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International Academy of Family Lawyers
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Common Law and Civil Law
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APRIL 14 2016

ENGLAND AND WALES: COMMON LAW JURISDICTION

- Civil Law vs Common Law
- Discretion vs Certainty
- Henry II and the Emperor Justinian
- English speaking world and the rest of the world with some fused systems.
- Property regimes
- Trusts

PROPERTY REGIMES

- In what context are the courts operating?
- Matrimonial Property Regimes created on marriage (immediate or deferred).
- Civil law countries consider that England and Wales has "separation of property" regime. Is that accurate?
- *White –v- White* 2001 1ALL ER1, HL.
- Separation of property and maintenance
- Maintenance not normally covered by pre-nups in civil law jurisdictions

PROCEDURE IN ENGLAND

- How does it work in England?
- Procedure on divorce.
- Duty to the court.
- Duty of full and frank disclosure – Form E.
- Very thorough system to include questionnaires.
- First Appointment, Financial Dispute Resolution Hearing (FDR) final hearing.
- Final hearings can last for days or weeks.

DOCUMENTS BEFORE THE COURT

- Case is argued many times on paper.
- Each hearing requires a skeleton argument in addition to the pleadings.
- Now limited to 350 pages per hearing
- Common law jurisdiction make more of a deal of it.

WHICH SYSTEM IS THE FAIREST?

- The formulaic system with limited discretion?
- A system which struggles to acknowledge interests in trusts or property held nominally by third parties?
- A system with lack of forensic thoroughness whether there is no duty to the court on the part of the lawyers or the parties?
- A system which is cumbersome, lengthy and very expensive for the parties?
- Perhaps a combination?

SOME THOUGHTS ON MAINTENANCE

- England and Wales out of step with the rest of the world (including Scotland).
- Germany: generous maintenance is granted in the south and little maintenance is granted in the north.
- Sweden, Finland etc. no maintenance
- Brussels II – rush to court
- Maintenance Regulation (EU regulation no: 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and decisions and co-operation in matters relating to maintenance obligations). Rush to court on maintenance
- EU provisions too complex and inconsistent. Many rely on civil law concepts and sit uneasily with common law jurisdictions.

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International Prenuptial Agreements

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Marital Agreements After *Petrakis* and *Petracca*

By Glenn S. Koopersmith

Although both *Petracca v. Petracca*,[1] and *Cioffi-Petrakis v. Petrakis*[2] have been cited for fundamental principles regarding contractual construction and fiduciary obligations, only a few cases (none on the appellate level) have applied these principles to comparable factual situations. While the subsequent cases are too few in number to establish a clear trend, they do seem to indicate an increased judicial willingness to intervene by rescinding all, or part, of a marital agreement if the ultimate impact of the agreement appears unfair or inequitable. It is unclear whether this trend will continue in the future or whether these principles will be adopted outside the Second Department.[3]

Petracca v. Petracca

In *Petracca*, the parties entered into a postnuptial contract approximately three months after the marriage. The wife waived any claim to the husband's business interests (including future appreciation) and the marital residence (to which the wife had made no financial contribution); both parties waived their rights of inheritance. The wife claimed that she had been pressured into signing the agreement because of the husband's threat to terminate the marriage and decline to have children with her.

Following a hearing, the Supreme Court found that the agreement was executed validly and the wife had failed to meet "her heavy burden of establishing by proof so clear and convincing as to amount to a moral certainty that the agreement was not properly executed." While the agreement provided that each party had been "advised by counsel of his or her own choosing," the Court credited the wife's testimony that she had not been represented by counsel. The Court invalidated the agreement, finding that it was "patently unconscionable and not fair and reasonable at the time of its execution," largely because the wife waived any interest in the multimillion dollar marital residence and her right to inherit from the husband.

On appeal, the Second Department affirmed the order invalidating the agreement. It noted that the husband's assets were "undervalued by at least $11 million" and relied upon the "vast disparity" in the parties' net worth and earnings and the wife's waiver of any claim to the marital residence and all inheritance rights, in concluding that since the "terms of the agreement were manifestly unfair to the plaintiff and were unfair when the agreement was executed, they give rise to an inference of overreaching."

