HAGUE SYMPOSIUM
QUEBEC 9TH JUNE 2015

The International Academy of Matrimonial Lawyers ("IAML") has organized a series of symposiums concerning The Hague 1980 since June 2012, with the aim to study and impose a joint approach to the practice of the Convention between local lawyers. These events have been led by the current IAML President Elect Nancy Zalusky Berg.

In June 2012 the first IAML Hague Symposium was held in Minneapolis, Minnesota, U.S.A. immediately before the IAML-USA annual chapter meeting. Nancy Zalusky Berg, working closely with Japanese fellow Mikiko Otani, planned the meeting specifically for a delegation of lawyers from Japan. The event was significant because Japan was formally considering assentation to The Hague Convention on the Civil Aspect of International Child Abduction.

The Second IAML Hague Symposium took place alongside the IAML Annual General Meeting in Singapore in September 2012. LAWASIA and the members of the local bar attended the half day Symposium to discuss practices from around the world. Presenters from New Zealand, Australia, Sweden, England and the United States engaged with the local lawyers to discuss best practices in implementing this important Convention for the best interests of children.

Successful symposiums have since taken placed in Arizona in February 2013, Buenos Aires in September 2013 and New York in June 2014, where presenters included The Secretary General for the Hague, US Ambassador Susan Jacobs and Chief Justice Diana Bryant AO.

The IAML USA and Canadian Chapters are holding their annual meeting in Quebec from June 10-13. Canadian fellows and local lawyers have asked for the IAML to organize a Hague Symposium in Quebec on Tuesday, 9 June 2015.

Accordingly, on Tuesday 9 June 2015, The Hague Symposium will take place in the auditorium at the Hotel Auberge Saint-Antoine, 8 Rue Saint-Antoine, Quebec City, Quebec, Canada, G1K 4C9.

Timetable:

9:00 – 9:15:	Introductory remarks and introduction of all speakers **Katharine Maddox** (USA) **&** **Carolina Pedreno** (UK), IAML Fellows
9:15 – 9:45:	Secretary General Bernasconi will appear by video presentation: *Greetings from The Hague – Current initiatives at the Hague Conference in the family law area and the Diplomatic Functions of the Hague.* **Christophe Bernasconi**, Secretary General of The Hague.
9:45 – 10:30:	Ms. Patricia Apy will speak on the recently enacted International Child Abduction and Return Act, 22 USC 9101. **Patricia Apy**, IAML Fellow – USA
10:30 – 10:45:	Coffee Break
10:45 – 11:30:	Ms. Corrin Ferber will discuss the role of the United States Executive Branch in Hague Convention proceedings. **Corrin Ferber** of the US State Department.
11:30 – 12:15:	Mr. Robert Arenstein and Mr. Lawrence Katz will discuss the attorney's perspective regarding concerns raised by Article 13b (the "grave risk" exception) together with problems associated with collecting legal fees in Hague Cases. **Bob Arenstein & Larry Katz**, IAML Fellows – USA
12:15 – 1:15:	Lunch
1:15 – 2:00:	The Honourable Justice Jaques Chamberland will discuss a jurist's perspective regarding the difficulties raised by the application of Article 13 in the context of domestic violence. **The Honourable Justice Jaques Chamberland**, Canada
2:00 – 2:45:	Mr. Max Blitt, Q.C. will discuss the Hague Convention from a Canadian perspective, to include trends in Hague cases. He will also briefly address his views on mediation and negotiation of Hague cases. **Max Blitt, Q.C.,** IAML Fellow – Canada
2:45 – 3:30:	Ms. France Remillard will present an overview of the application of the Hague Convention in Canada through its 13 Central Authorities, and particularly by the province of Quebec. **France Remillard**, Central Authority of Quebec
3:30 – 4:00:	Panel Question & Answer session with all speakers

The Case for Reciprocity:

Significance of the International Child Abduction Prevention and Recovery Act in the private practice of International Family Law

By Patricia E Apy[1]

In 1989, a mere three years after the United States Congress enacted the International Child Abduction Remedies Act, (ICARA) then, 42 USC 11601 et seq[2] a case was filed in United States Federal District Court in Wyoming, seeking the return from the United States of America of Sarah Isa Mohsen to her habitual residence, conceded to have been the Kingdom of Bahrain. The application also conceded that Bahrain was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Hague Conference on Private International Law, Final Act of the Fourteenth Session, October 25, 1980. 51 Fed. Reg. 10498 (1980). However, the petition for return of the child was predicated upon the argument that with the ratification of the Treaty by the United States, the courts of the United States were now obligated to apply the substantive analysis of the Treaty in deliberating on the question of wrongfulness of the removal and retention as well as considering the unique Treaty remedy of a speedy return of the child. The argument advanced concepts of Treaty compliance as well as the adoption of the protections as a component of "customary international law". However, the Wyoming Federal Judge was not moved, and dismissed the application based upon the lack of treaty reciprocity existing between the United States and Bahrain. *Mohsen v. Mohsen*, 715 *F.Supp* 1063 (D. Wyo. 1989).

Five years later, Barbara Mezo sought the return of her abducted children from various countries in North Africa, filing a petition in United States Federal District Court in the Eastern district of New York charging that then Secretary of State, Warren Christopher, should, "perform his duties" by implementing the provisions of ICARA and securing the return of her two children, taken to Egypt and subsequently from Egypt to Libya. The Court observed the disconnect between the diplomatic functions of the Department of State and a private cause of action under the Treaty, and then repeated that because the Hague Convention applied to neither Egypt nor Libya, the remedy she requested was unavailable and the action summarily dismissed. *Mezo v. Elmergawi*, 855 *F. Supp*. 59 (E.D.N.Y. 1994).

[1] Patricia E Apy has been a Fellow of the International Academy of Matrimonial Lawyers since 1998. On April 15, 2015 she received the American Bar Association's National Grassroots Advocacy Award recognizing her body of legislative work and advocacy including having served as one of the principal authors of the ICAPRA. This article includes information compiled in support of remarks being made at the IAML Hague Symposium, Quebec Canada June 9, 2015.

[2] Now transferred to 22 USC 9001 et seq.

In 2004 Sean Goldman was taken by his mother in the company of his two maternal grandparents to Rio de Janiero, Brazil. The trip was explicitly intended to be a few weeks in length, however the mother, and later her family, would argue that upon arrival in Brazil the she chose never to return to the United States. What followed was protracted litigation waged in two countries which eventually made its way to the consciousness of the average American and Brazilian and became newsworthy throughout the globe. Sean's father, David Goldman enlisted the assistance of various Congressional leaders, career diplomats with specific experience in Latin America and the American media to articulate a case that Brazil, in failing to have ever returned an American child consistent with their explicit responsibilities in the Treaty could no longer be considered as compliant. As a result, he argued, a reciprocal relationship as contemplated by the Treaty, simply failed to exist, and he requested diplomatic and legislative efforts to pressure Brazil in recognizing and complying with their obligations under International law.

Mr. Goldman's success at drawing Congressional attention to a host of systemic issues in the implementation and enforcement of the obligations found in the Hague Convention on the Civil Aspects of International Child Abduction, on a nation state basis made it patently obvious that replicating such action on behalf of any future individual litigant would require enormous financial and personal resources and offer little promise of institutional change. Similarly situated "left- behind" parents saw both increased hope, and overwhelming frustration in attempting to advance similar tactics in working for the return of their children from a host of countries, both within and without Treaty mechanisms.

However, these parents garnered Congressional attention in addressing the issues of international parental abduction, in calling for a reasoned assessment of the process and effectiveness of the United States Department of State in managing its role as Central Authority under the Treaty and in exploring the long held formal position of the Department of State in refusing to consider alternate diplomatic and legal mechanisms to press for international compliance with existing Treaty obligations or to explore bi-lateral or multi-lateral agreements with countries who were not Treaty signators, and whose legal systems and historic approach to international parental abduction made them unlikely participants in a reciprocal treaty scheme.

Between December of 2009 and August of 2014 the United States House of Representatives and the United States Senate held no fewer than six different hearings , conducted in committees and subcommittees, before the Tom Lantos Human Rights Commission and requested by the Women's Caucus addressing the Hague Abduction Convention and ICARA's application both outside and within the United States. Testimony was solicited not only from the United States Department of State office of Children's Issues, but from International family law practitioners, law professors and academics and subject matter advocates including representatives from various countries, NGO's and affected parents. Originally introduced by Congressman Christopher Smith of New Jersey in 2009, six different versions of what would eventually be entitled the Sean and David Goldman International Parental Kidnapping Prevention and Return

Act of 2014 (ICAPRA) were authored, marked up and negotiated and on August 8, 2014 executed by the President of the United States as 22 USCS 9111 et seq. The United States Department of State vociferously opposed them all.

The Act represents three areas of federal action now focused on the prevention of child abduction. First, it provides documentation and accountability regarding the administration, prosecution and resolution of diplomatically reported abduction cases. Second, it provides objective criteria for the use of diplomatic tools in addressing cases in which there are proven obstacles to the recovery of children. Third, it begins the process of establishing border controls and protocols to insure that judicial restraints on the removal of children from the United States may be legally and practically implemented. The Act is structured with attention to these three primary areas. Title I addresses actions to be taken by the Department of State, primarily in its role as Central Authority, by enhancing its ability to comply with the duties already assigned to it by the existing requirements of the Hague Abduction Treaty[3]; Title II outlines mandatory and discretionary diplomatic steps to be taken where objective evidence demonstrates either that a Treaty signator is not meeting its obligations under the Treaty, or where an alternate protocol for addressing child abduction must be negotiated apart from participation in the Hague Abduction Convention[4]. Title III begins the first step toward effective border control for the prevention of international child abductions from the United States with the goal of insuring that all children travelling from the United States are authorized to do so.[5]

Focus on Prevention: The Importance of the ICPRA Reporting Requirements to the Judicial Assessment of Risk of Abduction

Testimony elicited at hearing repeatedly demonstrated that the earliest observations made by the Hague Conference on Private International Law and included in its compilation of recommendations for continued good practice in dealing with the civil aspects of international child abduction, remained salient. , "Preventing abduction is a key aim of the 1980 Convention, and it is widely acknowledged that it is better to prevent an abduction than to have to seek the child's return after Abduction." (Guide to Good Practices)

---

[3] 22 USC Sec 9111-9114

[4] 22 USC 9121-9125

[5] Section III amends 6 USC 231 et seq. *The Secretary, through the Commissioner of U.S. Customs and Border Protection (referred to in this section as CBP), in coordination with the Secretary of State, the Attorney General, and the Director of the Federal Bureau of Investigation, shall establish a program that- 1)* seeks to prevent a child (as defined in section 1204(b)(1) of title 18, United States Code) from departing from the territory of the United States if a parent or legal guardian of such child presents a court order from a court of competent jurisdiction prohibiting the removal of such child from the United States to a CBP Officer in sufficient time to prevent such departure for the duration of such court order; and (2) leverages other existing authorities and processes to address the wrongful removal and return of a child.

Among those recommended measures by The Hague Special Commissions included; "…documentation of the requirement to obtain or maintain separate travel documentation for the minor child; the established express consent of both parents before issuing travel documentation for minor children; *assessing and taking into account the potential risk of wrongful removal or retention of a minor child.*" Summary: Proactive Measures- Creating a Legal Environment which reduces the risk of abduction." Part III Preventative Measures.

Among the difficulties discussed in years of congressional briefings and hearings, particularly by family law practitioners and parents, was the inherent challenge in successfully securing reasonable preventative restraints on international travel of their children.[6] They shared the complexity and expense of providing accurate and admissible information to the judges who were charged with fashioning parenting and international access arrangements when parents could not agree. Judges considering the imposition of preventative measures and restraints were universally and naturally reluctant to impose restraints where no objectionable behavior had as yet occurred. Further, locating and qualifying experts with specialized knowledge in not only in foreign law, but expertise in the actions of a foreign government or its governmental entities in its compliance with the Hague Abduction Convention factors were often challenging or unavailable.

In their seminal work on child abduction, summarized in the "Judges Guide to Risk Factors of Child Abduction", Linda Girdner Ph.D. and Janet Johnston Ph.D. explained that assessing the risk of removal or retention of child required, in addition to the individual characteristics of the parents and their actions, an objective assessment of the institutional obstacles to recovering that child.

Obstacles to recovery refer to the degree to which there are legal, procedural, policy or practical barriers to locating, recovering or returning a child in the event of an abduction. If the obstacles appear to be extremely difficult to overcome then the likelihood of the child ever being returned may be remote. If the case appears to involve a few minor obstacles, then the likelihood of the child being recovered promptly would be relatively good.…the family court judge should consider that in cases in which the obstacles to a prompt recovery would be difficult to overcome, the need for preventative measures is more acute, warranting the use of measures which are more restrictive. [7]

Of course, the Treaty itself is silent with regard to enforcement of its provisions or assessment of the current status of compliance among Treaty partners. Further, no formal record keeping component is contained within the structure of the Treaty nor has one been routinely or

---

[6] MacKinnon v MacKinnon, 191 NJ 240 (2007)

[7] "Judges Guide to Risk factors of Child Abduction", Linda Girdner, Ph.D. And Janet Johnston Ph.D. March 20, 1995 22nd National Conference on Juvenile Justice National Council of Juvenile and Family Court Judges and the National District Attorneys Association , March 20, 1995

voluntarily taken on by Hague Conference.[8] The original requirement of the United States Department of State to provide information to the Congress regarding the status of the abduction treaty was enacted, not as an original part of the implementing legislation for the Hague Abduction Convention, but as part of the Foreign Relations Authorization Act, Fiscal Years 1998 and 1999, and also as part of the Foreign Affairs Reform and Restructuring Act of 1998 and the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, and not as part of the original treaty implementing legislation. Under the prior reporting requirements the Office of Children's Issues, relying upon the Hague Conference "Guide to Good Practice" subjectively assessed three areas of performance in categorizing a country as "non-compliant" or "demonstrating patterns of non-compliance". Historically, many of the reports had been received with lukewarm enthusiasm by family lawyers who remained hopeful of the eventual ability to rely upon the information in their international practices. Practitioners perceived there was a sometime a myopic tendency on the part of the Department of State to avoid applying the moniker of "non-compliant" to offending countries even in circumstances where it was clear that the obstacles to recovery were virtually total. Unless a country had demonstrated deficiencies in all three of the areas of performance (central authority compliance, judicial performance and law enforcement performance) the report would indicate that the country displayed merely "patterns of non-compliance". Further, the reports did not highlight qualitative statistical data which would permit independent review or reliably document the current number of cases, how old they were or their disposition. There was no policy of identifying for members of Congress, abductions that had taken place into or out of their constituency. There was no formal recognition of the link between military service and an over-representation of international child abduction cases. Of course, the report was limited to information regarding countries who were signators of the Hague Abduction Treaty, and provided little information regarding reported abductions or requested assistance involving non-treaty signators.

The Hague Conference itself, has in the past, studiously guarded its "neutrality" avoiding engagement in any public negative critique of signatory countries (particularly where it could be viewed as punitive) in favor of educational and technical support to "encourage" treaty implementation. There is absolutely nothing wrong with this perspective, unless it results in an unintended loss of transparency or is unreservedly echoed in the diplomacy of Treaty signators without scrutiny. Reluctance to unflinchingly review and publically warn about the actions of states party (including , of course, the United States of America) encourages a false sense of comfort on the part of world's family court Judges who could assume that a country that identifies itself as a signator, without more, acts with reciprocity regarding the implementation

---

[8] In May of 2014 Secretary General Christophe Bernasconi in addressing the IAML Hague Symposium New York indicated that the Hague Conference does not have access to uniform or current statistics from signator countries providing a recent or relevant basis for the assessment of international reciprocity. See also, Caitlin M. Bannon, "The Hague Convention on Civil Aspects of International Child Abduction, The Need for Mechanisms to Address Non-Compliance 31 BC Third World L.J. 129, 153 (2011)

of the Treaty. To apply the Girdner-Johnston risk factor matrix, such misinformation could leave the impression of few existing obstacles to recovery of a child, in the absence of concrete disclosure of the number, circumstances and treatment of active abduction cases.[9] Without the necessary objective statistical assessment of the state of reciprocity, attorneys draft international access arrangements blissfully unaware of the potential inability to retrieve a child from a jurisdiction, and without considering or including additional security to insure international enforcement in their matrimonial litigation.

In her introductory correspondence accompanying the 2010 Compliance Report, Janice Jacobs, then Assistant Secretary of State for Consular Affairs declared that, "Compliance is a challenge for many countries. Consequently, continued evaluation of Treaty implementation in partner countries and the United States is vital for its success." [10]

The model for the diplomatic and reporting requirements now codified as part of ICAPRA was the United States' Trafficking Victims Protection Act of 2000 (TVPA) and its subsequent amendments . 22 USC 7107 The use of TVPA was not accidental.

The goal of the reporting requirements found in TVPA have been articulated as, "seeking to increase global awareness of the human trafficking phenomenon by shedding new light on various facets of the problem and highlighting shared and individual efforts of the international community and to encourage foreign governments to take effective action against all forms of trafficking in persons." [11]

While originally the subject of similar skepticism by the Department of State, who raised numerous objections in 1999 to the financial, manpower and diplomatic burdens inherent in the reporting function, a decade of TVPA has demonstrated that the TIP (Trafficking in Persons) report has had a remarkable impact upon the recognition and amelioration of trafficking in persons, both domestically and internationally.

