuse.

At 21, Tracy became pregnant with their second child and at 24, she became pregnant with twins. By the time she was 25 years old, she and Dave had four children together. She testified that they struggled financially and that she was often fired from jobs because she was too injured or bruised to go to work.

Tracy testified that Dave never physically abused the children, but that he often abused her in front of them. She told the court that the children understood what was happening in the house, and that they were terrified of Dave. She testified that the worst incident happened after she came home from work late because she had given a co-worker a ride home. She said that Dave was waiting for her with a gun. He told her that she was late and that now she was going to die. Dave fired the gun, shooting Tracy in the leg. A neighbor, hearing the gunshot, called the police right away.

Tracy testified that it was this incident with the gun that finally gave her the courage to leave Dave because she knew that if she stayed he would kill her. Tracy's sister lives in the United States. Tracy testified at the hearing that she believed her sister's house was the only place she could go to be safe.

Tracy left Canada with the twins. The two older children did not want to go with her. Tracy testified that leaving the children behind was hardest decision she has ever had to make, but that she could not stay with Dave. Tracy wants the two older children to come live with her once she is settled in the United States.

Dave contacted an attorney shortly after Tracy left Canada. Tracy has been served with documents from the Canadian court requiring her to return the children to Canada. Dave has also filed a petition for return of the twins under the Hague Convention.

Issue #1: Children Left Behind and Documents from Canadian Court

The court in a Hague Convention case has no jurisdiction to hear issues regarding children that were not wrongfully removed or retained from their country of habitual residence.[420]

[420] *See* Convention at art. 12 (court may order return where child has been wrongfully removed or retained as per Article 3 of the Convention).

If Tracy is going to seek custody or relocation of her older children, that case will be handled separately. Correspondingly, unless there are documents regarding Dave's rights of custody under Canadian law at the time of removal or retention, documents from the Canadian family court regarding the children's return are not relevant to the Hague Convention case.

Issue #2: Article 13(b): Grave Risk

It is clear from Tracy's testimony that her health and safety would be at risk if she returned to Canada. She is isolated in Canada, and her only family lives in the United States. In *Abbott*, the U.S. Supreme Court noted that when a respondent can show that return would put his or her own safety at risk, the court can consider whether that is sufficient to indicate a grave risk or otherwise intolerable situation for the child.[421] Additionally, courts have acknowledged that spousal abuse may create a grave risk to the children.[422]

Although the abuse was not directed at the children, there is a risk that they will be subject to physical abuse by Dave in the future (co-occurrence) and that they will be exposed to psychological harm by returning to an abusive environment.

If the court orders the children to return to the Requesting State, Tracy must then choose between accompanying the children back to Canada where she will be at risk or protecting herself by remaining in the United States while the children are returned without her.

Issue #3: Drug and Alcohol Abuse

The petitioner's drug and alcohol abuse is an appropriate factor to consider under the grave risk exception.[423] However, the court should be careful not to put such weight on this factor that it is engaging in a best interests analysis. The Hague Convention does not address custody, nor does it allow for a best interests analysis in determining whether a petition for return should be granted.[424] But the drug and alcohol abuse can be considered in the context of petitioner's abusive behavior in determining whether return poses a grave risk of exposure to physical or psychological harm to the children.

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[421] *Abbott v. Abbott*, 560 U.S. 1, 22 (2010).

[422] *See Acosta v. Acosta*, 725 F.3d 868, 876 (8th Cir. 2013); *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570 (7th Cir. 2005); *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000). *See also Khan v. Fatima*, 680 F.3d 781, 786 (7th Cir. 2012) ("If the mother's testimony about the father's ungovernable temper and brutal treatment of her was believed, it would support an inference of a grave risk of psychological harm to the child if she continued living with him."); *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 554 (E.D. Pa. 2010) ("Respondent's evidence of spousal abuse compels a finding that the grave risk of harm affirmative defense applies here.").