The Appellate Division's finding that the agreement was "manifestly unfair...when [it] was executed" because of the wife's waiver of any claim to the marital residence and her rights of inheritance is seemingly inconsistent with the many cases in which the Second Department has refused to invalidate agreements which are improvident or one-sided.[4]

Cioffi-Petrakis v. Petrakis

In *Petrakis*, in which the wife signed a prenuptial agreement against her attorney's advice, the agreement contained a series of specific disclaimers which provided, *inter alia*, that: (1) the "entire understanding" of the parties was set forth in the agreement; (2) there were no oral representations other than those set forth in the agreement; (3) "the agreement and its provisions merge any prior agreement"; and (4) neither party was relying upon any promises which were not set forth in the agreement. If upheld, the agreement's equitable distribution provision limited the wife to no more than $25,000 for each year of the marriage and a 1/3 interest in one of the husband's businesses.

After a hearing, the wife's cause of action for fraudulent inducement was sustained and the agreement set aside. The Supreme Court found that: the husband was evasive, crediting the wife's testimony; the husband promised to tear up the agreement after they had a child and never intended to comply with this promise (notwithstanding the aforesaid disclaimers); and the wife justifiably relied on his (mis)representation, to her detriment. It did not directly address the longstanding rule of law in the Second Department that "a cause of action alleging fraudulent inducement may not be maintained if specific disclaimer provisions in the contract...disavow reliance upon oral representations."[5]

On appeal, the Second Department affirmed, sustaining the cause of action for fraudulent inducement and the rescission of the agreement. It noted that the wife's claim "rested largely on the credibility of the parties," the hearing court had resolved the credibility issues in the wife's favor and these findings were supported by the record. It, too, made no reference to the merger and oral modification disclaimer provisions of the agreement, notwithstanding that these provisions were fully addressed in the husband's brief. The husband's motion for leave to appeal to the Court of Appeals was denied.[6]

Both the Hearing Court and the Appellate Division relied on "credibility" and parole evidence and declined to address the sufficiency of the disclaimers set forth in the agreement, notwithstanding that similar issues have been litigated extensively in the past.[7]

The Post-*Petracca*-*Petrakis* Decisions

In *C.S. v. L.S.*,[8] in which a hearing was conducted to determine the validity of the parties' prenuptial agreement, the Court noted that the parties had been married for 11 years and had been engaged in an "intimate relationship" for 19 years. It emphasized that the wife, who was finan-

cially dependent of the husband, had sold her furniture and moved out of her apartment in advance of the execution of the agreement. The Court recognized that the wife was desperate to marry and had advised the husband that she would "sign any piece of paper you put in front of me and I won't even read it."

The first paragraph of the Court's decision tells it all:

> Nonetheless if Husband's present motion before the court is granted, upon the parties divorce wife will be left no home, no assets, no bank account and no maintenance.

Without reading anything further (and regardless of the seemingly unjust, coercive circumstances surrounding the execution of the agreement), the fundamental inequity which would have resulted if the agreement had been sustained was sufficient to compel the Court to invalidate the agreement.

The facts in *C.S.* provide a wonderful blueprint for how *not* to proceed in the drafting, negotiation and execution of a prenuptial agreement. Although the agreement was drafted by the husband's business attorney more than a month before it was signed and counsel immediately advised the husband that the wife would need independent counsel, the husband declined to advise the wife of this fact. The wife was not told that she would be required to sign the agreement "until either the night before or the morning of the appointment to sign the agreement."

The wife was never provided with an opportunity to review the agreement before it was signed. It was presented to her two days before the wedding on a "take it or leave it basis." She first met her attorney, an "office suite mate" of her husband's counsel who was selected by the husband's counsel, when she was first handed the agreement to sign. Her attorney advised that the agreement was very one-sided in the husband's favor but made no attempt to renegotiate its terms. The attorney confirmed that during his meeting with the wife she was "sobbing." The execution process took 45 minutes.

The *C.S.* Court cited *Petracca* (quoting *Christian v. Christian*[9]) for the proposition that courts have "thrown their cloak of protection" over marital agreements to ensure that they are free from fraud and duress, and *Petrakis* to establish the fiduciary nature of the relationship between prospective spouses. Citing *Matter of Greiff*,[10] the Court shifted the burden of proof to the husband to disprove "freedom from fraud, deception or undue influence." After reviewing the facts and finding that the agreement would "leave the wife nearly destitute," the Court, in explicit reliance on *Petracca*, set the agreement aside because: (1) the wife was provided with no opportunity to retain independent counsel; (2) she received the agreement on the date of its execution and was afforded "no meaningful opportunity" to reflect on its terms; (3) there was no opportunity to negotiate the terms of the agreement which was presented on a "take it or leave it basis"; (4) her attorney acknowledged that the agreement was inequitable yet made no attempt to renegotiate any of its terms; (5) the "nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in after acquired real and personal property," rendered the agreement manifestly unfair; (6) she waived of all inheritance rights; and (7) there was a "vast disparity" in the parties net worth and earnings.