---

[9] In her excellent memorandum "Re Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (ICAPA)" prepared for the International Academy of Matrimonial Lawyers, Ashley Tomlinson of Laura Dale& Associates, Houston Texas, reviewed the "pros and cons" of the new legislation. In doing so she recounts State Department testimony offered by Ambassador Susan Jacobs before the Senate Foreign Affairs committee summarizing the State Department's opposition to ICAPRA as somehow undermining the work of The Hague Conference and "threatening the efficacy of the Convention". However in the 35 years since the enactment of the Treaty, the Hague Conference has not seemed willing to exert its leadership in providing neutral assessment and publication of timely and relevant statistics evaluating the status of reciprocity. The United States Department of State's deference to the Hague Conference as a body to which the US should "continue to delegate its sovereign authority " is not supported in the arena of international family law practitioners having to identify and advocate legal protections based upon obstacles to recovery.

[10] See, "Hey Uncle Sam! Maybe it's time to stop condoning child abductions to Mexico", Antoinette A Newberry Wood, Ga. J. Int'l & Compels, Vol 42:217 at 240 (2013)

[11] Introductory remarks ,"Purpose, The 2009 Trafficking in Persons (TIP) Report" Report and subsequent updates available at www.state.gov/g/tip

Widely acknowledged as the world's most comprehensive and influential assessment of global anti-trafficking efforts, the Tip report is a potentially powerful advocacy and campaigning tool for anti-slavery groups working both in country and internationally. Since 2001, the Tip report has been the US' principal diplomatic tool to engage foreign governments on the issue of trafficking and slavery within their own borders. Using a three-tier system, the US state department ranks how countries are complying with the Trafficking Victims Protection Act. It offers a detailed analysis of credible evidence of people trafficking and slavery within each country, any counter-trafficking efforts being undertaken and a series of suggestions for how the situation could and should improve. 'It is a blunt instrument to force through change and a strong platform in delivering credible information that looks at solid evidence in an objective light with the weight of what is still the most powerful nation on earth behind it. As an advocacy tool you don't get much better than that.' Steve Trent Environmental Justice Foundation

"How NGO's are using the Trafficking in Person's Report", Annie Kelly, The Guardian, 21 June 2013

The motivation for the changes made to previous reporting requirements once added to ICARA are designed with precisely the same purpose as the TIP report. ICAPRA is designed to enhance and strengthen the information to be submitted to Congress by requiring production of more than generalized and subjective summaries and by expanding reporting requirements to provide information about abductions to non-Treaty jurisdictions. In addition to reporting on any countries in which there are pending abductions, regardless of their Treaty status, the new requirements will provide the tools for judges, in addition to law makers, to evaluate components of the practical obstacles facing those attempting to recover their abducted children. For the legislators and diplomats, this information is to be used to form and communicate a conclusion as to whether there has been a "governmental failure" when the evidence so demonstrates, and to contemplate diplomatic or legislative action if appropriate. For the jurist, attorney, arbitrator or mediator this information can be used to objectively assess the systemic obstacles to recovery of a child, apart from any contested allegations regarding the individual family dynamics and to be informed by this objective, non-case specific information in considering the necessity or prudence in recommending the imposition of preventative measures or enhanced enforcement mechanisms. (Title I ICAPRA Department of State Actions, Reporting Requirements; Actions in Response to Unresolved Cases; Actions in Response to Determination of Pattern of Noncompliance 22 USCS 9111-9114)

Reading the first ICAPRA Report 2014

On May 13 2015 the Office of Children's Issues released its first ICAPRA report, admittedly for a truncated reporting period. [12] It is clear, in reviewing the first compliance report issued pursuant to ICAPRA, that there are a number of weaknesses that at best may simply reflect the Department of State's inability to so quickly comply within the robust statutory time frame in a way that reasonably articulates the information required by the law in a useable form. At worst, it could be read as evidence of an unfortunate and persistent institutional resentment to the Congressional imposition of the modified reporting requirements and a profound determination to render the report of limited value. In either case, a comparison between the quality, scope and comprehensiveness of the 300 plus page annual Trafficking in Person's Report and the recently released 41 page ICAPRA report demonstrate a failure to appreciate the need for and potential international impact of the report required by the legislation.

This first report actually warns, "The *case numbers provided in Table 2 do not necessarily reflect the total amount of cases per country or area, reported to the USCA. Rather the statistics provided reflect the number of abduction or access cases that met the specific data requirements of the law, as outlined in the header of categories in Table 2 in CY 2014.*"Section 3.2 "Countries and Areas with Five or More Pending Abduction Cases during CY 2014".

Further, a cursory review indicates an almost arbitrary and entirely subjective inclusion and exclusion of cases, loosely based upon the Department's own reading of the legislation, and not as a result of specific instructions in the law to do so.

> **Non-Hague Treaty Cases:** By way of example, if one looks at a non-Treaty country such as the United Arab Emirates, the report, in Table 2 indicates incorrectly that the number of unresolved cases is zero. A check of the Appendix II which in Table 6 purports to list all unresolved cases, offers no listing for the UAE. This would come as a shock to Christopher Dahm, whose daughter Gabrielle was abducted by her Mother with the assistance of her maternal grandparents August 4, 2010. It would also be a surprise to his Congresswoman Lois Frankel and Senator Bill Nelson from South Florida who have been working with the Department of State and Department of Justice in insisting on her return. "Gabby's" abduction occurred in violation of express orders prohibiting the mother from removing the child from the United States, and placing restrictions on passport issuance. Neither parent is a citizen of the UAE. As a result, the United States Attorney for the Southern District of Florida sought and obtained criminal indictments against both the abducting Mother and her accomplice parents for International Child Abduction pursuant to the International Parental Kidnapping Prevention and Crime Act.[13] Mr. Dahm has, throughout his ordeal, identified his daughter as having been abducted, and sought the assistance of the Office of Children's Issues in securing the repatriation of his daughter, as well as frequent requests for diplomatic help in securing information regarding her location and her health. Communication from the Department confirms

[12] The report indicates that the reporting period under the statute was from August 2014 to December 2014 with future reports reflecting a calendar year.

[13] 18 USC 1204

that Mr. Dahm's case has been the subject of discussion with UAE authorities by Ambassador Susan Jacobs. Mr Dahm's Congressional Representative Lois Frankel, and her office have been aggressively involved with the matter, compelling regular diplomatic and law enforcement updates. Mr. Dahm's case can only be read as falling into the category of cases the Department of State has selectively removed from their reporting requirements.[14] Remarkably, understanding the purpose of the legislation in the prevention of abduction and the identification, location and recovery of abducted children, the report leaves the reader to guess at which cases the Department felt were outside of the "data requirements of the law" or which did not "necessarily" reflect the total number of cases.

With regard to the identification of Countries demonstrating a "Pattern of Non-Compliance", and necessarily implicating diplomatic remedies it is clear the selective choices made in reflecting the nature and number of pending abduction cases has a direct bearing on the assessment of whether a Country is acting in "persistent failure".

Hague Treaty Cases: Japan is singled out in the report, but only as a diplomatic success story, with contradictory information within different sections of the report, regarding Japan's status. While seemingly acknowledging that Japan has continued its historic patterns of recalcitrance in the return of abducted children or organization of rights of access, Japan is not identified as exhibiting patterns of non-compliance. Within hours of the Hague Abduction Convention becoming effective between the government of the United States and Japan in April of 2014, the desperate parents of children who had been abducted from the United States (some who have been prevented from seeing their children for many years), filed their applications for the organization of Rights of Access pursuant to Article 21 of the Treaty. Left-behind parents had already been told that the Treaty would not be retroactively applicable to their abduction claims, and were strongly encouraged by the Japanese Central Authority to relinquish any pre-ratification abduction claims or requests for return of their children to the US.[15] The chart of pending cases in the ICAPRA report confirms that the forty cases were brought, and indicates that only 29 were submitted to the Japanese Central Authority, and that the Japanese Central

[14] The Department has independently determined that "most non-Convention cases do not meet ICAPRA's definition of an unresolved abduction case." Their purposeful application of the definitions to exclude virtually all existing non-Treaty abduction cases from reporting , unless there is request made to a non-existent central authority is neither a fair nor accurate reading of the language and intent of the statute. The accompanying statement, "When parents use the legal system of a non-Convention country, they are likely participating in the proceeding for custody of the child, which may not involve the return of the child to the United States, rather than submitting an application for return of the child for determination to the judicial or administrative authority. Therefore the Department does not consider a custody proceeding to be an unresolved abduction case in a non-Convention country, unless there is also a formal request for return", is particularly unhelpful. If a parent has identified their child as having been abducted, and as a result opened a case with the Office of Children's Issues, to remove their case from the data, because they are forced to file a custody complaint as the only possible way to perfect the return of their child, is unsupportable.

[15] Indeed, a so called "access mediation program" had been offered in December of 2013 only to parents of abducted children who were willing to formally abandon their abduction claims.

Authority has taken no steps to submit the requests for access to either judicial or administrative bodies . Nevertheless, the report indicates that there are zero unresolved cases, despite the fact that as of May 30, 2015 there appear to have been no access accomplished pursuant to the Convention, for any of the applicants. The report fails to produce any evidence of efforts to negotiate a Memoranda of Understanding, or other alternate protocol to deal with the pre-ratification cases. The documentation fails to identify service members or former service members (despite the fact that at least two known cases were among the pre-ratification cases). In identifying its recommendations to improve resolution of cases the Department does not identify Japan as a country with which they have held bi-lateral meetings, as expressly contemplated by the legislation to encourage governmental officials to comply with their obligations under the Treaty, or to intensify their engagement with the Japanese Central Authority for updates or prompt case processing.[16] However, its discussion of Japan references the Department's efforts as it " continues to encourage the government of Japan to remove ***obstacles*** that parents still face in gaining access to or return of their children." The paragraph closes with the admission that " almost all of these non-Convention cases remained un-resolved" It is unclear what the Department means by "Non-Convention cases" in this context, in that while the pre-ratification abduction cases would be so considered , a new access case would be a Convention case. Finally a review of the "Reasons for Delay in Submission to Authority" found in Table 5 identifies each of the 29 listed access cases as suffering from a delay. Notably, the Department indicates that in 9 of the cases "the case was not submitted to a judicial or administrative authority while the parents pursue mediation" However, if this mediation is program advanced by the Japanese Central Authority in 2013 it has produced no recognizable success not only since access petitions were made a year ago, but since before the Treaty became effective. There is no viable explanation given that there has been no successful access application or abduction application, nor any significant movement on pre-existing cases, how Japan is kept from being identified objectively as demonstrating patterns of non-compliance.

The problem, of course, is that an attorney or Judge attempting to prospectively determine whether Japan poses systemic obstacles to recovery, would be entirely misguided in reading or attempting to evaluate the report. In fact counsel for a parent urging travel to Japan could (and likely will argue) that Japan should be considered entirely Treaty compliant and their reciprocal obligations under the Treaty positively met based upon this report, as a matter of law.

---

[16] Table 3 Recommendations to Improve Resolution of Cases in Countries or Areas with Five or More Pending Abduction Cases during CY 2014 p. 20.

The Hope of ICAPRA: Working Toward a National Registry for Custody Orders Preventing Travel from the United States

One of the most immediately promising portions of ICAPRA, and certainly the one that would directly impact family law attorneys and judges is found in the amendment to the Homeland Security Act. The new legislation requires the establishment of a federal program through the Commissioner of United States Custom and Border Protection, in coordination with the Department of Justice, Federal law enforcement and the Department of State to prevent children from being removed from the United States in violation of a valid court order. Title III begins this process by establishing a working a group comprised of the major stakeholders, including consultation with representatives from the Department of Defense and the FBI.

It is hoped that in formulating the program, work toward a federal uniform order preventing international travel can be drafted which provides an administrative mechanism for the registration of effective orders. In looking at the components of a meaningful and valid order the working group need not "reinvent the wheel". They can and should refer to the Uniform Child Abduction Prevention Act[17], promulgated by the National Conference of Commissioners on Uniform State Law in 2006. The Act harmonizes the Uniform Child Custody Jurisdiction and Enforcement Act [18] as well as considering a host of other state and federal laws and a myriad of substantive custody issues , including domestic violence concerns. In outlining a recommended process for, and the components of, a valid abduction prevention order, the act enumerates a number of specific measures that a court may order. The UCAPA references travel restrictions, the State Department's Child Passport Issuance Alert Program and includes criteria for expiration, modification or revocation of orders. Currently enacted in 14 states, using the UCAPA as a beginning template which has been drafted and amplified by subject matter experts , can only render a uniform order easier to use and therefore more likely to become a regular and accepted preventative method. Still, it will be helpful for international legal practitioners both in the United States and abroad, to remain engaged, through their professional associations[19] in rendering the process internationally user friendly.

---

[17] Uniform Child Abduction Prevention Act (Statutory Text, Comments, Un-Official Notations) Linda Elrod J.D. Reporter 41 Fam L.Q. 23 (2007)

[18] Uniform Child Custody Jurisdiction and Enforcement Act, approved 1997, enacted in all states except Mass where pending. www.uniformlawcommission.com

[19] International Academy of Matrimonial Lawyer Hague Working Group; International Law and Procedure Committee of the Family Law Section of the ABA should provide technical assistance to the working group in addressing best practices to establish validity of orders.

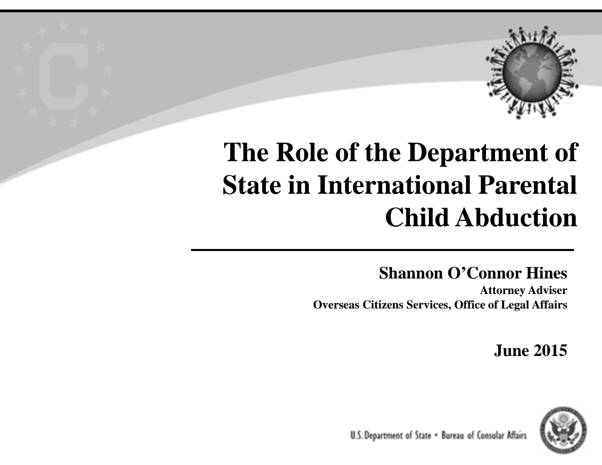
The Promise of ICAPRA for Family Lawyers:

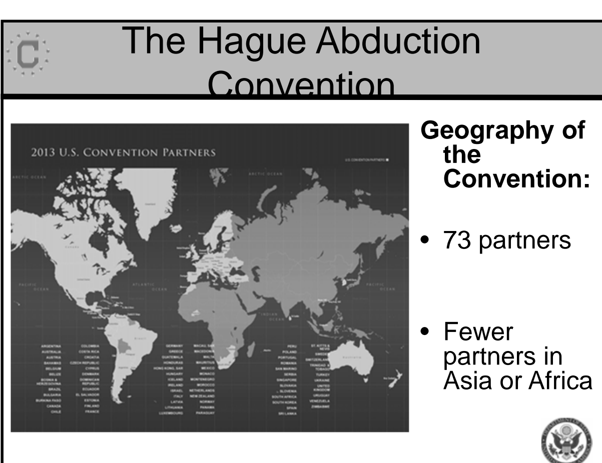
In addition to the reporting and diplomatic functions mentioned above and the steps toward border control, ICAPRA offers real time assistance to left behind parents and their counsel. Now, no longer experiencing their child's abduction as having been relegated to a "domestic dispute," litigants are assured of at least one senior official in each and every diplomatic and consular mission abroad specially assigned to assist parents who need to coordinate legal efforts abroad or may attempt to see their children. Embassies and consulates are to monitor developments in such cases and communicate accurate information back to OCI, and the litigants. For each country in which there are five or more active cases of international abduction, there must be a written strategic plan to engage with the appropriate foreign counterpart and provide predictable mechanisms for working such cases.

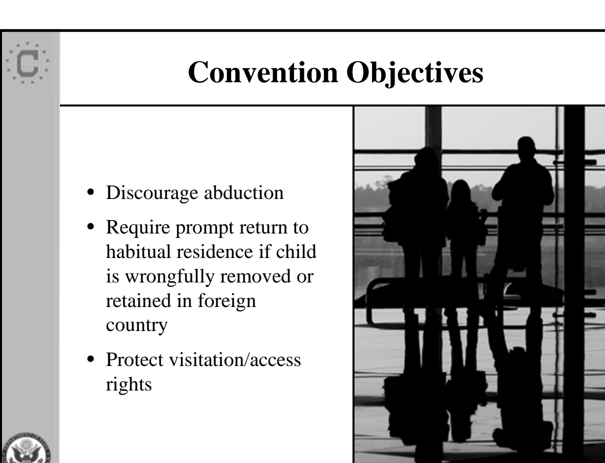
ICAPRA was not drafted to supplant or weaken ICARA, or the application of the Hague Abduction Treaty on a global basis. Nothing in the text of the legislation limits the Hague Conference in its current role, or its relevance. The Hague conference will presumably continue with its efforts for international judicial education and sharing of good practice and communicating international legal developments.

ICAPRA articulates congressional intention that an individual left behind parent and their legal representatives will no longer be forced to litigate "systemic" maladies in the diplomatic relationships between that country and the United States of America. Once it is determined , using entirely objective criteria, that there is a breach in the reciprocal relationship with a Treaty partner, or there is a systemic governmental failure to address international parental abduction, the burden for action shifts to the Department of State to utilize the diplomatic tools available to it identify and ameliorate the problems. If they can't, when they can't the President of the United States has an escalating arsenal of measured diplomatic resources to direct attention to the problem and communicate its priority to the American people. That begins with bi-lateral and multi-lateral discussions and agreements to develop alternate protocol for the resolution of international child abduction, particularly where religious and culturally based legal systems make the future likelihood of participation in the Abduction Convention remote. But it also means identifying and disclosing the difficulties with our Treaty partners, so that family lawyers are not lulled into the belief that the Treaty is properly working in a place it does not. Any serious critique of the working of the Abduction Convention will, undoubtedly, include a critical analysis of the treatment of Treaty cases within the United States. We can and should welcome such a review.