[423] *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008) ("The evidence presented was sufficient to support the court's conclusion that Baran's violent temper and abuse of alcohol would expose [the child] to a grave risk of harm were he to be returned to Australia.").

[424] Text and Legal Analysis, 51 Fed. Reg. 10,510.

§ 4.00 Custody Agreement; Child's Objection to Return; Kidnapping Charges

Lisa, the respondent, testified that she was in an abusive relationship with Diego, the petitioner, for 15 years. Lisa is from the United States and Diego is from Argentina. Lisa moved to Argentina at age 20 to live with Diego, and remained there with him for 15 years until they divorced.

Diego and Lisa have three children, ages 7, 10, and 13 years old at the time of the hearing. Lisa testified that in their custody agreement, Lisa has sole physical and legal custody of the children, but Diego has custody three weeks out of the year. Lisa testified that she took the children and left Argentina because Diego continued to interfere with her life even after their divorce. Diego did not consent to Lisa removing the children from Argentina. Lisa believes that under their custody agreement, she is permitted to relocate the children unilaterally and is not required to seek Diego's permission.

Lisa testified that Diego physically abused her during their marriage, but did not physically abuse the children. She told the court that after their divorce, Diego would "hang around" outside her house, wait for the children at school even though he did not have custody, and sit outside her office. She testified that she never felt safe in Argentina because Diego would not leave her alone and the police never took any action in response to her complaints. Lisa felt isolated in Argentina without her family and she did not have any help taking care of the children.

Lisa returned to the United States ten months ago. She and the children have been living in New York with her family since then. The children spent three weeks with Diego this past summer in Argentina as per their custody agreement, but have since told Lisa that they do not want to go back to Argentina again. Lisa testified that she believes the children are old enough to make this decision for themselves, and that if they do not want to return to Argentina then she will not send them back. Lisa has also testified that she is scared to go back to Argentina because she now faces kidnapping charges for taking the children to the United States.

Issue #1: Rights of Custody

The Hague Convention differentiates between rights of custody and rights of access.[425] Custody rights are defined by the Convention as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[426] Rights of access, on the other hand, are defined as "the right to take a child for a limited period of time to a place other than the child's habitual residence."[427] This inquiry does not require a custody determination; rather, Diego must prove that his rights under the parties' custody agreement as per Argentinian

[425] Convention at art. 5.
[426] *Id.*
[427] *Id.*

law (assuming Argentina is the children's habitual residence) amount to "rights of custody" within the meaning of the Convention.[428]

In this scenario, and according to Lisa's understanding of their custody agreement, Lisa has physical custody of the children for most of the year—49 out of 52 weeks—and "sole legal custody." In her testimony she describes the petitioner's time with the children as "custody," but it is unclear from her testimony alone what rights Diego has under Argentinian law. It is Diego's burden to prove that the rights he has under Argentinian law amount to rights of custody under the Convention. It is important to note that merely labeling a party's rights "custody" or "visitation" does not end the inquiry. Rather, the court must determine the actual rights conferred by the country of habitual residence and what they amount to under the Convention's meaning.

If the court finds that Diego has rights of access and not custody rights, he may file a petition for access to the children but cannot seek return pursuant to the Convention.[429]

Custody rights, however, have been interpreted broadly by courts. In *Abbott* the U.S. Supreme Court looked to the law of Chile (the children's habitual residence in that case), which provided the father with a *ne exeat* right[430] by operation of law rather than by judicial order, and determined that the *ne exeat* right was a custody right within the meaning of the Convention because the right was construed both as a right relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.[431] Similarly, in some countries even when one parent is awarded sole custody of the child the non-custodial parent maintains *patria potestas* rights, rights of parental authority and responsibility that have been found sufficient to establish rights of custody for the purpose of the Convention.[432] This court will need more information about Diego's rights under Argentinian law to make a determination on this issue.