In *Zinter v. Zinter*,[11] the defendant-husband was the monied spouse; the divorce action was commenced after eight years of marriage. After the husband's attorney prepared a prenuptial agreement, he met jointly with the parties and provided the wife with the name of three experienced matrimonial lawyers. The wife selected one of these attorneys and met with him three times. The agreement was executed more than a month before the wedding. The agreement utilized an expansive definition of separate property and a narrow definition of marital property pursuant to which title controlled the classification and distribution of assets. The amount of maintenance upon divorce was linked directly to the "cumulative gross earnings" of the parties. The Court noted that "the longer the marriage, presumably the greater the amount of cumulative earnings and thus greater the maintenance would be." The husband's business and the appreciated value of that business were to remain his separate property. The agreement contained mutual waivers of the right of election and specified that if the wife predeceased the husband she would receive $250,000 in cash, a marital residence, a car and his retirement plan. Both parties waived any claim to the other's retirement assets acquired both before and after the marriage.

While the *Zinter* Court cited *both Petrakis* and *Petracca* for basic legal principles, ironically it also cited *Christian,* noting that where there has been full disclosure of the relevant facts and their "contextual significance" and there has been an absence of "inequitable conduct," "courts should not intrude so as to redesign the bargain…."

The *Zinter* Court rejected the wife's claim that the husband's failure to state his annual income in the agreement and his alleged undervaluation of the business stated a cause of action for fraud. In reaching this determination, the court noted: (a) the failure to include income in a marital agreement is not "by itself sufficient to vitiate [an] agreement"; (b) the wife never alleged that she would not have signed the agreement if she was aware of the husband's income or the purportedly higher value of his business; and (c) it was clear at the time of the agreement that the "defendant had considerable means while plaintiff did not, and these disparities were indeed disclosed (citation omitted)." The *Zinter* Court also dismissed the wife's claim of duress because her attorney was one of three suggested by the husband's counsel, she met with him three times and the agreement, which was signed more than one month before the wedding, was "not foisted or sprung upon the plaintiff at the last minute."

The court's decision with respect to whether the agreement was "'manifestly unfair' and thus unconscionable" was more nuanced. While the court did not cite *Petracca*

directly in its conclusion, it certainly appears to have been influenced by its principles. The court found that the maintenance provision was neither manifestly unfair nor unconscionable. With respect to the duration of the payment, the court noted that the wife was to receive a five-year payment in an eight-year marriage. The Court's analysis of the amount of the payment emphasized that while the agreement provided the wife with less than she otherwise would have received, the formula entitled her to more maintenance as the marriage matured since the parties cumulative earnings would "presumably" increase over time.

With respect to the property distribution, the agreement provided that marital property included assets that the parties "purchase or otherwise acquire during the marriage that is owned or held by them jointly." Thus, while the contract provided that title was to control the classification of property—it was to remain separate unless "owned or held by them jointly"—the Court found that this provision was "manifestly unfair and unconscionable as applied to the facts of this case." It emphasized that notwithstanding the parties' receipt of approximately $2.7 million in gross marital earnings between 2006 and 2011, the assets in joint accounts totaled approximately $80,000 at the time of the decision. The court was offended by the fact that the husband, as the "sole breadwinner," "had the means and capacity to title accounts as he saw fit and thus to create marital or separate property at his whim." Thus, the court eliminated the phrase "that is owned or held by them jointly" from the agreement. This effectively modified their agreement by establishing that the assets acquired during the marriage would become marital property regardless of how they were titled. The court did not alter the definition of separate property which permitted the husband to retain his business and its appreciated value.

When stripped to its essentials, the *Zinter* Court concluded that notwithstanding that the wife had been adequately represented and there was no duress in the execution of the agreement, the provision that title would control the classification (and ultimately distribution) of assets acquired during the marriage was manifestly unfair. Despite its citation to *Christian*, the *Zinter* Court redesigned the bargain between the parties based on its own subjective assessment of equity and fairness. Thus, as in *Petracca*, the Court relied upon its personal assessment of the terms of the agreement, years after its execution, to conclude that it was manifestly unfair.