There is something worse than a country that has not yet signed the Hague Abduction Convention, it is a country that has but is not demonstrating a capacity or desire to act in reciprocity.


The Role of the Department of State in International Parental Child Abduction
Shannon O'Connor Hines
Attorney Adviser
Overseas Citizens Services, Office of Legal Affairs
June 2015
U.S. Department of State • Bureau of Consular Affairs

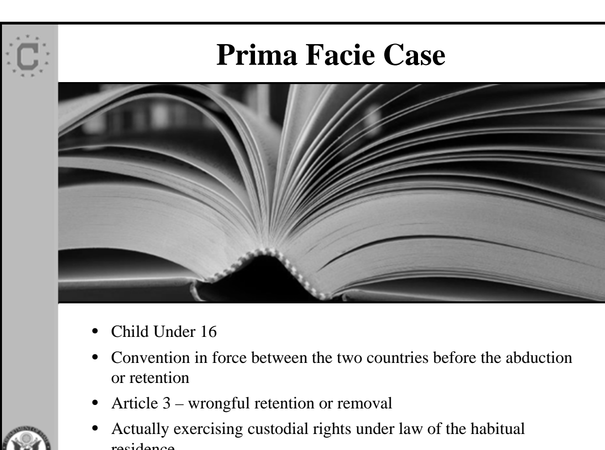

The Hague Abduction Convention
2013 U.S. Convention Partners
Geography of the Convention:
• 73 partners
• Fewer partners in Asia or Africa


Convention Objectives
• Discourage abduction
• Require prompt return to habitual residence if child is wrongfully removed or retained in foreign country
• Protect visitation/access rights

Key Components

- Venue treaty
- The child should be returned to country of habitual residence so that a court of competent jurisdiction may make an appropriate custody and access determination (subject to some defenses).

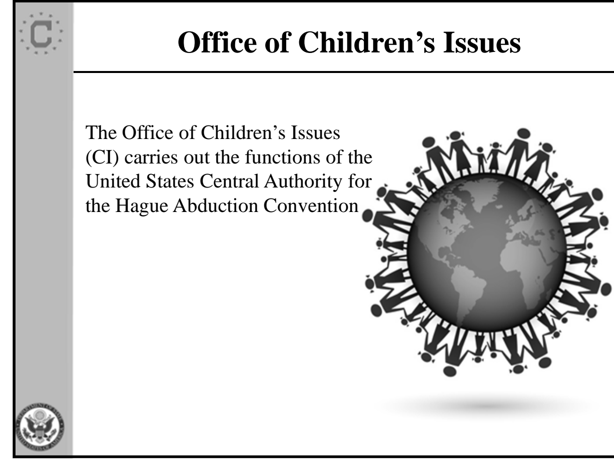
Prima Facie Case



- Child Under 16
- Convention in force between the two countries before the abduction or retention
- Article 3 – wrongful retention or removal
- Actually exercising custodial rights under law of the habitual residence

Office of Children's Issues

The Office of Children's Issues (CI) carries out the functions of the United States Central Authority for the Hague Abduction Convention



Role in Outgoing Hague Cases

- Provide information to parents
- Forward Hague Applications to the FCA
- Monitor the case and provide information to parents
- Provide information on local resources

Role in Incoming Hague Cases

We do:

- Receive cases from the foreign central authority (FCA)
- Locate the child in the United States
- Notify state courts with pending custody proceedings of open Hague cases under Article 16
- Communicate with the applicant parent, FCA, and attorneys to make sure the FCA is updated on the case
- Assist in coordinating the safe return of the child
- Facilitate direct judicial communications upon request

We don't:

- Act as attorneys in individual cases
- Provide legal advice
- File cases with the court

Hague Network of Judges

- Organized by the Hague Conference on Private International Law
- Approximately 90 judges from 70 countries
- Facilitate direct judicial communications
- Point of Contact for:
  - Domestic judges on Convention education
  - International judges on questions of US law and procedure

What the Department can do for you

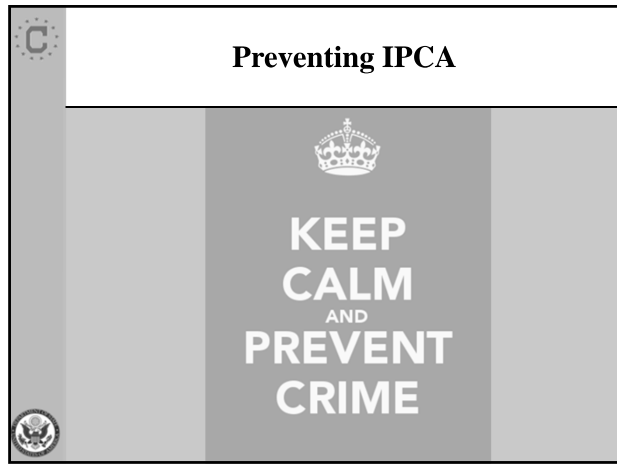
- Arrange for communication with a Hague Network Attorney.
- Use of Language Line for Direct Judicial Communication
- Liaise with Law Enforcement
- Coordinate issuance of passports for minors
- Connect a judge with a U.S. Hague Network Judge

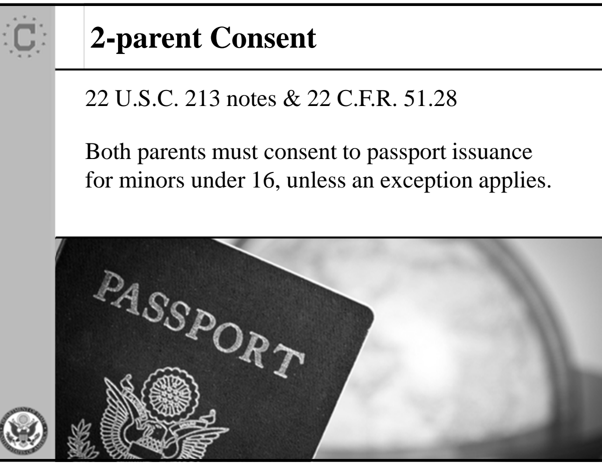
What the Department Cannot Do

- Provide Translators for Trials
- Provide Translations of Documents
- Interpret Foreign law
- Provide funding for parents' travel
- Provide Expert Testimony

Role in Non-Hague Cases

- Provide information and resources to parents
- We can facilitate communication with other U.S. government agencies and non-governmental organizations





Sole Parent

- Birth Certificate with one-parent's name
- Court order terminating parental rights
- Death Certificate
- Single Parent Adoption
- Court order stating that the other parent is mentally incapacitated.

Sole authority per a custody order

Sole Legal Custody

OR

Permission to apply for a passport solely and/or travel internationally.

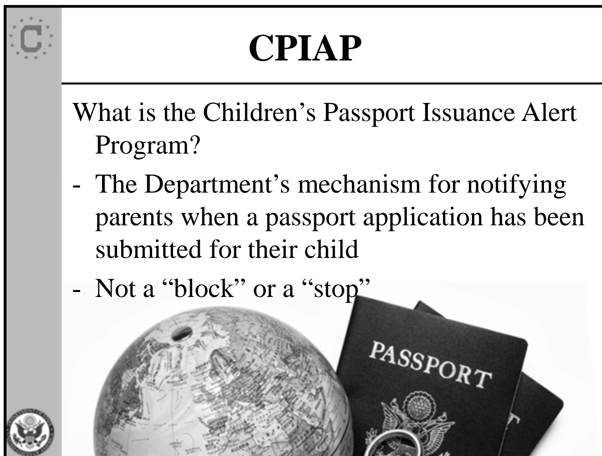
Authorization to travel internationally

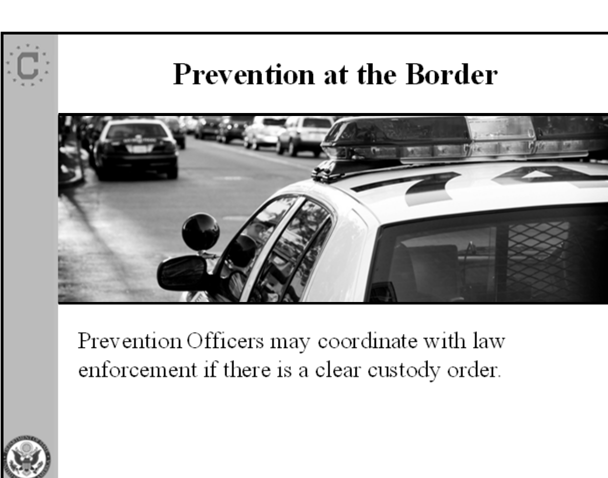
- Notice vs. Consent
- If a court order requires ONLY notice to the non-applying parent prior to international travel, then we will issue the passport.
- We will not look behind the order to determine if notice was, in fact, given.

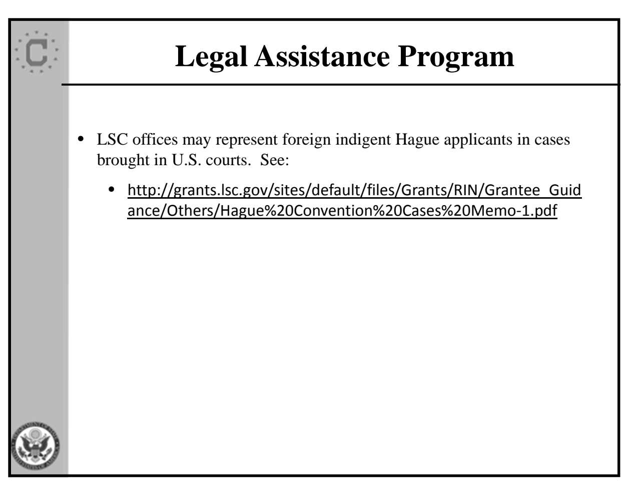
Special or Exigent Circumstances

22 CFR 51.28(a)(5)

Allows the Department to issue a passport without consent or a qualifying court order.


CPIAP
What is the Children's Passport Issuance Alert Program?
- The Department's mechanism for notifying parents when a passport application has been submitted for their child
- Not a "block" or a "stop"
PASSPORT


Prevention at the Border
Prevention Officers may coordinate with law enforcement if there is a clear custody order.


Legal Assistance Program
• LSC offices may represent foreign indigent Hague applicants in cases brought in U.S. courts. See:
• http://grants.lsc.gov/sites/default/files/Grants/RIN/Grantee_Guidance/Others/Hague%20Convention%20Cases%20Memo-1.pdf

LAC Program Support

- **Resources available for attorneys to assist with Hague cases include:**
  - Hague Manuals available at: http://travel.state.gov/content/childabduction/english/legal/for-attorneys.html
  - Mentor Attorneys
  - Language line

To Join the Hague Attorney Network

- No experience required
- Legal assistance coordinator Patricia Hoff can be reached at 202-485-6124 and hagueconventionattorneynetwork@state.gov
- Information and sign up sheet available at: http://travel.state.gov/content/dam/childabduction/5%203%201.1_Attorney%20Network%20Flyer%20and%20Form_FINAL.pdf

Contact Us

The Office of Children's Issues

- 1-888-407-4747
- Travel.state.gov

Email for general inquiries:
- AskCI@state.gov

Legal Assistance Program:
- HagueConventionAttorneyNetwork@state.gov

Shannon Hines
- hinesso@state.gov

ATTORNEYS FEES UNDER THE HAGUE CONVENTION
22 USC 9007 formerly 42 USC 11607

ROBERT D. ARENSTEIN
295 MADISON AVENUE
NEW YORK, NEW YORK 10017
212 679 3999
arensteinlaw@aol.com

Petitioner's Right to Recover Counsel Fees and Expenses

Litigants have the right to recover counsel fees and expenses pursuant to the Hague Convention. Section 8 of the International Child Abduction Remedies Act (the Hague Convention) provides foran award of counsel fees for a prevailing petitioner. 22 U.S.C.A § 9007 (b)(3) formerly 42 U.S.C.A. § 11607(b)(3)
If the court orders that a child is to be returned, then it "shall order the Respondent to pay necessary expenses incurred by or on behalf of the Petitioner, including court costs, legal fees, private investigators, housing and child care costs during the proceedings in the action, and transportation costs related to the return of the child, unless Respondent establishes that such order would be "clearly inappropriate." Id. The plain language of the statute creates the presumption that the appropriate fees must be paid, See Whallon v. Lynn, 356 F.3d 138 (1st Cir. 2004) where the Court found that "the district court has a Duty under 42 U.S,C.A. § 11607(b)(3), to order the payment of necessary expenses and legal fees, subject to a broad caveat denoted by the words, clearly inappropriate." see also Rydder v. Rydder, 49 F_3d 369 (8th Cir. 1995): see also Diabo v. Delisle, 500 F. Supp. 2d 159 (N.D.N.Y., 2007).

Attorneys' Fees and Costs

While there are not many cases involving fees after a child abduction under

ICARA, there are enough cases to guide our approach in determining whether fees can be called necessary. The "lodestar" approach is the proper method for determining the amount of reasonable attorneys' fees. See Freier v. Freier, 985 F.Supp. 710, 712 (E.D.Mich.1997). Kutner v. Kufner 480 F.Supp2d 491, Distler v. Distler, 26 F. Supp 2d 723, Berendsen v. Nichols 938 F. Supp 737, 739 (D. Kan 1996). Using this approach, the Court should multiply the number of hours reasonably expended on the litigation by the reasonable hourly rate. Reed v. Rhodes 179 F.3d 453, 471-72 (6th Circuit 1999)
A detailed guide for determining the reasonableness of the rates was spelled out clearly in a twelve step analysis by the Court in Johnson v. Georgia Highway Express Inc. 488 F2d 714 The factors considered were:
1) The time and labor require& "Although hours claimed or spent on a case should not be the sole basis for determining a fee, Electronics Capital Corp. v. Sheperd, 439 F.2d 692 (5th Cir. 1971), they are a necessary ingredient to be considered, The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities, If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

The Distler Court found the services of a foreign lawyer were necessary expenses under this analysis. The Court ruled that the foreign attorney was not merely a consultant but an integral part of the case.

Clerical ,and editing work was performed by secretarial staff and paralegals and billed at this rate. Telephone calls, facsimile transmissions, witness fees, certified mail and postage, service fees , copying and filing fees incurred are also proper for reimbursement under the ruling of the Kufner and Berendsen Court.

2. The novelty and difficulty of the questions. "Cases of first impression generally require more time and effort on the attorney's part. Although this greater expenditure of time in research and preparation is an investment by counsel in obtaining knowledge which can be used in similar later cases, he should not be penalized for undertaking a case which may "make new law." Instead, he should be appropriately compensated for accepting the challenge."

Souratgar v. Fair involved several questions of first impression including determining a) if domestic violence should be a determining factor in a 13 b Grave risk determination under the Convention and b) if the Application of

Sharia law in a proceeding in the habitual residence would prevent a return under Article 20 .

3. The skill requisite to perform the legal service properly, "The trial judge should closely observe the attorney's work product, his preparation, and general ability before the court. The trial judge's expertise gained from past experience as a lawyer and his observation from the bench of lawyers at work become highly important in this consideration."

4. Preclusion of other employment by the attorney due to acceptance of the case. "This guideline involves the dual consideration of otherwise available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes."
,
5. The customary fee. "The customary fee for similar work in the community should be considered, It is open knowledge that various types of legal work command differing scales of compensation. . As long as minimum fee schedules are in existence and are customarily followed by the lawyers in a given community they should be taken into consideration." A Hadix v. Johnson, 65 F.3d 532,536 , Flynn v. orders in 472F.Supp.2d, 2007)

8. Whether the fee is fixed or contingent. "The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case. In most cases the attorney fees are fixed pursuant to the attached signed retainer agreement.

7 Time limitations imposed by the client or the circumstances. "Priority work that delays the lawyer's other legal work is entitled to some premium. This factor is particularly important when a new counsel is called in to prosecute the appeal or handle other matters at a late stage in the proceedings". These cases are a priority due to its expeditious nature.

8. The amount involved and the results obtained.: The successful outcome of this case resulting in a) obtaining a return order to the habitual residence.

9, The experience, reputation, and ability of the attorneys. "Most fee scales reflect an experience differential with the more experienced attorneys receiving larger compensation."

All attorneys on this case specialize in child abduction under the Convention

10. The "undesirability" of the case. In Souratgar v.Fair the case involved an Iranian Petitionerwho was accused of domestic violence and plans to abduct his child to Iran, acountry whose government is not in favor with the United States and not amember of the Hague Convention. Disproving accusations of domestic

violence and imagined terrorist activities were not popular causes and required additional attention to successfully resolving and diffusing the sensitive issues involved.
Although this analysis is usually applied to Civil Rights cases and this is not a traditional civil rights case Mr. Arenstein's representation of this client under the strict guidelines of the Hague Convention against the sometimes relentless domestic violence lobby, proved to be daunting, in light of the volume and strength of support from the legal community in favor of treating this case as the one to defend the rights of victims of domestic violence.).

11. The nature and length of the professional relationship with the client." A lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office".