Issue #2: Article 13(a): Consent or Acquiescence

If Diego does prove that he has rights of custody, and otherwise proves his *prima facie* case, the court will turn to the respondent's defenses.

The children visited Diego in Argentina and then returned to their mother in the United States. Diego had to know where the children were located because they were in his care for a period of time and then he sent them back to their mother. Moreover, prior to filing his petition he did not make any attempts to have them returned to Argentina nor did he communicate that he wanted

[428] *Id.* at art. 3.
[429] *Id.* at art. 21.
[430] "*[N]e exeat* right: the authority to consent before the other parent may take the child to another country." *Abbott v. Abbott*, 560 U.S. 1, 5 (2010).
[431] *Id.* at 11.
[432] *See, e.g.*, *Whallon v. Lynn*, 230 F.3d 450, 452 (1st Cir. 2000).

them to return. Acquiescence usually requires a level of formality, including "a consistent attitude over a significant period of time."[433] Diego's cooperation in returning the children to the United States should at least be considered by the court in determining whether he acquiesced to the children's removal.

Issue #3: Article 13: The Objection of a Mature Child

The children in this case are 7, 10, and 13 years old. Lisa has testified that they do not want to return to Argentina, and she is asserting Article 13, the mature child exception. Under this exception 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 views."[434] The Convention does not indicate at what age a child is sufficiently mature enough for his or her view to be taken into account, nor does it articulate ages that are too young to consider.[435]

In this scenario, Lisa has represented her belief that the children do not want to be returned to Argentina. However, the court must make a factual determination as to whether the children do in fact object to being returned, and if so, whether they are mature enough for the court to take their objection into consideration and how much weight to afford their objection. The Ninth Circuit, in addressing maturity, has noted the importance of ensuring that a child's statements reflect his or her "own, considered views."[436]

This can be the court's sole basis to deny return if the respondent meets her burden in proving the exception.[437]

§ 5.00 Date of Retention; Determining Habitual Residence

Jenny is the respondent in this Hague Convention case. She and Andrew, the petitioner, have been married for 7 years by the date of the hearing. During the hearing, Jenny testified that they started dating during college in the United States. She told the court that Andrew was controlling from the beginning, but that she loved him. Jenny and Andrew were married after college and had their first child. Jenny testified that after their first child was born Andrew became increasingly controlling, but that she made attempts to ignore his behavior. Two years after their first child was born Jenny became pregnant with their second child.

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[433] *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996).
[434] Convention at art. 13.
[435] *See Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001).
[436] *Gaudin v. Remis*, 415 F.3d 1028, 1037 n.3 (9th Cir. 2005). *See also* Elrod, *Please Let Me Stay*, *supra* note 372, at 686-87 ("If the child's objection appears to be the result of parental indoctrination or undue influence, the court may order return over the child's objections.").
[437] *See Anderson v. Acree*, 250 F. Supp. 2d 876, 883 (S.D. Ohio 2002) (citing *Blondin*, 238 F.3d at 166).

Jenny testified that shortly after the birth of their second child, Andrew informed her that his employer was transferring him to Australia. Jenny did not want to move to Australia because all of her family lived close to them in New York. Jenny had a job that she loved, and she did not want to relocate her family. Jenny testified that she told Andrew that she did not want to move, but later agreed because Andrew said that if he did not take the transfer to Australia, his employer would fire him. Andrew earned more money than Jenny, and she was concerned about the financial impact on the family if he lost his job.

Jenny testified that she only agreed to move to Australia because it seemed like the only practical option. Once the family arrived in Australia, Andrew's controlling behavior worsened. Jenny testified that in Australia the abuse escalated and Andrew became physically violent. Jenny told the court that Andrew never hit the children, but he did hit her in their presence.

She testified that she and the children were isolated and afraid in Australia, constantly worrying that their actions would cause an attack on Jenny. Andrew held all of the family's passports, identification, and other travel documents. Jenny testified that he had promised several times to file her application for a work permit but never did. Because of this, Jenny had no access to money without going through Andrew. Jenny told the court that Andrew took away her credit cards and gave her a set budget, monitoring her spending and movement.