In *E.C. v. L.C.*,[12] after 26 years of marriage, the parties executed a postnuptial agreement which the wife had obtained from the Internet. Neither party had counsel and the agreement was signed before a notary at a bank. While the Court in *E.C.* (the same Justice who decided *C.S. v. L.S.*) again cited *Petracca* for the principle that courts have "thrown their cloak of protection" over marital agreements, the court denied the wife's application to set aside the agreement after a hearing was conducted. The Court again cited *Matter of Greiff*, but concluded that there was no basis for shifting the burden of proof to the husband to disprove fraud because there was no evidence that the relationship was unequal or that the wife had executed the agreement under duress. Interestingly, although the *E.C.* court cited *Levine v. Levine*[13] for the proposition that "if the execution of the agreement...be fair, no further inquiry will be made" and found that there was no inequity in the execution since the complaining party—the wife—had procured the agreement, the Court still made a detailed, subjective evaluation of the terms of the agreement, including the property distribution, before concluding that the agreement was neither manifestly unfair nor inequitable. This willingness to subjectively evaluate the "fairness" of an agreement (often many years after it was executed), even where it is clear that the execution process was equitable and there was no duress or undue influence, may ultimately prove to be the legacy of the *Petracca* case.

In *D.R. v. M.R.*,[14] the Court cited both *Petracca* and *Petrakis* in denying the husband's motion to dismiss the wife's cause of action to rescind a divorce settlement agreement. The Court noted that the wife had waived any claim to the marital residence and a vintage 1973 Ford Mustang in exchange for receiving 50% of the husband's Teamster's Fund which she would have received in any event. In denying the motion to dismiss, the Court relied on *Petracca* for the proposition that:

> Pursuant to the terms of the Settlement Agreement, Plaintiff agreed to give up her rights to what appears to be the single largest asset of the marriage, the Marital Residence, as well as her rights in a vintage car, and received, in exchange, Defendant's interest in the Teamsters Fund, which may be less than half the value of Plaintiff's interest in the Marital Residence. *Petracca*, 101 A.D.2d at 698 (wife demonstrated that terms of agreement were manifestly unfair given the nature and magnitude of rights she waived, giving rise to inference of overreaching); *Pennise*, 120 Misc.2d at 788–89; *Christian*, 42 N.Y.2d at 71–72.

Thus, the Court in *D.R.* emphasized the "magnitude" of the asset waived and the perceived inequity rather than whether there was fraud, duress or overreaching in the execution of the agreement.

The Lessons of *Petracca-Petrakis* and Their Progeny

1. **Be generous, or at a minium, fair**. In each case where the Court set aside an agreement (or a portion of an agreement) and substituted its judgment for that of the parties, the non-monied spouse would have received a minimal amount of assets and/or maintenance if the respective agreements had been sustained. The longer the marriage, the more likely it is that a court will be tempted to intervene to ensure that the non-monied spouse receives equitable treatment. Nothing is more likely to cause a Court to invalidate an agreement than a provision

which precludes a spouse from sharing in the vast majority of the assets accumulated during a long-term marriage.

2. **Avoid agreements where title will control the classification and distribution of assets**. These provisions, which generally vest the monied spouse with discretion to avoid the creation of marital assets, are more likely to induce judicial intervention. An agreement in which there are no marital assets or one spouse has the ability to thwart the acquisition of marital assets is more likely to be invalidated. The court's decision to modify the agreement in *Zinter* was expressly based on this provision. The *Petracca* agreement contained a comparable provision which resulted in the wife's waiver of any interest in the marital residence, the husband's estate upon death and his business (including appreciation during the marriage). Since there were minimal assets in the parties' joint names after 15 years of marriage, it appears that the Court felt constrained to protect the wife by setting the agreement aside.

3. **Use a sliding scale-formula to divide marital assets and provide for maintenance.** As evidenced by the *Zinter* Court's decision to uphold the maintenance provision, courts look favorably upon agreements which provide an increased benefit as the marriage endures. While there is ample support for preserving the separate nature of a party's assets (including the appreciated value of those assets during the marriage), an agreement which provides for the non-monied spouse to receive an increased share of marital assets as the marriage matures is more likely to be upheld. In both *Petracca* and *Petrakis*, the substantial nature of the respective husband's separate assets, juxtaposed against the minimal amount of assets which their wives would have received if the agreements had been upheld, surely contributed to the invalidation of both agreements.