12. Awards in similar cases. The reasonableness of a fee may also be considered in the light of awards made in similar litigation within and without the court's circuit. See Milner v. Kufner 480F.Supp2d 491 F.Supp.2d2010 C.A. No, 07-046 8, Distler v. Distler Ibid

THE "CLEARLY INAPPROPRIATE' ANALYSIS

The Convention anticipates that all "necessary expenses incurred ... to secure the child[ren]'s return" will be shifted to the abductor, both "to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first . place." See 51 Fed,Reg. 10493, 10511 (App. C)

Courts have consistently awarded travel expenses (including lodging and meals), legal fees and court costs. See Grimer v. Grimer, 1993 U.S. Dist. LEXIS 18616, *2, *3, *4 (D. Kan. Dec. 8, 1993); see also Levesque v. Levesque, 816 F„Supp. 662, 667 (D. Kan.1993); see also In re Issak, P.S. 5382192, slip op. (D. Ct Tel Aviv Mar. 3, 1993) (Israeli decision attached to petitioner's Request for Payment under Article 26 and 42 U.S.C, 5 11607 ("fee application")). The only limitations on reimbursable expenses are that they must have been 1) necessary to secure the children's return and 2) not "clearly inappropriate." See 42 U.S.C. 11607(b)(3); see also Grimer, 1993 U.S. Dist, LEXIS 18616 at *3.

The court in Geiger v. Herbeck 2012 WL. 5994935 (D.Minn) awarded the Petitioner costs for all travel and accommodation relating to her action as necessary expenses. They included paying or her mother's air fare and hotel bills to assist her with the child during he trial Courts have applied this language in a straightforward manner and have awarded travel expenses for Petitioner and the child under 42 USC 11607 (b) (3) The Court in Kufner v. Kufner ibid included

lodging and meals, legal fees and court costs as necessary expenses. See also Grimer v. Grimer, 1993 U.S. Dist. LEX1S 18616, *2, *3, *4 (D. Kan. Dec. 8, 1993); Levesque v. Levesque, 816 F.Supp. 662, 667 (D. Kan.1993); In re Issak, P.S, 5382/92, slip op. (D. Ct. Tel Aviv Mar. 3, 1993.

Courts have applied the "clearly inappropriate " rule by applying a fact specific analysis involving an equitable balance of several factors including financial circumstances . However, a claim of limited financial resources does not preclude an award of attorney fees and costs if the Petitioner prevails in the action. Courts in Neves v Neves 637 F. Supp. 2d 322, 345 (WDNC 2009) and Kufner v, Kufner 480 Supp, 2d at 509 found it not clearly inappropriate to award Petitioner fees and costs even though Respondents were unemployed and claimed they had no money or assets. The Court in Kufner ruled that " to deny any award to Petitioner would undermine the dual statutory purpose of 11607 (b)(3) - restitution and deterrence . ... "The bottom line is that Judge Smith and the First Circuit affirmed that Respondent wrongfully removed her children from Germany..." and " ICARA does not say that an award of fees and costs should be imposed against a party who is unable to pay. The purposes of awarding fees and costs are to (restore) the Petitioner to the financial position he would have been had there been no removal or retention and (2) to deter such removal or retention from happening in the first place." Fridlund v. Spychaj No. 5:08- (Document Nos. 151-152) "obviously a finding that denies or substantially reduces an award of fees and costs to a party who prevails in establishing wrongful removal under ICARA does not further either of these purposes. See also Whallon 356, F.3d at 140 and Fridlund v. Spychaj-Fridlund ibid

The Convention and ICARA mandate reimbursement of expenses incurred without regard to respondent's intent to violate the law—although the imposition of costs is intended to act as a deterrent—or petitioner's own ability to pay. Accordingly, courts do not accept respondent's arguments that they should not be required to reimburse petitioner either because they were ill-advised by attorneys or that they believed in good faith that they were not "wrongfully removing" the children or find that an award of fees and expenses is clearly inappropriate because of respondent's strained financial circumstances if the Respondent has assets in his country of habitual residence and is able to find employment and make arrangements to assume the financial responsibility placed on him by the Convention and statute. See Currier v. Currier 1994 WL 39260(DNH)99CV 1994

An award of fees and costs serves two important purposes: (1) "to restore the applicant to the financial position he or she would have been in had there been no removal or retention" and (2) "to deter such removal or retention." Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10494-01, 10511 (Mar. 26, 1986).

The statute, as noted above, gives this court the discretion to reduce or

eliminate a respondent's obligation for attorneys' fees and other costs where a full award "would be clearly inappropriate." 42 U.S.C. § 11607(b)(3). See Rydder v. Rydder, 49 F.3d 389, 373 (8th Cir.1995); Berendsen v. Nichols, 938 F.Supp. 737, 739 (D.Kan.1996). The Distler court found that the Respondent had the ability to pay this award because he had assets in Israel that would satisfy his obligation, despite his limited resources in New York and that there was nothing "clearly inappropriate" about entering this judgment against him.

The Court in Hirts v. Hirts 52 Fed.Appx. 137, 2005 Wt_ 2641023 (C.A.3 Pa) awarded Petitioner costs and attorney fees to be paid by Respondent's mot her (a co Respondent) out of half her total assets since Respondent, wife was living in a homeless shelter, had no assets and no prospects for employment in Germany

A review of the cases applying ICARA's “clearly inappropriate” caveat reveal that the analysis is highly fact specific and involves an equitable balancing of several factors including financial circumstances. Poliero v. Centenaro, No. 09–CV–2682 (RRM)(CLP), 2009 WL 2947193 (E.D.N.Y. Sept. 11, 2009)

Attorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients. Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 283 (2d Cir.1987). U.S. Football League v Natl. Football League, 887 F2d 408, 416-17 [2d Cir 1989] ; Knigge ex rel. Corvese v. Corvese, 2001 WL 883644 (S.D. New York, 2001); E.D.T. ex rel. Adamah v. Tayson, 2010 WL 4116666 (E.D.N.Y.)

In Ozaltin v Ozaltin, 708 F.3d 355 (2d Cir. 2013), the Second Circuit Court of Appeals observed that absent any statutory guidance to the contrary, the appropriateness of such costs depends on the same general standards that apply when “attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. “There is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light

of the [relevant] considerations." In referring to the relevant considerations, the Second Circuit cited Fogerty v. Fantasy, Inc., 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) where the holder of copyright for song brought an infringement action against musician who originally composed the song, and sought attorneys fees under the Copyright Act fee-shifting provisions, which allow attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. See Copyright Act of 1976, 17 U.S.C. § 505. The court, in Fogerty, stated that: "There is no precise rule or formula for making these determinations," but instead equitable discretion should be exercised "in light of the considerations we have identified" citing Hensley v. Eckerhart, 461 U.S. 424, 436-437, 103 S.Ct. 1933, 1941-1942, 103 S.Ct. 1933 (1983).

Positive
As of: May 19, 2015

ANGELICA LOPEZ SANCHEZ, Plaintiff - Appellee v. R. G. L., as next friend Alex Hernandez; S. I. G. L., as next friend Alex Hernandez; A. S. G. L., as next friend Alex Hernandez, Movants - Appellants

No. 12-50783

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

761 F.3d 495; 2014 U.S. App. LEXIS 14849; 89 Fed. R. Serv. 3d (Callaghan) 449

August 1, 2014, Filed

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Western District of Texas.
Sanchez v. R. G. L. ex rel. Hernandez, 755 F.3d 765, 2014 U.S. App. LEXIS 10510 (5th Cir. Tex., June 5, 2014)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Immigrant children had standing to appeal an order directing their return to their mother under the Hague Convention on the Civil Aspects of International Child Abduction because their attorney played an active role in the proceedings below, and they had a strong personal stake in the outcome; [2]-The district court did not clearly err under *42 U.S.C.S. § 11603(e)(1)(A)* in ordering the children's return, but because the children had been granted **asylum** in the interim, all available evidence from the **asylum** proceedings should be considered by the district court before determining whether to enforce the return order, and on remand, joinder of the Government, the children's tem-

porary legal custodian, was required under *Fed. R. Civ. P. 19*, and a guardian ad litem should be appointed under *Fed. R. Civ. P. 17(c)(2)*.

OUTCOME: Order vacated. Case remanded.

CORE TERMS: asylum, custody, custodian, physical custody, guardian ad litem, notice, alien, intervene, temporary, immigration, wrongfully, joined, legal custody, joinder, appoint, amicus brief, unaccompanied, nationality, persecution, returning, treaty, granted asylum, foster parents, quotation marks omitted, psychological harm, jurisdictional, psychological, ordering, removal, foster

LexisNexis(R) Headnotes

Civil Procedure > Justiciability > Standing > Personal Stake
Civil Procedure > Appeals > General Overview
[HN1] To determine whether a non-party has standing to appeal, the appellate court asks: (1) whether the non-party actually participated in the proceedings below; (2) whether the equities weigh in favor of hearing the appeal; and (3) whether the non-party has a personal stake in the outcome.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN2] In every case under the Hague Convention on the Civil Aspects of International Child Abduction, the well-being of a child is at stake.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN3] The Hague Convention on the Civil Aspects of International Child Abduction has two stated objectives: (a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. Hague Convention art. 1. It accomplishes these objectives through the return remedy. This means that under the Convention, a wrongfully removed child is returned to his or her home country; the return order is not a determination as to permanent legal or physical custody of the child. By focusing on the child's return, the Convention seeks to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court. The return remedy determines the country in which the custody decision is to be made; it does not make that decision.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act

[HN4] The implementing statute provides concurrent original jurisdiction over a Hague Convention on the Civil Aspects of International Child Abduction petition in state and federal court; it sets venue at the location of the child. *42 U.S.C.S. § 11603(a), (b)*. Notice of an action brought under *§ 11603(b)* shall be given in accordance with the applicable law governing notice in interstate child custody proceedings. *§ 11603(c)*. The applicable law comes from the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). As codified in Texas, the UCCJEA states notice and an opportunity to be heard must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child. *Tex. Fam. Code Ann. § 152.205(a)*.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act

[HN5] Once a petitioner files and gives notice, the International Child Abduction Remedies Act explains both what the petitioner must establish in order to obtain relief and what a respondent who opposes the return of the child must show. *42 U.S.C.S. § 11603(e)(2)*. To secure the return of the child, the petitioner must establish that the child has been wrongfully removed or retained within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction. *§ 11603(e)(1)(A)*. The Hague Convention art. 3 requires a showing that the petitioner had some rights of custody that are derived from the child's home country and that she was exercising her custody rights at the time of removal.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act

[HN6] A petitioner is defined as any person who, in accordance with this chapter, files a petition in court seeking relief under the Hague Convention on the Civil Aspects of International Child Abduction, and a respondent is any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention. *42 U.S.C.S. § 11602(4), (6)*. A person includes any individual, institution, or other legal entity or body. *§ 11602(5)*.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act

[HN7] The burden shifts to the respondent to establish by clear and convincing evidence that one of the exceptions set forth in Hague Convention on the Civil Aspects of International Child Abduction art.

13(b) or 20 applies. *42 U.S.C.S. § 11603(e)(2)(A)*. None of the exceptions turn on whether the person removing or retaining was properly exercising custody rights. Article 13(b), for example, concerns whether there is a **grave risk** that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Hague Convention art. 13(b). This exception derives not from a concern for the respondent's rights but from a consideration of the interest of the child. If the respondent fails to show that one of the exceptions applies, the court shall order the return of the child forthwith. Hague Convention art. 12.

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
[HN8] Standing has three elements. First, the plaintiff must have suffered an injury in fact. Second, a causal connection between the injury and the conduct complained of must exist. That is, the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Last, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Questions of standing are reviewed de novo. Additionally, all elements of standing should be determined at the outset of the litigation.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN9] The Hague Convention on the Civil Aspects of International Child Abduction was designed to afford the child's home country the right to decide legal custody disputes: Ordering a return remedy does not alter the existing allocation of custody rights but does allow the courts of the home country to decide what is in the child's best interests. Typically, this means serving the petition on the person with physical custody of the children in order to effectuate the expedited return of the children to their home country.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN10] The United States has an obligation under the Hague Convention on the Civil Aspects of International Child Abduction to assist with a parent's application. Hague Convention, art. 7.

Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
Civil Procedure > Justiciability > Standing > Personal Stake

[HN11] When establishing redressability, a plaintiff need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm.

Civil Procedure > Parties > Joinder > Necessary Parties
[HN12] A party must be joined, if feasible, when joinder is required for certain purposes enumerated in *Fed. R. Civ. P. 19*.

Civil Procedure > Parties > Joinder > Necessary Parties
[HN13] See *Fed. R. Civ. P. 19*.

Civil Procedure > Parties > Intervention > Right to Intervene
[HN14] *Fed. R. Civ. P. 24(a)* provides for intervention as a matter of right when a prospective party claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Civil Procedure > Parties > Capacity of Parties > Guardians
[HN15] *Fed. R. Civ. P. 17(c)(2)* provides that a court must appoint a guardian ad litem, or issue another appropriate order, to protect a minor or incompetent person who is unrepresented in an action.

Civil Procedure > Parties > Intervention > Right to Intervene
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN16] The appellate court reviews de novo the denial of a motion to intervene as a matter of right.

Civil Procedure > Parties > Capacity of Parties > Guardians
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN17] Denial of appointment of a guardian ad litem is reviewed for abuse of discretion.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN18] Children are not usually parties to Hague Convention on the Civil Aspects of International Child Abduction proceedings, though nothing in the Convention expressly prohibits a court from allowing children to intervene. Some cases, but not very many, may warrant a child's formal representation in a Hague Convention proceeding. District courts have sometimes allowed children to participate through guardians ad litem when their interests were not adequately represented by either party. Granting the

children representation in appropriate situations is consistent with the United States Supreme Court's view that courts can achieve the ends of the Convention and International Child Abduction Remedies Act, and protect the well-being of the affected children, through the familiar judicial tools.

Family Law > Child Custody > Guardians Ad Litem
Civil Procedure > Parties > Capacity of Parties > Guardians
[HN19] *Fed. R. Civ. P. 17(c)(2)* requires a court to appoint counsel for an unrepresented minor in the proceedings, and these children's interests were unrepresented.

Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN20] The district court's findings of fact are reviewed for clear error.

Immigration Law > Asylum & Related Relief > Eligibility
[HN21] To qualify for **asylum,** an applicant must either have suffered past persecution or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *8 U.S.C.S. § 1101(a)(42)(A)*, incorporated by *8 U.S.C.S. § 1158(b)(1)(B)(i)*.

Immigration Law > Asylum & Related Relief > Eligibility
[HN22] Where immigrant children are deemed to be unaccompanied alien children, the United States Citizenship and Immigration Services makes the determination as to whether they qualify for **asylum.** *8 U.S.C.S. § 1158(b)(3)(C)*.

Immigration Law > Asylum & Related Relief > Eligibility
[HN23] The language of the Immigration and Nationality Act indicates that the discretionary grant of **asylum** is binding on the Attorney General or Secretary of Homeland Security.

Immigration Law > Asylum & Related Relief > Eligibility
Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN24] An **asylum** grant does not supersede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security under the Immigration and Nationality Act.

Immigration Law > Asylum & Related Relief > Eligibility
Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN25] Immigrant children's **asylum** grant is relevant to

whether the Hague Convention exceptions to return should apply. There is a significant overlap between the **asylum** inquiry and Hague Convention on the Civil Aspects of International Child Abduction art. 13(b). Both focus on the level of harm to which the children would be exposed if returned to their home country. An asylee has been found to face persecution upon return to his or her country of nationality. *8 U.S.C.S. § 1101(a)(42)(A)*. Persecution has been defined as an extreme concept and turns on whether suffering or harm is likely to be inflicted on the **asylum** applicant. Similarly, Hague Convention art. 13(b) requires a respondent to show that there is a **grave risk** that his or her return would expose the child to physical or psychological harm. The level of harm necessary to trigger the art. 13(b) exception must be a great deal more than minimal.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
Immigration Law > Asylum & Related Relief > Eligibility
[HN26] The **asylum** finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Hague Convention on the Civil Aspects of International Child Abduction art. 13(b) about whether return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial procedures under the Convention do not give to others, even a governmental agency, authority to determine these **risks.** The district court makes an independent finding of potential harm to the children, considering all offered relevant evidence. The prior consideration of similar concerns in a different forum are relevant, but an **asylum** grant does not remove from the district court the authority to make controlling findings on the potential harm to the child.

Immigration Law > Asylum & Related Relief > Eligibility
Family Law > Child Custody > Interference > International Child Abduction Remedies Act
[HN27] The evidentiary burdens in the **asylum** proceedings and those under International Child Abduction Remedies Act's framework are different. To be granted **asylum,** the children were required to show their eligibility by a preponderance of the evidence. *8 C.F.R. § 1208.13(a),(b)(1)(i)*. In order for a Hague Convention on the Civil Aspects of International Child Abduction exception to apply, a respondent must establish the exception by clear and convincing evidence. *42 U.S.C.S. § 11603(e)*. The level of participation by interested parties in the two proceedings may also be different.

Family Law > Child Custody > Interference > International Child Abduction Remedies Act
Immigration Law > Asylum & Related Relief > Eligibility
[HN28] The United States Citizenship and Immigration Services grants of **asylum** are relevant to any analysis of whether the Hague Convention on the Civil Aspects of International Child Abduction art. 13(b) or 20 exception applies.

COUNSEL: For Angelica Lopez Sanchez, Plaintiff - Appellee: Gary Caswell, Esq., Attorney, San Antonio, TX; Marisa C. Balderas-Flores, Attorney, Balderas & Balderas, San Antonio, TX.