Jenny testified that when she told her sister what was happening in Australia, her sister encouraged her to return to the United States. Jenny's sister offered to help her "get back on her feet" once she returned. Shortly after that conversation Jenny learned that Andrew had not been forced to take the transfer to Australia, but rather had *requested* the transfer and threatened to quit if his company did not permit it. Jenny testified that learning this information was what triggered her decision to take the children back to the United States.

Jenny asked Andrew if she could take the children to the United States for a vacation and he agreed. Once back in New York, Jenny filed for divorce and custody of the children. Immediately after being served with the divorce papers, Andrew filed a petition for return of the children to Australia.

Issue #1: Date of Retention

Jenny took the children to the United States with Andrew's permission; therefore, this is a case involving retention, not removal. Andrew must prove that the children's habitual residence was Australia prior to their retention in the United States.[438] Retention refers to a parent keeping the child out of the country beyond the limits of the other parent's permission. In this scenario, Andrew agreed that Jenny would take the children to the United States on vacation, but the facts here do not indicate whether a specific timeframe was agreed to by the parties. In determining

[438] *See* Convention at art. 3.

the date of retention or the date a retention became wrongful, courts have looked to the date on which the petitioner was "truly on notice" that the respondent was not returning with the child.[439] If Jenny had purchased round-trip plane tickets, a court may find that retention did not occur until the date of the return ticket had passed.[440] Andrew may argue, however, that he was truly on notice when Jenny filed for divorce in the United States, even if the agreed-upon time period for the vacation had not yet elapsed.[441] This distinction is important because in some jurisdictions courts have held communicating an intention not to return amounts to retention.[442]

Issues #2: Habitual Residence

Once the court determines the date of wrongful retention, it must then turn to whether Australia was actually the children's habitual residence immediately prior to that date. The children were born in the United States and lived there continuously until the move to Australia. Jenny was reluctant to move to Australia and the move, which Andrew said was necessary to keep his job, was predicated on a lie. Andrew must prove that the children's habitual residence changed from the United States to Australia during the time spent there.

The court may look to whether the parties had a "settled purpose" or "shared intent" to relocate.[443] Because the move was predicated on a lie and Jenny was denied the opportunity to make an informed decision about the move, the court may find that the parties could not have had a settled purpose or intent, and that Australia never became the children's habitual residence.

Issue #3: The Complaint for Divorce

Since the petition for return was filed immediately after the divorce was filed, the two cases may conflict and thus the court must determine how to proceed. Once a judicial or administrative authority is notified of a "wrongful removal or retention" in the Contracting State in which the child has been removed to or retained in, any matter regarding the merits of custody must be stayed until a decision is made in the Hague Convention case, unless a petition is not filed within a reasonable time following notice.[444]

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[439] *See Blanc v. Morgan*, 721 F. Supp. 2d 749, 762 (W.D. Tenn. 2010); *see also McKie v. Jude*, Civil Action No. 10-103-DLB, 2011 WL 53058, at *6 (E.D. Ky. Jan. 7, 2011).
[440] *See Toren v. Toren*, 191 F.3d 23, 28 (1st Cir. 1999); *Falk v. Sinclair*, 692 F. Supp. 2d 147, 162 (D. Me. 2010); *Philippopoulos v. Philippopoulou*, 461 F. Supp. 2d 1321, 1323-24 (N.D. Ga. 2006).
[441] *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001) (upholding lower court's finding that respondent's act of filing for divorce and custody in the United States communicated her intention not to return, thereby constituting retention).
[442] *Id.*
[443] *See id.* at 1076 (holding that a child's habitual residence is based on the intention of the person or persons entitled to fix the child's residence).
[444] Convention at art. 16. *See also* Text and Legal Analysis, 51 Fed. Reg. 10,509.

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