4. **Independent counsel is essential**. While the absence of counsel will not automatically invalidate an agreement,[15] it is among the most critical factors that a court will consider in determining the validity of such agreements. An agreement must specifically identify the attorney for the non-monied spouse—it is not sufficient for it to provide that the non-monied spouse has had the opportunity to consult with an unidentified attorney. Although the *Petracca* agreement explicitly provided that the wife had consulted with her own independent attorney, both the Hearing Court and the Appellate Division credited her testimony that she never consulted with counsel. This would not have happened if the attorney had been identified in the agreement. In addition, the attorney for the monied spouse should *never* recommend counsel for the other spouse. Even where multiple attorneys are suggested (as in *Zinter*), the recommendation by opposing counsel may appear collusive and can be used as a component of an overall strategy to invalidate an agreement.

5. **Ensure that the non-monied spouse (and his or her attorney) is provided with a copy of the agreement substantially in advance of its execution and that the agreement is signed well in advance of the wedding**. The execution of the agreement should appear to be a considered, voluntary determination.

6. **If you are representing the monied spouse, engage in negotiations with opposing counsel as to the proposed terms**. Avoid the "take it or leave it" approach discussed by the Court in *C.S. v. L.S.* The monied spouse's willingness to be flexible with respect to some of the terms creates the impression that the agreement is more equitable, thereby making it more difficult to attack at a later date.

7. **Carefully consider mutual estate waivers, the waiver of the right to election and mutual waivers of post-marital retirement assets**. While such waivers have been commonplace, especially for second or third marriages where there are prior issue, the focus upon such waivers in *Petracca* and *C.S. v. L.S.* may be significant, indicating a greater likelihood of judicial intervention if a spouse has waived the statutory right of election and there are mutual estate waivers. While such waivers are not troubling in the early years of a marriage, the longer the marriage endures, the more disturbing they become. This perceived inequity may be remedied by a provision requiring the monied spouse to maintain a life insurance policy (which may provide for a increased death benefit over time) or the inclusion of a "sunset provision," pursuant to which the waiver becomes invalid on a specified date.

8. **Be as specific as possible with respect to the various disclaimers set forth in the agreement**. Disclaimers are essential to thwart a possible cause of action for fraudulent inducement. In addition to the standard broad general disclaimers (i.e., no oral representations other than those set forth in the agreement, the agreement sets forth the "entire understanding" of the parties, the provisions merge all prior agreements and neither party was relying upon promises which were not set forth in the agreement), it is preferable to include other specific factors which cannot be used as a basis for claiming fraudulent inducement (i.e., this agreement will not be invalidated by the birth of any children, employment or unemployment of any party, level of income of either party, acquisition of any asset, etc). If the *Petrakis* agreement had specified that it was not subject to invalidation by the birth of any children, the result would likely have been different.

9. **Identify all assets and do *not* undervalue them**. There is a temptation on the part of many monied spouses to either hide or undervalue their assets. This is a mistake. It is essential to identify every as-

set. The purported undervaluation of the business in *Petracca* was a factor in the Appellate Division's decision to affirm the rescission of the agreement. This is an especially difficult area to navigate because formal asset valuations rarely occur prior to the execution of a prenuptial or early marriage postnuptial agreement. Since it is common to estimate value in these circumstances, especially with respect to business assets, it seems wiser to estimate high rather than low. It is also useful to include a provision recognizing that there have been no formal valuations, the amounts listed are just estimates and any inaccuracy in the listed values will not impact the validity of the agreement.

10. **Consider suggesting that the court may uphold the property distribution while holding a hearing on the unconscionability of maintenance**. Under appropriate circumstances, the courts have directed a hearing on the alleged unconscionability of maintenance, while sustaining the property distribution provisions of a marital agreement.[16] Where both the property distribution and maintenance provisions are being challenged and the property distribution provision is more valuable, it may be beneficial to remind the court that it may uphold the property distribution, while directing a hearing to determine whether the maintenance provision is unconscionable upon the entry of judgment.