For R. G. L., as next friend Alex Hernandez, S. I. G. L., as next friend Alex Hernandez, A. S. G. L., as next friend Alex Hernandez, Movants - Appellants: Lee J. Teran, Adriane Jaeckle Meneses, Andrea Melissa Sauters Aguilar, Esq., St. Mary's University, School of Law, San Antonio, TX; Adam Auchter Allgood, Esq., Morgan, Lewis & Bockius, L.L.P., Houston, TX; Christopher Simon Bloom, McDermott Will & Emery, L.L.P., Houston, TX; Nicholas Gerhart Grimmer, Attorney, McDermott Will & Emery, L.L.P., Houston, TX; Geoffrey Alan Hoffman, Esq., University of Houston, Law Center, Houston, TX; Albert Henry Kauffman, St Mary's University, School of Law, San Antonio, TX.

For Kids in Need of Defense, Amicus Curiae: Rosa Arguelles Shirley, Baker & McKenzie, L.L.P., Dallas, TX.

For United States of America, Amicus Curiae: August E. Flentje, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC; Katherine E. M. Goettel, Trial Attorney, **[**2]** U.S. Department of Justice, Office of Immigration Litigation - DCS, Washington, DC; Elizabeth J. Stevens, Assistant Director, U.S. Department of Justice, Office of Immigration Litigation, Washington, DC.

JUDGES: Before JOLLY, DeMOSS, and SOUTHWICK, Circuit Judges. HAROLD R. DeMOSS, JR., Circuit Judge, DISSENTING.

OPINION BY: LESLIE H. SOUTHWICK

OPINION

[*499] ON SECOND PETITION FOR PANEL REHEARING

LESLIE H. SOUTHWICK, Circuit Judge:

Today, for the third time, we address an appeal by three children who are natives of Mexico, who seek reversal of the district court's finding under the Hague Convention on the Civil Aspects of International Child Abduction that they were being wrongfully retained in the United States and should be returned to Angelica Sanchez, their mother. While this appeal was pending, the

United States Citizenship and Immigration Services granted the children **asylum**. This new evidence is critical to determining whether one or more of the Hague Convention's exceptions to return applies.

On February 21, 2014, we vacated the district court order and remanded for further proceedings. *See Sanchez v. R.G.L., 743 F.3d 945 (5th Cir. 2014)* (withdrawn on rehearing). We issued a second opinion on June 5, 2014, in response **[**3]** to the children's first petition for rehearing. In that opinion, we held that a jurisdictional question regarding the necessity of the Government's being made a party did not need to be resolved because we were ordering the Government's joinder on remand. *See Sanchez v. R.G.L., 755 F.3d 765, 2014 U.S. App. LEXIS 10510, 2014 WL 2532434 (5th Cir. 2014)* (withdrawn by this opinion on rehearing).

The children have petitioned for panel rehearing.[1] They argue, and we agree, that we erred in concluding that the jurisdictional challenge raised by the children can be mooted by Rule 19 joinder. We WITHDRAW our previous opinion and issue the present opinion, which restates our initial conclusion that the district court had jurisdiction over Sanchez's petition because the individual with physical custody over the children was a party. We reiterate our conclusion from the rehearing opinion that the Government should be joined in this lawsuit under *Federal Rule of Civil Procedure 19*. The district court's order to return the children is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

1 The occasions when second rehearings are appropriate are *exceedingly* rare, but our legal error in the first rehearing opinion **[**4]** is such an instance. Petitioners' motion to file for rehearing out-of-time is granted. We cannot envision granting leave to file for a third.

BACKGROUND

R.G.L., S.I.G.L., and A.S.G.L., the three minor children involved in this appeal, were born and raised in Mexico and are Mexican citizens. They lived with their mother, Angelica Sanchez ("Sanchez"), and her boyfriend, Arturo Quinonez, in Ciudad Juarez, Chihuahua. On June 9, 2012, the children's aunt and uncle, Miriam Lopez Sanchez and Jose Sanchez, brought the children across the border into El Paso, Texas, either without Sanchez's permission **[*500]** or under false pretenses. Several times, Sanchez asked for her children's return. On July 18, 2012, Miriam Sanchez took the children to the Bridge of the Americas in El Paso and instructed the children to cross into Mexico where Sanchez and

Quinonez were waiting on them. As the children were walking across the international bridge, they presented themselves to Department of Homeland Security ("DHS") officers and stated that they did not want to return to Mexico because they feared Quinonez.

The DHS officers escorted the children to a passport control office where they interviewed the children. R.G.L., **[**5]** the oldest, told the officers that he and his brothers did not want to return because Quinonez, who they claim was a member of the Azteca gang, was involved in drug trafficking, using drugs, and abusing the children. At some time during the interview, FBI agents contacted the DHS officers and informed them that Sanchez and Quinonez had reported the children kidnapped and were coming to the passport control office, under FBI supervision, to speak with the children. When Sanchez and Quinonez arrived, they were able to speak with R.G.L. briefly and were themselves interviewed separately by FBI agents. Sanchez denied the children's allegations of abuse and informed the agents that her children had been taken to El Paso against her will. Sanchez was informed that DHS would retain custody of the children. She and Quinonez returned to Mexico without the children.

DHS promptly determined that the children were unaccompanied alien children with a credible fear of returning to Mexico. Accordingly, DHS transferred the children to the custody of the Office of Refugee Resettlement ("ORR"), Division of Unaccompanied Children's Services, which is responsible for coordinating and implementing the children's **[**6]** care and placement. ORR, though retaining legal custody, placed the children in the physical custody of Baptist Services Child and Family Services to provide for their care, including education, travel, and medical care. Baptist Services placed the children in a foster home in San Antonio, where they remained until sometime during this appeal. Because the children were declared by DHS to be "unaccompanied alien children," they entered mandatory removal proceedings. ORR, as authorized by statute, appointed pro bono counsel for the children. *See 8 U.S.C. § 1232(c)(5)-(6)*. Their counsel applied for relief from removal on a number of grounds, including **asylum**.

Almost a year after the children had been removed from Mexico, Sanchez filed this suit in district court against the children's aunt and uncle, Miriam and Jose Sanchez, and against the director of Baptist Services, Asennet Segura. She sought access to the children, their return, and an immediate temporary restraining order preventing the children's transfer out of Texas. She claimed entitlement to this relief under the Hague Convention

on the Civil Aspects of International Child Abduction and also under the International Child Abduction **[**7]** Remedies Act ("**ICARA**"). The Hague Convention is an international treaty to which both the United States and Mexico are signatories, *see* T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, and **ICARA** is the domestic implementing legislation. *See 42 U.S.C. § 11601, et seq.*

Because Hague Convention petitions are intended to be addressed expeditiously, the district court held an evidentiary hearing one month after Sanchez filed her suit. Miriam and Jose Sanchez did not participate. **[*501]** [2] Baptist Services was represented at the hearing, but took no position on whether the children should be returned to their mother. Instead, because it was acting at the direction of ORR in maintaining custody of the children, it argued that ORR was the proper party to the proceedings. The children's ORR-appointed **asylum** attorney appeared informally at the hearing on the children's behalf, arguing that the court should allow the children to intervene through Alex Hernandez, as next friend, or in the alternative, grant their motion for the appointment of a guardian ad litem. The district court would later deny the motion, but it allowed the children's attorney to participate in all critical stages of the hearing.

2 The **[**8]** district court's docket sheet indicates that Miriam and Jose Sanchez were represented by the same counsel as Baptist Services. That counsel, however, did not represent to the court that he was appearing on their behalf.

After the hearing, the court directed ORR, who was not formally a party to the proceedings, to answer these questions: "(1) whether this Court has jurisdiction under the Hague Convention; (2) does any procedure in the immigration court preempt or stay this Court's actions; and (3) whether ORR has a position as to whether or not the children would be subject to **grave risk** or harm by being returned to their mother." ORR, through the Office of Immigration Litigation (which has filed an amicus brief on appeal), informed the court that it "does not take a position at this time" on the first and third question and moved that the district court hold the petition in abeyance pending the disposition of the children's **asylum** applications.

On August 3, 2013, the district court issued findings of fact and conclusions of law. It acknowledged the difficulties presented by the parallel **asylum** proceedings but determined that the Hague Convention's demands for expediency counseled against **[**9]** prolonging a resolution of Sanchez's petition. The court did not indicate what bearing, if any, the

children's **asylum** proceedings would have on its grant of relief, though it did suggest that it would be relevant. The court also did not address whether the United States Government, through ORR, was a proper party to the petition and denied the children's request for representation. The district court concluded that the children were "wrongfully retained" within the meaning of the Convention and none of the Convention's exceptions to return applied. Therefore, the court ordered "the minor children be returned forthwith to the custody of Petitioner," but later stayed the enforcement of the order pending this appeal.

Two other post-judgment developments are important to this appeal. Shortly after the notice of appeal was filed but before briefing, the United States Citizenship and Immigration Services ("USCIS") granted the children **asylum** pursuant to *8 U.S.C. § 1158*.[3] Among other things, that statute states that in the case of aliens who are granted **asylum**, "the Attorney General . . . shall not remove or return the alien to the alien's country of nationality." *§ 1158(c)(1)(A)*. Secondly, **[**10]** before we held oral argument in this case, the Government informed the court that it was in the **[*502]** process of transferring the children to the physical custody of Catholic Charities. The Government informed us that the transfer would take six to eight weeks, and would vest legal custody, under Texas law, in Catholic Charities. In rehearing briefing, though, the children maintain that their custodial status has not changed.

3 It is unclear whether USCIS had more information about the **risks** to the children than did the district court. Relevantly, there are two unresolved motions related to the children's **asylum** grant. We grant the children's motion to take judicial notice of their **asylum** grant but deny the alternative to supplement the record. We also grant the unopposed motion of the Government to seal the assessments in support of the children's **asylum** grant.

The children, who are the sole appellants in this case, challenge both the district court's handling of Sanchez's petition and the enforceability of the district court's order in light of the subsequent **asylum** grant. First, they argue that Sanchez did not have standing to pursue her petition. They assert that the only way Sanchez would **[**11]** have had standing to pursue her petition was by naming ORR as a respondent in her petition. They also argue that even if Sanchez did have standing, none of the respondents meaningfully advanced their interests under the Convention and therefore they had the right to formally

participate in the district court proceedings. They also contend that the district court erred in ordering their return in light of the evidence presented.

As for the **asylum** grant, the children advance alternative theories on how the court should proceed. First, they argue that the district court can no longer order their return to Mexico because their **asylum** status prohibits their return. In the alternative, they argue that this case should be remanded to the district court with instructions for it to consider their **asylum** grant in order to determine whether they should be returned. Three other interested parties, including the Government, filed amicus briefs in this case. The Government asks the court to remand the proceedings to the district court with instructions for it to consider evidence of the children's **asylum** grant.

DISCUSSION

I. Whether the Children Have Standing to Appeal

Our threshold issue is whether **[**12]** the children, who were not parties, have the right to appeal as *de facto* parties. Sanchez disputes this argument in one paragraph in her brief. The children were the primary opponents of Sanchez's petition for return, even though the district court denied their motion to intervene as respondents. [HN1] To determine whether a non-party has standing to appeal, we ask: (1) "whether the non-party actually participated in the proceedings below"; (2) whether "the equities weigh in favor of hearing the appeal"; and (3) whether "the non-party has a personal stake in the outcome." *SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 329 (5th Cir. 2001)* (quotation marks omitted). The factors weigh in favor of finding that the children should be allowed to appeal.

With regard to the first factor, the children's attorney played an active role in the evidentiary hearing, submitting briefs and evidence, and arguing issues before the court. Others who might have responded to the petition -- the children's aunt and uncle, their foster parents, the foster agency, or the Government -- did not respond meaningfully and failed to assert the Convention exceptions that are designed, in part, to account for the harms that **[**13]** could result from the children's return. As to the other factors, both the equities and the children's strong personal stake in the outcome weigh in favor of permitting their appeal. [HN2] "In every case under the Hague Convention, the well-being of a child is at stake." *Chafin v. Chafin, 133 S. Ct. 1017, 1027, 185 L. Ed. 2d 1 (2013)*. If the appeal is not allowed, we will not be able to consider the ar-

guments that their well-being will be adversely affected by the **[*503]** ruling. We conclude the children have standing to appeal.

II. Whether the District Court Erred in Ordering the Children's Return

Before we address the merits of the children's arguments, we begin with a general discussion of the Hague Convention, as implemented through **ICARA.** [HN3] The Hague Convention has two stated objectives: "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, art. 1. It accomplishes these objectives through the return remedy. *E.g., Abbott v. Abbott, 560 U.S. 1, 8-9, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010)*. This means that under the Convention, a "wrongfully **[**14]** removed" child is returned to his or her home country; the return order is not a determination as to permanent legal or physical custody of the child. *Id. at 1987*. By focusing on the child's return, the Convention seeks to "restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court." *England v. England, 234 F.3d 268, 271 (5th Cir. 2000)* (quotation marks omitted). The return remedy determines the country in which the custody decision is to be made; it does not make that decision.

[HN4] The implementing statute provides concurrent original jurisdiction over a Hague Convention petition in state and federal court; it sets venue at the location of the child. *42 U.S.C. § 11603(a), (b)*. "Notice of an action brought under *subsection (b)* of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings." *42 U.S.C. § 11603(c)*. The applicable law comes from the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *See Livanos v. Livanos, 333 S.W.3d 868, 876 (Tex. App. -- Houston [1 Dist.] 2010)*. As codified in Texas, the UCCJEA states "notice and an opportunity to be heard **[**15]** . . . must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child." *TEX. FAM. CODE ANN. § 152.205(a)*.

[HN5] Once a petitioner files and gives notice, **ICARA** explains both what the petitioner must establish in order to obtain relief and what "a respondent who opposes the return of the child" must show.[4] *42*

U.S.C. § 11603(e)(2). To secure the return of the child, the petitioner must establish that the child "has been wrongfully removed or retained within the meaning of the Convention." *42 U.S.C. § 11603(e)(1)(A)*. Article 3 of the Hague Convention requires a showing that the petitioner had some "rights of custody" that are derived from the child's home country and that she was exercising her custody rights at the time of removal. Hague Convention, art. 3; *see also Larbie v. Larbie, 690 F.3d 295, 307 (5th Cir. 2012)*.

4 [HN6] A petitioner is defined as "any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention," and a respondent is "any person against **[**16]** whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention." *42 U.S.C. § 11602(4), (6)*. A person includes "any individual, institution, or other legal entity or body." *42 U.S.C. § 11602(5)*.

[HN7] The burden then shifts to the respondent to establish "by clear and convincing evidence that one of the exceptions set forth in Article 13(b) or 20 of the Convention **[*504]** applies." *42 U.S.C. § 11603(e)(2)(A)*. None of the exceptions turn on whether the person removing or retaining was properly exercising custody rights. Article 13(b), for example, concerns whether "there is a **grave risk** that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13b. This exception derives not from a concern for the respondent's rights but "from a consideration of the interest of the child." *See* Elisa Pérez--Vera, *Explanatory Report: Hague Conference on Private International Law*, ¶ 29, *in* 3, Acts and Documents of the Fourteenth Session, Child Abduction 426, 464 (the "Explanatory Report").[5] If the respondent fails to show that one of the exceptions applies, the **[**17]** court "shall order the return of the child forthwith." Hague Convention, art. 12.

5 We have previously relied upon the Explanatory Report "as the official history, commentary, and source of background on the meaning of the provisions of the" Convention. *Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 343 (2004)*.

A. Proper party defendants

The children begin by arguing the district court lacked jurisdiction to grant Hague Convention relief because Sanchez failed to sue the proper party. They label this issue with the

word [HN8] "standing," which has three elements. "First, the plaintiff must have suffered an 'injury in fact.'" *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Second, "a causal connection between the injury and the conduct complained of" must exist. *Id*. That is, the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id*. (quotation marks omitted). Last, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id. at 561* (quotation marks omitted). Questions of standing are reviewed *de novo. Bonds v. Tandy, 457 F.3d 409, 411 (5th Cir. 2006)*. **[**18]** Additionally, all elements of standing should be determined "at the outset of the litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*.

The children's argument focuses primarily on the last element of the standing inquiry, which is redressability.[6] They argue that the district court order could not redress Sanchez's injury because Segura, the most significant respondent in this case, cannot be compelled in her official capacity as director of Baptist Services to return the children because she was not the actual physical custodian of the children, and even if she could, Baptist Services lacked the legal authority to return her children to her. Instead, the children assert that ORR, as the children's temporary legal guardian, was the only respondent who had the authority to return the children. Therefore, they argue Sanchez should have named ORR in her petition in order to be able to receive any relief. But even then, the children argue that if Sanchez would have named ORR in the petition, it would have failed because the Hague Contention cannot be used to compel **[*505]** the Government to return children within their legal custody.

> 6 The children **[**19]** also dispute whether any party named in the petition caused her injury. They suggest that Jose and Miriam Sanchez are not presently causing their mother injury, even if they did initially take them from their mother. Regardless, we discuss later that Segura is a named party who at the time of suit was said to be wrongfully withholding custody from the children's mother.

Sanchez responds that, under the Hague Convention, the person who "controls the body" is the person appropriate for suit. She argues that is so because the necessary respondent

under the Convention is the party who can physically complete the return, if ordered. Legal custody is then resolved in the new forum. Thus, she argues, the legal custodian is not needed for jurisdiction. Sanchez is correct that the person with physical custody of the child must be a respondent, regardless of whether someone else has legal custody. For instance, had Jose and Miriam Sanchez continued to retain the children after they entered the United States, they would have been proper **ICARA** respondents. The issue here is whether Sanchez's failure to join the actual physical custodians (the unidentified foster parents) or the Government, as the **[**20]** current legal custodian, deprived the district court of Article III jurisdiction over Sanchez's petition.

The Government has scrupulously avoided taking a position on whether it should have been or must be made a respondent. The district court directed the Government to explain its position on "whether this court has jurisdiction under the Hague Convention." The Government, represented by the Office of Immigration Litigation in the Civil Division of the Department of Justice, answered that "as a general matter, the court has jurisdiction over a Hague Convention case," but it expressly did "not take a position at this time on whether the petitioner has named a proper respondent in this case." It also suggested the court hold the case in abeyance pending the children's **asylum** determinations. The district court interpreted the position of the Government as agreeing that: (1) the court had jurisdiction over the case and (2) the **asylum** proceedings would not alter its authority to order the children's return.

Similarly, on appeal, the Government, in its amicus brief, has not suggested that ORR is a necessary respondent in this case. It has contended that the executive branch's proposed interpretation **[**21]** of a treaty, "particularly in light of the Department of State's involvement" in the treaty process, is entitled to "great weight." *See Abbott, 560 U.S. at 15*. The Government's interpretation of the Convention, however, in no way suggested that it was a necessary party. If anything, it did the opposite. In its amicus brief, the Government said that its interest in this case "arises out of its treaty obligations and federal immigration law." It did not state that it had any vested interest by virtue of its legal guardianship of the children or its contractual relationship with Segura or Baptist Services. The clear implication of the briefing was: the Executive Branch did not dispute the district court's jurisdiction to enter an order that the children could be returned to their mother, even without ORR as a party to this

suit. Further, at oral argument, the Government represented to this court that it would not interfere with a court-ordered return of the children.

Despite these assertions, the children raise a variety of hypothetical scenarios regarding what the Government might do if the district court issues a return order. The primary argument in their petitions for rehearing is **[**22]** that Segura will not have authority to carry out the order because ORR *may* prevent her from returning the children. The children, however, have yet to identify any authority to suggest that the Hague Convention or **ICARA** requires the Government, as temporary legal custodian, to be involved in this suit. Put another way, they have failed to identify what would *prevent* Segura from returning **[*506]** the children pursuant to a judicial order. As explained above, [HN9] the Hague Convention was designed to afford the child's home country the right to decide legal custody disputes: "Ordering a return remedy does not alter the existing allocation of custody rights . . . but does allow the courts of the home country to decide what is in the child's best interests." *Abbott, 560 U.S. at 20; see also England, 234 F.3d at 271.* Typically, this means serving the petition on the person with *physical custody* of the children in order to effectuate the expedited return of the children to their home country.

We first conclude that no jurisdictional defect arises from the fact that Segura was not the actual physical custodian of the children. The record indicates that Sanchez was diligent in trying to determine the location **[**23]** of her children and the identity of their custodians. [HN10] The United States had an obligation under the Convention to assist with her application. *See* Hague Convention, art. 7. It identified the foster service but not the foster parents. Consequently, Sanchez could not serve notice on the children's actual but unknown physical custodians. The best she could do was serve her petition on Segura, the person identified by the United States. Though Segura was not the actual physical custodian,[7] she had knowledge of the children's location and, as director of child placement, had authority over the Baptist Services to direct their placement. That is enough to oversee the children's return, which would redress Sanchez's injury. The Hague Convention demands no more.

7 We note that even if Sanchez had named the unidentified foster parents as John and Jane Doe in her petition, she could not have served the petition on them, and thus could not have given them the notice required by **ICARA.** Moreo-

> ver, the children argue that Baptist Services could have been served. That may be correct, but they do not explain why Segura cannot accomplish the same acts as the Baptist Services.

Further, we hold that Sanchez's **[**24]** failure to name the Government as a respondent did not create a jurisdictional defect. The district court did not lack jurisdiction to enter its order because Segura, as either physical custodian or someone with authority over the physical custodian at the time the petition was filed, could provide Sanchez relief under the Convention by overseeing the return of the children to their home country. [HN11] When "establishing redressability, [a plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." *Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 318 (1st Cir. 2012)*. Here, a court order for the children's return has the potential, in whole or in part, to redress the claimed injury.

Nevertheless, we conclude that joinder of the Government is required in this action. [HN12] A party must be joined, if feasible, when joinder is required for certain purposes enumerated in *Federal Rule of Civil Procedure 19*. The rule provides as follows:

> [HN13] (a) Persons Required to Be Joined if Feasible.
>
> > (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court **[**25]** of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relat-

ing to the subject of the action and is so situated that disposing of **[*507]** the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial **risk** of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19.

There are legitimate concerns that, absent the Government as a party, the carrying out of any court order could become difficult. Although the court has jurisdiction, the Government has been the temporary legal custodian throughout this action and selected the children's physical custodian. As previously noted, the record is

unclear on whether the Government still retains temporary legal custody and whether Baptist Services retains physical custody; instead, both legal and physical custody may have been transferred to Catholic Charities. The children insist their custodial status is unchanged. These questions fall within the **[**26]** principle that courts at times must decide cases "where the practical impact of [a] decision is not assured." *Chafin, 133 S. Ct. at 1025*. Yet we should also endeavor to increase the level of assurance when practicable.

Failure to include the temporary legal custodian in a situation where a change in physical custody during the appeal has been suggested, presents unusual **risks.** In order to assure complete relief to Sanchez, the Government should be joined pursuant to *Rule 19(a)(1)(A)*.

Additionally, the children have contended that Segura lacks authority to comply with a return order due to ORR's congressionally mandated custody. *See 8 U.S.C. § 1232(b)(1)* (tasking HHS with care of unaccompanied alien children); *6 U.S.C. § 279(a)* (naming ORR as the responsible entity within HHS). Instead, they maintain Baptist Services, as physical custodian, is simply a contractor with ORR and cannot move the children without ORR's prior consent. As a result, a return order entered by the district court could put Segura, or Baptist Services, in the difficult position of disobeying a court order or breaking contractual and legal obligations to maintain physical custody. In order to avoid potentially imposing **[**27]** inconsistent obligations on Segura, the Government should be joined pursuant to *Rule 19(a)(1)(B)(ii)*.

We therefore hold that the Government should be joined on remand. We leave it for the district court to determine whether the United States, ORR, its director, or some other entity is the proper governmental party. Joinder will expedite a resolution of this case, which has already been delayed too long.

B. The children's motion to intervene or appoint a guardian ad litem

The children's second argument is whether the district court should have granted their motions to intervene or to appoint a guardian *ad litem* in light of the fact that none of the respondents asserted the Convention's exceptions. The children argue they have the "right to be heard" but were not allowed to exercise that right in the district court. It is unclear whether they seek reversal on this basis alone or whether they are asking the court to provide instruction to the district court to allow them to intervene if it decides that remand on other grounds is warranted.

[HN14] *Federal Rule of Civil Procedure 24(a)* provides for intervention as a matter of right when a prospective party "claims an interest relating to the property **[**28]** or transaction that is the subject of the action, and is so situated that disposing of **[*508]** the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *FED. R. CIV. P. 24(a)*. [HN15] *Rule 17(c)(2)* provides that a court "must appoint a guardian ad litem -- or issue another appropriate order -- to protect a minor or incompetent person who is unrepresented in an action." *FED. R. CIV. P. 17(c)(2)*. [HN16] We review de novo the denial of a motion to intervene as a matter of right. *Heaton v. Monogram Credit Card Bank of Georgia, 297 F.3d 416, 422 (5th Cir. 2002)*. [HN17] Denial of appointment of a guardian *ad litem* is reviewed for abuse of discretion. *See Fernandez-Vargas v. Pfizer, 522 F.3d 55, 66 (1st Cir. 2008)*.

[HN18] Children are not usually parties to Hague Convention proceedings, though nothing in the Convention expressly prohibits a court from allowing children to intervene. The First Circuit has stated that some cases, but not "very many," may warrant a child's formal representation in a Hague Convention proceeding. *See Walsh v. Walsh, 221 F.3d 204, 213 (1st Cir. 2000)*. District courts have sometimes allowed children **[**29]** to participate through guardians *ad litem* when their interests were not adequately represented by either party. *See Danaipour v. McLarey, 286 F.3d 1, 8 (1st Cir. 2002)* (noting that the district court appointed a guardian *ad litem*); *Lieberman v. Tabachnik, 2007 U.S. Dist. LEXIS 95390, 2007 WL 4548570, *2 (D. Colo. Dec. 19, 2007)* (appointing a guardian *ad litem*). Granting the children representation in appropriate situations is consistent with the 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 . . . ." *Chafin, 133 S. Ct. at 1026-27*.

As we have acknowledged, the circumstances of this case are exceptional. The abducting respondents have disclaimed any responsibility for the children. The children's physical guardian was represented by counsel and participated in the matter when it was before the district court but appeared to be concerned with her own interests. And the Government, the children's temporary legal guardian, chose not to assert the Convention defenses for the children when queried by the district court. Moreover, none of the respondents named in Sanchez's petition have participated **[**30]** in this appeal. Without the informal participa-

tion of the children's ORR-appointed counsel, the children would have had no advocates before the district court.

Despite the district court's clear concern for the children, and despite the considerable informal allowances made for the children's attorney, we find that the children should now be appointed formal legal representation. The children's fundamental interests are at stake in the district court's proceedings, and no respondent is making an effort to represent those interests. [HN19] *Rule 17(c)(2)* requires a court to appoint counsel for an unrepresented minor in the proceedings, and these children's interests were unrepresented. On remand, the district court should appoint the children a guardian *ad litem*. We reject, however, the children's assertion that they should be allowed to intervene. The fact that the children have obtained additional "rights" through their **asylum** grants does not change their status vis-a-vis an **ICARA** petition. Our concern here is that the children's fundamental interests are represented as embodied in the Hague Convention. The children's **asylum** grants, as explained below, are only relevant to these proceedings **[**31]** to the extent that they cast some additional light on the relevant Hague Convention defenses, which can be adequately asserted by the court-appointed guardian *ad litem*.

[*509] *C. The sufficiency of the district court's findings*

The children also attack the merits of the district court's return order. [HN20] "The district court's findings of fact are reviewed for clear error . . . ." *Sealed Appellant, 394 F.3d at 342*. Relying in particular on *Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012)*, they argue that the district court erred by failing to mention the children's psychological evaluations, and perhaps some other evidence, in considering whether any of the Hague Convention's exceptions to return apply. The Seventh Circuit determined that the district court should have considered psychological evidence suggesting that the return of the children to the petitioner would subject them to psychological harm. *Id. at 788*.

Here, critical to the district court's legal conclusion was its factual finding that the children would not be returned to the same threatening situation as they were in when they left Mexico. The psychological evidence presented by the children centered mostly on harm Quinonez was inflicting **[**32]** on their mother and them and only vaguely referenced the children's belief that the same situation would exist if they were returned because they believed their mother would not permanently leave Quinonez. Sanchez had abandoned Quinonez and that the Mexican government

had presented evidence that it could protect the children. *See Walsh, 221 F.3d at 219*. The Convention's exceptions to return, and Article 13(b) in particular, are prospective, whereas the psychological reports are primarily retrospective in nature. The district court did not clearly err by failing to account for the mostly retrospective harm allegedly suffered by the children, or the conclusions of the psychologist, which were based on the children's belief that the same conditions would be present upon their return.

*III. Effect of **asylum** grant on the district court's order*

The final issue we address is whether the children's **asylum** grant should be considered by the district court. The children first argue that an **asylum** grant directly conflicts with the district court order, and the more recent **asylum** grant should take precedence over Convention relief under the last-in-time rule. *See Ntakirutimana v. Reno, 184 F.3d 419, 426-27 (5th Cir. 1999)*. **[**33]** This argument focuses on the effect of the **asylum** grant vis-a-vis the district court order and views Sanchez's attempt to secure the return of her children under **ICARA** as an impermissible collateral attack on the grant of **asylum**. Alternatively, the children argue that we should remand to the district court for reconsideration of whether the Article 13(b) or 20 exception applies in light of the recent grant of **asylum**, which is new evidence not considered by the district court.

Sanchez responds that, if Convention relief is found to be in conflict with the **asylum** grant, the return order should take precedence over the **asylum** grant because the Convention proceedings were more thorough. She also disputes the argument that it is necessary for the district court to consider the **asylum** grant because evidence related to that grant was already considered by the district court. In its amicus brief, the Government advances the position that a grant of **asylum** is not dispositive of but is relevant to whether either the Article 13(b) or 20 exception applies.

The children were granted **asylum** pursuant to the Immigration and Nationality Act ("INA"), as amended by the William Wilberforce Trafficking Victims **[**34]** Protection Reauthorization Act of 2008 ("TVPRA"), *8 U.S.C. §§ 1158*, *1229a*, *1232*. [HN21] To qualify for **asylum**, an applicant must either have **[*510]** suffered past persecution or have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *8 U.S.C. § 1101(a)(42)(A), incorporated by 8 U.S.C. § 1158(b)(1)(B)(i)*.[8] The children's grant of **asylum** was discretionary, *8 U.S.C. §*

1158(b)(1)(A), and provides that "the Attorney General shall not remove or return the alien to the alien's country of nationality . . . ." *8 U.S.C. § 1158(c)(1)(A)*.

> 8 [HN22] Because the children were deemed to be unaccompanied alien children, the USCIS made this determination. *See 8 U.S.C. § 1158(b)(3)(C)*.

We disagree with the children's argument that the **asylum** grant must be revoked before they can be returned to Mexico pursuant to the Hague Convention. [HN23] The language of the INA indicates that the discretionary grant of **asylum** is binding on the Attorney General or Secretary of Homeland Security. *See id*. No authority has been offered to support the argument that the discretionary grant of **asylum** confers a right to remain in the country despite judicial orders **[**35]** under this Convention. [HN24] The **asylum** grant does not supercede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security under the INA. *See Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993)*.

[HN25] The children's **asylum** grant, though, is relevant to whether the Hague Convention exceptions to return should apply. We agree with the Government that there is a significant overlap between the **asylum** inquiry and Article 13(b) of the Hague Convention. Both focus on the level of harm to which the children would be exposed if returned to their home country. An asylee has been found to face persecution upon return to his or her country of nationality. *8 U.S.C. § 1101(a)(42)(A)*. Persecution has been defined as an "extreme concept" and turns on whether suffering or harm is likely to be inflicted on the **asylum** applicant. *Eduard v. Ashcroft, 379 F.3d 182, 187 & n.4 (5th Cir. 2004)*. Similarly, Article 13(b) of the Hague Convention requires a respondent to show that "there is a **grave risk** that his or her return would expose the child to physical **[**36]** or psychological harm." Hague Convention, art. 13(b). The level of harm necessary to trigger the Article 13(b) exception must be "a great deal more than minimal." *Walsh, 221 F.3d at 218*.

Despite similarities, [HN26] the **asylum** finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Article 13(b) of the Convention about whether return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b). The judicial procedures

under the Convention do not give to others, even a governmental agency, authority to determine these **risks.** The district court makes an independent finding of potential harm to the children, considering all offered relevant evidence. The prior consideration of similar concerns in a different forum are relevant, but we determine that an **asylum** grant does not remove from the district court the authority to make controlling findings on the potential harm to the child.

We note also that [HN27] the evidentiary burdens in the **asylum** proceedings and those under **ICARA's** framework are different. To be granted **asylum**, the children were required to show **[**37]** their eligibility by a preponderance of the evidence. *See 8 C.F.R. § 1208.13(a),(b)(1)(i)*. In order for a Convention **[*511]** exception to apply, a respondent must establish the exception by clear and convincing evidence. *42 U.S.C. § 11603(e)*. The level of participation by interested parties in the two proceedings may also be different, a point Sanchez makes when arguing she did not have an opportunity to make a meaningful presentation prior to the **asylum** grant.

As the district court recognized, [HN28] the USCIS grants of **asylum** are relevant to any analysis of whether the Article 13(b) or 20 exception applies. When faced with a motion to stay the proceedings while the children's **asylum** application was pending, the district court determined that the interests of a prompt answer under the Convention outweighed the merits of a stay. Now that the children have been granted **asylum**, though, all available evidence from the **asylum** proceedings should be considered by the district court before determining whether to enforce the return order.

CONCLUSION

The district court's return order is VACATED. The case is REMANDED to the district court with instructions to determine the current physical and legal custodian; **[**38]** to join the Government, if it still retains temporary legal custody, as a party respondent; to appoint the children a guardian *ad litem*; and to consider the **asylum** grants, assessments, and any related evidence not previously considered that relates to whether Article 13(b) or 20 applies. Any remaining issues such as whether the oldest child is no longer subject to these proceedings, can be addressed. Finally, we repeat our previous statement, which was echoed in the previous dissent, that the United States Government should take "all appropriate measures" to fulfill its Convention-imposed duties, including an obligation to "facilitate the institution of judicial or administrative proceedings with a view to obtain-

ing the return of the child." Hague Convention, art. 7.

DISSENT BY: HAROLD R. DeMOSS, JR.

DISSENT

HAROLD R. DeMOSS, JR., Circuit Judge, DISSENTING:

In my judgment, the proper disposition of this appeal would be for this court to affirm the district court's October 30, 2012 decision which ordered that the children be returned to the custody of their mother pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). *See 42 U.S.C. § 11601, et. seq.*

As **[**39]** the district court acknowledged, this case is peculiar because collateral to their mother's Hague Convention action in the district court the boys were seeking **asylum** in administrative proceedings. After the district court issued its order, the boys were granted **asylum**. I am unaware of any controlling authority which indicates that a grant of **asylum** necessarily precludes the return of a child under the Hague Convention.