Endnotes

1. 101 AD3d 695 (2nd Dept., 2012).
2. 103 AD3d 766 (2nd Dept., 2013).
3. In *Barocas v. Barocas*, 94 AD3d 551 (1st Dept., 2012) decided shortly before *Petracca* and *Petrakis* in which the Court sustained the validity of a prenuptial agreement pursuant to which the wife received $35,550 while the husband retained $4.6 million. This would appear to indicate that the First Department is less likely to adopt a more subjective standard.
4. *See, e.g., Label v. Label*, 70 AD3d 898, 899 (2nd Dept., 2010); *Rauso v. Rauso*, 73 AD3d 888 (2nd Dept. 2010); *Schultz v. Schultz*, 58 AD3d 616 (2nd Dept., 2009).
5. *Tarantul v. Cherkassky*, 84 AD3d 933 (2nd Dept., 2011); *Laxer v. Edelman*, 75 AD3d 584 (2nd Dept., 2010).
6. *Cioffi-Petrakis v. Petrakis*, 21 NY3d 860 (2013).
7. Courts have evaluated whether a disclaimer or merger clause is sufficiently "specific," based on "the very matter" at issue so as to preclude the introduction of parol evidence [See *Danann Realty Corp. v. Harris*, 5 NY2d 317 (1959); *Citibank, N.A. v. Plapinger*, 66 NY2d 90 (1985)] or contradict the written contract "in a meaningful fashion," so as to negate any claim of reliance. *Dutcher v. Shaver*, 40 AD3d 1192 (3rd Dept., 2007); *Bango v. Naughton*, 184 AD2d 961 (3rd Dept., 1992); *Republic Investors, Inc. v. O'Keefe*, 227 AD2d 541 (2nd Dept., 1996).
8. 41 Misc.3d 1209(A) (Sup. Ct,. Nassau Co., 2013).
9. 42 NY2d 63 (1977).
10. 92 NY2d 341 (1998).
11. 42 Misc.3d 1233(A) (Sup. Ct., Saratoga Co., 2014).
12. 41 Misc.3d 1050 (Sup. Ct., Nassau Co., 2013).
13. 56 NY2d 42, 47 (1982).
14. 41 Misc.3d 1208(A) (Sup. Ct., Westchester Co., 2013).
15. *See, e.g., Brennan-Duffy v. Duffy*, 22 AD3d 699 (2nd Dept., 2005); *Brennan v. Brennan*, 305 AD2d 524 (2nd Dept., 2003).
16. *See, e.g., Barocas v. Barocas*, *supra*; *Santini v. Robinson*, 68 AD3d 745 (2nd Dept., 2009).

Glenn S. Koopersmith maintains offices in Garden City, New York. He is an editor of this publication and concentrates his practice exclusively in matrimonial and family law appellate matters where he has been appellate counsel of record in numerous well-known cases, including the *Petracca* case discussed in this article. He is a Fellow of the American Academy of Matrimonial Lawyers and one of the founding Barristers of the New York Family Law American Inn of Court. He may be reached at glennkoop@optonline.net.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Gottlieb v. Gottlieb, N.Y.A.D. 1 Dept., January 28, 2016

92 N.Y.2d 341
Court of Appeals of New York.

In the Matter of Herman GREIFF, Deceased.
Helen GREIFF, Appellant,
v.
Wallace J. GREIFF et al., Respondents.

Oct. 27, 1998.

Wife sought to exercise right of election against husband's estate. The Surrogate's Court, Kings County, Bernard M. Bloom, S., invalidated husband and wife's prenuptial agreements and granted wife's petition. Husband's children from prior marriage appealed. The Supreme Court, Appellate Division, reversed, 242 A.D.2d 723, 663 N.Y.S.2d 45. Wife appealed. The Court of Appeals, Bellacosa, J., held that Appellate Division's failure to correctly apply controlling legal principles required reversal and remittal to that court.

Appellate Division's decision reversed and remitted.

West Headnotes (6)

[1] **Husband and Wife**
Evidence

A party challenging the judicial interposition of a prenuptial agreement, used to defeat a surviving spouse's right of election, may demonstrate by a preponderance of the evidence that the premarital relationship between the contracting individuals manifested "probable" undue and unfair advantage; in these exceptional circumstances, the burden should fall on the proponent of the prenuptial agreement to show freedom from fraud, deception, or undue influence.