Turning to the Hague Convention analysis, the district court determined that Mexico was the children's country of habitual residence, that their mother had rights of custody, that the children were being wrongfully retained, that the mother was exercising her custodial rights or would have been exercising those rights absent the removal or retention, and that no exceptions to returning the children were applicable. The record reflects that the district court spent a tremendous amount of time and effort considering whether exceptions to returning the children under the Hague Convention were applicable. The district court went as far as interviewing the two older children. Ultimately, I am unpersuaded that the district court erred in finding that the exceptions to the **[**40]** Hague Convention were inapplicable.

[*512] Finally, I want to address the fact that the mother filed her case under the Hague Convention nearly a year after the boys left Mexico. In my mind, such a delay is likely attributable to the facts of this case. It appears as though the mother is a woman of limited means, and after leaving Mexico the children have been shuffled between various administrative agencies and foster organizations. Given these facts, it is no wonder that it took the mother several months to file a lawsuit. As the majority notes, the United States has certain responsibilities under the Hague Convention. I urge the Department of State, the designated Central Authority, to fully comply with its statutory duties. *See id.* at *§ 11606*; Exec. Order No. 12,648, 3 C.F.R. p. 579 (1988).

125529

********** Print Completed **********

Time of Request: Tuesday, May 19, 2015 15:10:43 EST

Print Number: 1825:513948491
Number of Lines: 716
Number of Pages:

Send To: KATZ, LAWRENCE
LAWRENCE S. KATZ
9130 S DADELAND BLVD STE 1511
MIAMI, FL 33156-7817

DOMESTIC VIOLENCE AND ARTICLE 13(1)b) "GRAVE RISK" EXCEPTION: A CHALLENGE FOR ALL

June 9, 2015 – Quebec City

- *Convention* of 25 October 1980 *on the Civil Aspects of International Child Abduction*.
- The issue of Article 13(1)b) "grave risk" exception in a context of domestic violence: a difficult one... the establishment of a WG composed of judges, CA and cross disciplinary experts to develop a Guide to good practice on the interpretation and application of Article 13(1)b).
- The main objective of the *Child Abduction Convention* is to counter international parental abductions by securing the prompt return of the child to the State of habitual residence, save for a limited number of exceptions inspired by the best interests of the child. These exceptions must be applied so far as they go but no further (restrictively) if the Convention is not to become a dead letter.
- "Grave risk" ... "intolerable situation"... "a situation which this particular child, in the particular circumstances should not be expected to tolerate" (*Thomson v. Thomson*, [1994] 3 SCR 551; *Re D (A Child) (Abduction: Rights of Custody)*, [2006] UKHL 51).
- 1980-2015, a change in the profile of the taking parent. Should this change result in any change to the interpretation and application of the Convention? (*Re E (Children) (Wrongful Removal: Exceptions to Return)*, [2011] UKSC 27, para. 8).
- The concept of "domestic violence": a broad definition. The risk to unduly broaden the "grave risk" exception.
- The need to properly identify the role of the court where allegations of domestic violence are made. The duty to deal with the return application expeditiously. A tension between the inability of the court to resolve factual disputes and the risk that the child will face if the allegations happen to be true. Is there a sensible and pragmatic solution to this problem?
- The application of the Convention entails a certain degree of self-denial on the part of the judge where the "grave risk" exception is alleged. A return application is not a custody hearing. A delicate balance between the summary nature of the return application and the taking parent's need to prepare his or her case.
- Domestic violence is not in itself an exception to return under the *Child Abduction Convention*. Should it be?
- Domestic violence and parental child abduction: two social evils. Is the *Child Abduction Convention* equipped to address them both?

*

International Academy of Matrimonial Lawyers
Quebec City, Quebec, June 9, 2015

The Hague Convention, A Canadian Perspective, with Trends in Recent Hague cases

By:
Max Blitt, Q.C.
Zukhraf Baig

Spier Harben
Barristers & Solicitors
Calgary, Alberta

Topics to be addressed

1. Overview of the Convention
2. Basic Concepts
3. Defences including recent Canadian Cases
4. Mediation and Negotiation in Hague Convention Cases

2

I. Overview

3

4

What is the Convention?

- International treaty
  - Negotiated through Hague Conference on Private International Law
  - Canada signed in 1980
  - Adopted by statute in each province & territory
- Over 90 countries have adopted
- Japan was latest to adopt on April 1, 2014

5

Purpose of the Convention

- Purpose is to respond to and deter wrongful removal or retention of children.
- Requires return of children "wrongfully removed or retained" in violation of "custody rights" to jurisdiction of "habitual residence"
- Best interest inquiry & litigation in jurisdiction of habitual residence, and respect for parental rights as determined in that jurisdiction
- Hague proceedings are intended to be resolved quickly. Hague Secretariat encourages summary proceedings (no oral evidence, affidavits only).
- Hearing of oral testimony may be needed if there are "serious credibility" issues.

6

Hague Convention Cases Involve

- 1. Expedited Hearing
- 2. Limited Time to seek expert reports
- 3. Limited information about the ‘abducted’ child
- 4. Not about child’s best interest
- 5. Translation Requirements

7

Issues in Hague Proceeding

1. Is the child 16 years of age or younger? (Art. 4)
2. Was the child “habitually resident” in left-behind jurisdiction?
3. Did left-behind parent have “rights of custody” that were actually being exercised? (Art. 3(a)

   - If answers to these questions are **YES**, then “wrongful removal”

4. Is there an exception to return?
   - Acquiescence or consent (Art 12)
   - Application made after one year (Settled Defence) (Art 12)
   - Grave risk of harm from return (Art 13)
   - Mature child objects (Art. 13)
   - Would return violate fundamental human rights (Art. 20)

8

II. Basic Concepts

9

Article 3: Wrongful Removal or Retention

Article 3

The **removal or the retention** of a child is to be considered **wrongful** where –
a) it 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; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The **rights of custody** mentioned in sub-paragraph a) above, **may arise in particular by operation of law or by reason of a judicial or administrative decision,** or by reason of an agreement having legal effect under the law of that State.

10

"Right of Custody"

- "Right of custody" defined by law of habitual residence
- Protect rights of parents with joint legal custody or rights arising upon separation without court order
- May be established even if there is no formal agreement or order on basis of *de facto* custody or common law or statutory rights of habitual residence
  - *Kirby v. Thuns*, [2008] O.J. No. 3586 (SCJ)

11

"Right of Custody" Contd.

- USA & UK cases have held that "right of custody" includes situation where there is an order preventing removal of child from jurisdiction (*ne exeat*) (Abbott USSC, 2012)
- In Canada, only protection if interim order of court preventing removal while pending proceedings (*Thomson v. Thomson* [1994] 3 S.C.R. 551)

12

Habitual Residence

- A child's habitual residence is tied to that of the child's custodian(s).
- Habitual residence is a question of fact to be decided based on all of the circumstances; the habitual residence is the place where the person resides for an appreciable period of time with a "settled intention".
- A "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;
  - *Korutowska-Wooff v. Wooff*, [2004] O.J. No. 3256 (OCA)
  - *A.S. v. A.W.* [2013] A.J. No. 316 (Alta. C.A.)
  - *Madrigal v. Castro* [2015] A.J. 544 (Alta. Q.B.)

13

III. Defenses

14

Article 12 and 13

- Art 12 provides that if child is "settled in new environment" **and** 1 year or more before application, then court may decline to order return.
  - No "equitable tolling": if child is concealed by taking parent, this may be factor in exercise of discretion, but not automatic: *Lozaro v. Alvarez* (USSC 2014); *Kubera v. Kubera* 2010 B.C.J. 383; *Mauna v. Astorga* [2011] A.J. 464
- Art 13 (a) provides that if left behind parent has "consented" or acquiesced" to the move, then court may decline to return the child.
  - "consent" or "acquiescence" requires knowledge of relocation with child
- "some reasonable delay" in bringing *Hague* application does not mean "consent or acquiescence
  - *Ibrahim v. Girgis*, [2008] O.J. No. 99 (OCA)

15

Grave Risk & Child's Objections: Art 13(b)

Hague Convention – Art 13(b)

"the judicial …authority of the requested State is not bound to order the return of the child if the **person… that opposes its return establishes** that ..

b) 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.**

The judicial or administrative authority may also refuse to order the return of the child if it finds that the **child objects** to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

16

Article 13b: Grave Risk

- "Grave risk" of physical or psychological harm or "intolerable situation"
- Must be something more than "ordinary risk" and disruption of returning a child to the care of left behind parent
  - *Thomson v. Thomson*, 1994 SCJ 6
- War zone and civil unrest are reasons not to return child, but OK to return to Israel despite greater risk of terrorism (*R.M. v. J.S.* ABCA 441)
- Lower living standard not reason to refuse return

17

Grave Risk & Domestic violence: Art 13(b)

- In the 1980s, most Hague cases took a very narrow approach to Art 13(b). Generally accepted that courts fulfill the objectives of the Convention by narrowly interpreting the exceptions, and not allow "abducting parents" to litigate (or re-litigate) the child's best interests
- Now much greater recognition of harmful effects of spousal abuse on victims (mainly women) and their children.

18

Art 13(b) – Challenge of Domestic Violence Cases

- How does taking parent satisfy the “onus” of establishing that domestic violence occurred in another jurisdiction?
- How can applicant challenge allegations?
- How to assess whether the police and courts of the jurisdiction of habitual residence can adequately protect the victim and child if return ordered

19

Matzke v. Matzke 2009 BCSC 1532

- Petition by father to return the children to the US from Kamloops, BC.
- Children were born in US
- They were residing in Texas before the mother moved with the Children to Kamloops, BC, Canada, where the maternal grandmother lived.
- There was domestic violence alleged by both sides; the mother reported the assault to the police 8 days after the incident in September 2008.
- The Husband took the wife’s car keys and cell phone, he said this was because he was concerned with the mother’s state of mind and feared she would take the children.

20

Matzke v. Matzke 2009 BCSC 1532 Contd.

- After mother left for Canada father obtained a Divorce Judgment against the mother and full custody of the children. The Father conceded that this was without notice to the mother.
- There was no doubt that the children’s habitual residence was US
- It was the mother’s burden to prove that the children were being returned to a situation of intolerable harm.
- Changing residences frequently does not mean children will suffer harm.

21

Matzke v. Matzke 2009 BCSC 1532 Contd.

- The mother had claimed that the father spanked and slapped the children.
- There was a voice of the child report where the children stated that they had seen violence by the father towards the mother.
- The judge concluded that the parent's statements were contradictory and the children seem to have been influenced to make those statements.
- In the mother's second affidavit she had claimed that the father had come into one of the children's rooms with a knife, the judge wondered why, given the seriousness of this allegation, it wasn't mentioned in the first Affidavit.

22

Matzke v. Matzke 2009 BCSC 1532 Contd.

- The Court found that there was an incident in September of 2008. The rest of the incidents however were not credible and the mother's defence under Article 13(b) has not been made out.

23

Sampley v. Sampley 2015 BCCA 113

MONTANA

- Parties married in 2010 in Alberta
- Father was a U.S. citizen while mother was a Canadian citizen.
- Family moved to Montana from Alaska in September 2013
- After three weeks mother and child went to BC to visit the mother's family.
- The mother then stayed in BC. Mother denied stating that she would return, however she had only packed for a short visit.

24

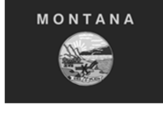
Sampley v. Sampley 2015 BCCA 113 contd.

- The mother's retention was wrongful.
- The father had acquiesced to the mother extending her stay in B.C., but he did not consent to her remaining there.
- The mother had made domestic violence allegations against the father in accordance with article 13(b), stating that the father had been violent towards the mother, the child and the mother's previous partner. The Court of Appeal did not consider those allegations that serious even if true. The Court of Appeal ruled that the B.C. court should defer to the U.S. court's jurisdiction to protect the child.

25

Sampley v. Sampley 2015 BCCA 113 contd.

- The trial court had ordered child support and spousal support as a condition for the return of the child. The Court of Appeal ruled; given that there was no application for maintenance, it was inappropriate for the court to place such conditions.



26

R.M. v. J.S. 2014 ABCA 441

- The mother had brought an application for the return of the child to Israel from Alberta.
- The parties married in Israel. After the parties divorced the Father moved to Canada while the mother and child stayed in Israel.
- The Child would visit the Father during the summer, starting 2008
- In the summer of 2011 the Father did not return the child who was 9 at that time.

27

R.M. v. J.S. 2014 ABCA 441 Contd.

- The provincial court ruled that the father had wrongfully retained the child in Canada, but refused the mother's application on the basis of the child's objection to returning to Israel and that the child was mature enough to voice his objections. Article 13(B)
- The objection was upheld in the Court of Queen's Bench of Alberta.
- The Court of Appeal ruled that a proper evidentiary basis did not exist to assess the maturity of the child.

28

R.M. v. J.S. 2014 ABCA 441 Contd.

- The Court of Appeal ruled that the court required the opinion of a qualified expert to assess the maturity of the child and a more comprehensive evaluation of the child's position.
- The Court of Appeal ordered the child to be returned to Israel forthwith.

29

Allibhoy v. Tabalujan 2015 BCSC 37

- Petition by the Father, a celebrity chef in London to return the Child to London, England from Vancouver.
- The Father was a Spanish citizen living and operating two restaurants in England.
- The Mother was an Indonesian and Canadian citizen.
- In April 2013 when the mother was pregnant she travelled to Canada with the intention of giving birth to the child with help from her parents, who were in Canada.

30

Allibhoy v. Tabalujan 2015 BCSC 37 Contd.

- The mother lived with her parents until December 2013, after which she flew with the child and father to live with the father's parents in Madrid.
- The Mother and child moved to London in March 2014.
- After the mother and father moved to London, the mother's parents visited them in London.
- The parties were having relationship problems and the mother felt that it would help the parties work on their relationship if the chid lived with the mother's parents in Canada for a few months.

31

Allibhoy v. Tabalujan 2015 BCSC 37 Contd.

- The Father consented to the child living in Vancouver provided that the child was returned to London no later than September 8, 2014.
- The mother, the mother's parents and the child left for Canada on June 30, 2014.
- The mother returned to London on July 14, 2014.
- On July 25, 2014 the Father told the mother that he no longer wanted to stay in the relationship.

32

Allibhoy v. Tabalujan 2015 BCSC 37 Contd.

- The Father told the mother that he wanted the child to return to London by July 30, 2014 and he no longer consented to the child staying in Canada.
- The mother left for Canada in August 2014 and served the Father with a Family Application.
- Return of the Child to London was ordered. The settled intention of the parties before the wrongful retention was to stay in London. The trip to Canada for the child was temporary whether before or after the separation.

33

Allibhoy v. Tabalujan 2015 BCSC 37 Contd.

- The mother had stated that the child would be facing a grave risk of harm if returned due to the father's recreational use of cocaine.
- The father conceded to the fact but also stated that mother used the drug recreationally as well, a claim that the mother did not deny.
- The grave risk argument failed in this case.
- The mother submitted that the Habitual Residence of the child had effectively changed to London as the child was in Vancouver upon separation.

34

Allibhoy v. Tabalujan 2015 BCSC 37 Contd.

- The mother's habitual residence argument failed.
- The mother's hope to someday return to Canada was not sufficient to establish that B.C. was the child's habitual residence from the time the child arrived there.
- The father never accepted that the child should remain in Canada, either before or after the parties' relationship ended.
- The parents' shared intention, prior to the child's wrongful retention in Canada, was that his stay in B.C. would be temporary and that he would be returned to London no later than September 2014.

35

J.H.F. v. S.H.F.N. 2015 BCSC 349

- Application by grandparents for the return of the children to Florida
- There were Court Orders from Florida for custody in favour of the grandparents
- The Court Orders were made with Consent from the parents who were travelling at that time to further their medical education.
- The mother and father had the right to modify the orders, at any time, as long as the request was made "jointly".

36

J.H.F. v. S.H.F.N. 2015 BCSC 349 Contd.

- Father did not consent, mother made an application in Florida but that was rejected, the mother *still* ended up taking the children to B.C.
- A total of 57 Affidavits were submitted. The hearing lasted "5 days"
- The grandmother is the controlling mind behind what is known as Nehemiah International Ministries ("NIM"). Over several years many young persons have been sent to NIM by their parents for instruction and discipline supervised by the grandmother.

37

J.H.F. v. S.H.F.N. 2015 BCSC 349 Contd.

- The forms of correction used on children with eating disorders included:
  1. force-feeding a child while his or her hands are tied;
  2. confinement to garbage cans while being forced to eat;
  3. placing a bucket over a child's head for an extended period of time if he or she refused to eat; and
  4. placing a bucket over a child's head for an extended period of time if he or she refused to eat; and
  5. forcing a child to eat his or her own vomit.

38

J.H.F. v. S.H.F.N. 2015 BCSC 349 Contd.

- A psychologist appointed by the Court interviewed the children.
- The Court did not conclude that the children at issue had themselves suffered physical abuse at the hands of their grandmother but it was clear they had seen other children subjected to physical abuse, and they expressed their anxieties to the psychologist about what they had seen.
- The Court had no doubt that the children who witness abuse suffer psychological harm as a result.

39

J.H.F. v. S.H.F.N. 2015 BCSC 349 Contd.

- The Mothers Article 13(b) defence of grave risk of harm was successful in this case.
- "64 In *Baran* the court commented that:
  ...Although we are cognizant of the Convention's goal of quickly returning abducted children to their countries of habitual residence, the text of the Convention and the commentaries on it place a higher premium on children's safety than on their return."

40

Brown v. Pulley [2015] O.J. No. 1770

- Application by the Father to return the parties two children to North Carolina from Toronto.
- The Mother took the children to Toronto with her without notice or consent of the father.
- The mother claimed that due to the severe physical and emotional abuse of her by the Father, there would be a grave risk that returning the children to North Carolina would expose them to physical or emotional harm or otherwise place them in an intolerable position.
- In her reply Affidavit the mother attached a letter from a psychotherapist in Toronto that she had taken the children to see.

41

Brown v. Pulley [2015] O.J. No. 1770 Contd.

- The letter from the Psychotherapist contained a clinical diagnosis of the children and several child statements.
- The father objected to the admission of the letter, submitting that it was not sworn evidence, that it was improper opinion evidence, that it was not appropriate reply evidence and that the children's statements in it were hearsay and unreliable.
- The judge, after hearing initial submissions, ordered a *voir dire* for the following hearing date where the psychotherapist would be called to provide her evidence. At the start of the voir dire, counsel for the applicant advised that the applicant would not be calling the psychotherapist as an expert ---she was only being called to testify about the children's statements.

42

Brown v. Pulley [2015] O.J. No. 1770 Contd.

- The mother asked the Court to admit the statements for the truth of their contents as an exception to the rule against hearsay evidence, using the approach of establishing necessity and reliability as set out in *R v. Khan*[1990] S.C.J. No. 81.
- The parties agreed the necessity test was met, leaving the issue of reliability.
- The court determined that the psychotherapist's process was "so fundamentally flawed that it did not even reach the threshold reliability and the children's statements made to her are inadmissible."

43

Brown v. Pulley [2015] O.J. No. 1770 Contd.

- Some of the flaws in the psychotherapists report given by the Court were:
  1. The psychotherapist did not bring her notes to court about her discussions with the children. Without notes, the psychotherapist had to rely on her memory, the father's counsel was restricted in cross-examination.
  2. The Children were not interviewed privately from the mother. The mother was in the next room and could hear the answers the children were giving.
  3. Children were not interviewed separately.
  4. The psychotherapist did not interview the father.
  5. The psychotherapist went into the interview with the assumption that the children were victims of domestic abuse.
  6. There was no screening to determine if the children were influenced about what to say.
  7. The psychotherapist asked the children several leading and suggestive questions.

44

Brown v. Pulley [2015] O.J. No. 1770 Contd.

- The Court also stated "It would be dangerous, not only for this case, but for other cases involving child statements, to lower the threshold reliability standard to the degree that child statements made in such flawed circumstances would be admissible. It would make the threshold reliability test virtually meaningless. There would be a real risk that cases could be incorrectly decided on highly unreliable evidence."
- The Court ruled that the Mother did not meet the threshold for grave risk of harm.
  1. The mother had contributed to the domestic violence
  2. The mother's reasons for leaving North Carolina were not credible, it was more likely that she left out of fear that she might have to share custody or lose custody to the father.
  3. The children enjoy a good relationship with the father.

45

Brown v. Pulley [2015] O.J. No. 1770 Contd.

- The mother also submitted that due to her immigration status in the United States she might not be able to re-enter and returning the children to the father would cause them psychological harm and place them in an intolerable position.
  - This argument also failed. The mother not being able to re-enter the United States is speculative. The father is experienced in caring for the children and has a loving relationship with them.
- While the court found that the children witnessed some domestic violence, the level of violence did not meet the standard required for an Article 13 (b) exception. The North Carolina courts are also capable of dealing with these issues.
- The Court Ordered that the children be returned to North Carolina.

46

IV. Negotiation and Mediation

47

Negotiation and Mediation

- Mediation while rarely used in Hague Convention cases could be effective for the following reason:
  - More control over timing & process for return
  - Conditions for return may be part of settlement
  - Undertakings or mirror orders
  - Negotiating a visitation schedule for the access parent
  - Avoidance of abducting parent's successful relocation application after an order for return.

48

Conclusion

- With increased international mobility and "international marriages," the number of international abduction cases appears to be on the rise.
- Family Lawyers need to address issues of prevention and be able to respond quickly
- Involve more experienced counsel or international family bar

49

Questions or Comments

mblitt@spierharben.com

zukhraf.baig@spierharben.com

50

References & Sources: Hague Convention

- The Incadat database on International Child Abduction is maintained by the Permanent Bureau of the Hague Conference on International Law and has extensive materials, including:
  - A database of cases from signatory countries
  - Information about Central Authorities in signatory countries
  - Guides to Good Practice: http://www.incadat.com

51

Websites: & Resources

Prevention of Child Abduction

- Resources:
  - **Foreign Affairs Consular Services: Child Abduction and Custody Issues** http://travel.gc.ca/assistance/emergency-info/child-abduction-welfare
  - **Reunite:** http://www.reunite.org/
  - **Hague Convention Child Abduction Section:** http://www.hcch.net/index_en.php?act=text.display&tid=21
  - **The I CARE foundation**: http://theicarefoundation.org/
- Law Journal Articles:
  - Bala & Maur, "The Hague Convention on Child Abduction: A Canadian Primer" (2014) Dec. Issue C.F.L.Q.
  - Starr, "Preventing Parental Child Abduction — The Role of the Lawyer in Managing the Risk" (2013) 32 C.F.L.Q. 137.

52

Websites: Prevention & Location

- Locating Children
  - Our Missing Children Program- CBSA, RCMP and Foreign Affairs
    http://www.cbsa.gc.ca/security-securite/omc-ned-eng.html
    http://travel.gc.ca/travelling/publications/international-child-abductions

53

Appendix: CBSA websites

- **National Centre for Missing Persons and Unidentified Remains:**
  - *http://www.canadasmissing.ca/index-eng.htm*
- **Carry the proper identification:**
  - *http://www.cbsa-asfc.gc.ca/travel-voyage/td-dv-eng.html#_s3*
- **Taking children on a plane:**
  - *http://travel.gc.ca/travelling/children/taking-children-on-a-plane*
- **Canada's missing children resource centre:**
  - *http://missingkids.ca/app/en/*
- **Passport Canada's System Lookout List**
  - *http://www.ppt.gc.ca/protection/16-.aspx?lang=eng*

54

Vue d'ensemble de l'application de la Convention de La Haye au Canada par ses 13 Autorités centrales, et en particulier par le Québec / **Overview on the application of The Hague Convention in Canada through its 13 Central Authorities, and particularly by the province of Quebec**

Symposium de La Haye / Hague Symposium

Québec – Le 9 juin 2015

France Rémillard, Autorité centrale du Québec

Justice Québec

Autorités centrales / Central Authorities

- 13 Autorités centrales (10 provinces et 3 territoires) / 13 Central Authorities (10 provinces and 3 territories)
- 1 Autorité centrale fédérale située au Ministère de la Justice du Canada / 1 Federal Central Authority located with Canada's Department of Justice

Mise en oeuvre de la Convention / Implementation of the Convention

- Mise en oeuvre dans les provinces/territoires par des moyens législatifs différents / Implementation in the provinces/ territories by different legislative means

  Par exemple au Québec / For example in Quebec

  - Adoption d'une nouvelle loi reprenant le texte de la Convention / Adoption of a new legislation containing the text of the Convention
- Entrées en vigueur dans les provinces/territoires à des dates différentes entre 1983 et 1988 / In effect in the provinces/ territories at different dates between 1983 and 1988
- La Convention ne s'applique pas à l'interprovincial / The Convention does not apply to interprovincial abductions

Autorité centrale fédérale / Federal Central Authority

- Fournit des renseignements généraux au public et aux autres Autorités centrales / Provides general information to public and other Central Authorities
- Coordonne les réunions nationales et internationales / Coordinator for National and International meetings
- Coordonne les réponses et positions canadiennes / Coordinator for Canadian responses and positions
- Reçoit les demandes des Autorités centrales étrangères lorsque l'endroit où se trouve l'enfant est inconnu / Receives applications from foreign Central Authorities where the location of the child is unknown
- Donne de la formation / Provides training

Devoirs / Duties - article 7

- Localiser un enfant / Discover the whereabouts of a child
- Assurer la remise volontaire de l'enfant ou favoriser une solution à l'amiable / Attempt a voluntary return or an amicable resolution
- Échanger des informations / Exchange of information
- Faciliter l'obtention de l'aide juridique / Facilitate the provision of legal aid
- Prendre ou faire prendre des mesures provisoires pour prévenir de nouveaux dangers / Take or cause to take provisional measures
- Introduire ou favoriser l'introduction d'une requête / Initiate or facilitate proceedings
- Assurer le retour sans danger de l'enfant / Secure safe return of the child

Localiser un enfant / Whereabouts of a child

- Collaboration / Assistance
  - Police locale ou la Gendarmerie royale du Canada / Local police or the Royal Canadian Mounted Police
  - Agence des services frontaliers Canada / Canada Border Services Agency
- Au Québec / In Quebec:
  - Banques de données des permis de conduire et des inscriptions scolaires auprès du Ministère de l'Éducation / Databases such as driving licenses and school enrollment to the Ministry of Education
  - Equifax (dossier de crédit) / Equifax (credit report)
  - Plumitif (registre des procédures civiles) / Plumitif (database of judicial records)

Représentation légale / Legal representation

- Manitoba et Nouveau-Brunswick: fournissent des services juridiques aux parents requérants / Manitoba and New Brunswick provide legal services to the requesting parents
- Autres provinces et territoires, incluant le Québec: si éligible, l'aide juridique est offerte aux parents requérants / For the other provinces and territories, including Quebec: if eligible, legal aid is offered to the requesting parents
- Au Québec / In Quebec:
  - Autorité centrale aussi représentée à la cour / Central Authority also represented in court

Articles 11 et 16 / Articles 11 and 16

- Protocoles de procédures judiciaires adoptés dans les provinces/ teritoires de Common Law / Judicial Procedural Protocols adopted in the Common Law provinces/territories
  - Le juge établit les délais pour une audience expéditive (article 11) / The judge establishes the timelines for an expeditious hearing (article 11)
  - L'Autorité centrale informe le tribunal de la réception d'une demande; un dossier est ouvert et on ne procède pas si une demande de garde est faite (article 16) / Central Authority shall inform the court when receiving an application; a file is opened and the court shall not proceed if a custody application is made (Article 16)
- Au Québec / In Quebec:
  - Rencontre des avocats avec le juge coordonnateur pour planifier une audience rapide (article 11) / Meeting of the attorneys with the judge coordinator to schedule a fast hearing (article 11)
  - Lettre transmise à l'avocat du parent ravisseur demandant de ne pas procéder (article 16) / Letter sent to the taking parent's lawyer asking not to proceed (article 16)

Articles 7e) et 15 / Articles 7e) and 15

Droit applicable/Applicable Law (article 7e)

- Certaines Autorités centrales vont préparer un affidavit énonçant le droit applicable dans la province/territoire de la résidence habituelle de l'enfant / Some Central Authorities will prepare an Affidavit stating the Law in the province/territory of the child's habitual residence
  - Le plus souvent demandé lorsqu'il n'y a pas de jugement de garde / Most often requested where there is no order for custody

Attestation/Decision (article 15)

- Seuls les tribunaux sont habilités à produire une décision ou attestation constatant que le déplacement ou le non-retour était illicite / Only the courts are empowered to produce a decision or other determination that the removal or retention was wrongful

Rôle d'*amicus curiae* au Québec / Role of *amicus curiae* in Quebec

- Choix du Ministre de la Justice du Québec de ne pas introduire la requête pour le retour / Choice of the Ministry of Justice of Quebec to not introduce the motion for return
- Choix de rester neutre dans ces dossiers / Choice to remain neutral in these cases
- Choix de s'assurer du respect de la loi et d'éclairer la cour et les avocats sur son fonctionnement / Choice to ensure compliance with the law and inform the court and lawyers of its operation
- Avocat du Procureur Général du Québec (PGQ) à la cour afin d'assister les juges dans leurs demandes avec l'assistance de l'Autorité centrale / Attorney for the Attorney General of Quebec (AGQ) in court to assist the judges in their requests with the assistance of the Central Authority

Mesures d'urgence par le PGQ / Emergency measures by the AGQ

- Obtention d'un jugement *ex parte* pour localiser l'enfant concerné et l'amener au Directeur de la protection de la jeunesse (DPJ) (article 10 de la Loi) / Obtaining an *ex parte* order to find the child in question and take him to the Director of Youth Protection (DYP) (article 10 of the Act)
  - Pour prévenir un nouvel enlèvement et/ou assurer sa sécurité pendant les procédures de retour / To prevent another abduction and/or ensure its security during return proceedings
  - Valide pour 48 heures / Valid for 48 hours
  - Utilisé seulement lors de situations exceptionnelles / Used only in exceptional circumstances
  - Condition: La requête pour le retour doit être prête à être signifiée au parent ravisseur / Condition: the motion for the return must be ready to be served on the taking parent

Rôle du DPJ / Mandate of DYP

- Son mandat en vertu de la Convention est différent de celui en vertu de la *Loi sur la protection de la jeunesse* / Its mandate under the Hague Convention is not the same as under the *Youth Protection Act*
  - Coordonne et supervise les contacts entre l'enfant et les parents pendant les procédures de retour / Coordinates and supervises contact between child and parents during Hague proceedings
  - Organise la réunification entre l'enfant et le parent requérant, si nécessaire / Organizes the reunification between the child and the requesting parent, if necessary
  - Coordonne la remise de l'enfant une fois la décision sur le retour rendue / Coordinates the delivery of the child once the decision on the return is made

Exécution des décisions de retour / Enforcement of Return Orders

- Assure le retour tel qu'ordonné par le tribunal / Ensure the return as ordered by the court
  - Coordonne avec les services sociaux et les forces policières, si nécessaire / Coordinate with social services and police if necessary
  - Coordonne avec les consulats/ambassades pour obtenir des documents de voyage pour l'enfant / Coordinate with consulates/embassies to obtain travel documents for the child
  - Coordonne avec les autorités compétentes pour assurer le «transit» de l'enfant s'il y a escale dans un autre pays / Coordinate with relevant authorities to ensure the "transit" of the child if there is a flight connection in another country

Médiation internationale / International Mediation

- La Convention est silencieuse sur la médiation sauf
  - article 7c) -» assurer la remise volontaire de l'enfant ou faciliter une solution amiable
  - article 10 -» assurer le retour volontaire
- The Convention is silent on mediation except for
  - article 7c): -» to secure the voluntary return of the child or to bring about an amicable resolution of the issues
  - article 10 -» to obtain the voluntary return of the child
- La médiation est offerte dans plusieurs provinces/territoires, mais il n'y a pas de programme spécialisé pour les dossiers de la Convention de La Haye / Mediation is offered in many jurisdictions but there is no specialized program for Hague Convention cases

Médiation au Canada / Mediation in Canada

- La plupart des provinces/territoires offrent des services de médiations privés / Most of the provinces/territories offer private mediation services
- Certaines provinces/territoires offrent de la médiation gratuite ou selon les revenus des parents / Some provinces/territories offer free mediation or based on income of the parents
- **Par exemple / For example**
  - **Saskatchewan:** Médiation offerte gratuitement par leur «Dispute Resolution Bureau» / Free mediation is offered by their "Dispute Resolution Office"
  - **Colombie-Britannique:** Médiation offerte gratuitement par des médiateurs de Justice / Free mediation is offered by Justice mediators
  - **Québec:** Médiation offerte gratuitement (6 séances) par visioconférence ou téléphone / Free mediation is offered (6 sessions) by videoconference or telephone

Programme «Nos enfants disparus» / "Our Missing Children " Program

Le programme est le résultat d'un partenariat entre différents ministères et agences au Canada / The program is the result of a partnership between different departments and agencies in Canada

- Créé en 1995 / Created in 1995
- Chaque service a un rôle différent à jouer / Each service has a different role to play
- Son mandat est d'aider les parents à trouver et ramener chez eux les enfants disparus / Its mandate is to help parents find and bring home the missing children
- Programme de transport et de réunification avec Air Canada et Via Rail / Travel Reunification Program with Air Canada and Via Rail

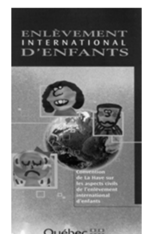
Partenaires / Partners

- Gendarmerie royale du Canada / Royal Canadian Mounted Police
- Agence des services frontaliers Canada / Canada Border Services Agency
- Citoyenneté et immigration Canada / Citizenship and Immigration Canada
- Affaires étrangères Canada / Foreign Affairs Canada
- Ministère de la Justice du Canada / Department of Justice Canada

Le programme au Québec / The program in Quebec

- Le programme a été élargi avec maintenant plus de 30 coordonnateurs de 17 ministères/agences différents / The Program has now expanded to more than 30 coordinators from 17 different Departments/Agencies
- Une réunion d'une journée est organisée tous les 18 mois pour: / A one-day meeting is organized every 18 months to:
  - Discuter des nouveautés à chaque partenaire / Discuss on what is new with each partner
  - Discuter de nouvelles techniques ou ressources utiles pour régler les dossiers d'enlèvement international d'enfants / Discuss on new techniques or useful ressources in handling cases of international child abduction
  - Discuter de cas vécus ou de cas problématiques pour assister les partenaires à trouver des solutions / Discuss of past or difficult cases to assist the partners in finding solutions

Autorité centrale du Québec / Central Authority for Quebec



- Autorité centrale du Québec
  a/s **France Rémillard**
  Direction des services professionnels – Entraide internationale
  Ministère de la Justice
  1200, route de l'Église, 2e étage
  Québec (Québec) G1V 4M1
- Téléphone/phone (418) 644-7153
- Télécopieur/fax (418) 528-9716
- Enlevement.enfant@justice.gouv.qc.ca