11 Cases that cite this headnote

[2] **Contracts**
Presumptions and burden of proof

A party seeking to vitiate a contract on the ground of fraud bears the burden of proving the impediment attributable to the proponent seeking enforcement.

1 Cases that cite this headnote

[3] **Contracts**
Freedom of contract

Husband and Wife
Validity of settlement in general

There is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements.

27 Cases that cite this headnote

[4] **Contracts**
Presumptions and burden of proof

Where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest) to disprove fraud or overreaching.

8 Cases that cite this headnote

[5] **Husband and Wife**
Evidence

Whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based, particularized inequality before a proponent of a prenuptial agreement suffers the shift in burden to disprove fraud or overreaching.

12 Cases that cite this headnote

[6] **Husband and Wife**
Enforcement

Appellate Division's failure to correctly apply controlling legal principles required reversal and remittal to that court of its order reversing trial court's decisions to invalidate husband and wife's prenuptial agreements, and to grant wife's petition to exercise right of election against

husband's estate; specific frame of reference for that court would be whether nature of relationship between couple when they executed their prenuptial agreements rose to level to shift burden to proponents of agreements to prove freedom from fraud, deception or undue influence.

13 Cases that cite this headnote

Attorneys and Law Firms

***895 *342 **753** Miller and Korzenik, L.L.P., New York City (Jeffrey Craig Miller, of counsel), for appellant.

Ronnie M. Schindel and Stanley M. Nagler, New York City, for respondents.

***343 OPINION OF THE COURT**

BELLACOSA, Judge:

[1] This appeal raises the question whether the special relationship between betrothed parties, when they execute a prenuptial agreement, can warrant a shift of the burden of persuasion bearing on its legality and enforceability. A party challenging the judicial interposition of a prenuptial agreement, used to defeat a right of election, may demonstrate by a preponderance of the evidence that the premarital relationship between the contracting individuals manifested "probable" undue and unfair advantage (*Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim,* 45 N.Y.2d 692, 699–700, 412 N.Y.S.2d 593, 385 N.E.2d 285). In these exceptional circumstances, the burden should fall on the proponent of the prenuptial agreement to show freedom from fraud, deception or undue influence.

The reversal by the Appellate Division of the Surrogate's Court's decree reflects a misapprehension of governing law, in that the Appellate Division reached its conclusion without factoring or finding facts relevant to fixing the evidentiary burden for this kind of case. Thus, this Court should remit for plenary consideration of the particular legal issue, and all others explicitly bypassed but raised at the intermediate level of appellate review.

Appellant Helen Greiff married Herman Greiff in 1988 when they were 65 and 77 years of age, respectively. They had entered into reciprocal prenuptial agreements in which each ***344** expressed the usual waiver of the statutory right of election as against the estate of the other. The husband died three months after the marriage, leaving a will that made no provision for his surviving spouse. The will left the entire estate to Mr. Greiff's children from a prior marriage. When Mrs. Greiff filed a petition seeking a statutory elective share of the estate, Mr. Greiff's children countered with the two prenuptial agreements which they claimed precluded Mrs. Greiff from exercising a right of election against her husband's estate (*see,* EPTL 5–1.1[f]).

A trial was held in Surrogate's Court, Kings County, on the issue of the validity and enforceability of the prenuptial agreements. The Surrogate explicitly found that the husband "was in a position of great influence and advantage" in his relationship with his wife-to-be, and that he was able to subordinate her interests, to her prejudice and detriment. The court further determined that the husband "exercised bad faith, unfair and inequitable dealings, undue influence and overreaching when he induced the petitioner *****896 **754** to sign the proffered antenuptial agreements," particularly noting that the husband "selected and paid for" the wife's attorney. Predicated on this proof, the credibility of witnesses and the inferences it drew from all the evidence, Surrogate's Court invalidated the prenuptial agreements and granted a statutory elective share of decedent's estate to the surviving spouse.

The Appellate Division reversed, on the law, simply declaring that Mrs. Greiff had failed to establish that her execution of the prenuptial agreements was procured through her then-fiancé's fraud or overreaching. This Court granted the widow leave to appeal. We now reverse.

[2] **[3]** A party seeking to vitiate a contract on the ground of fraud bears the burden of proving the impediment attributable to the proponent seeking enforcement (*see, Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim,* 45 N.Y.2d 692, 698, 412 N.Y.S.2d 593, 385 N.E.2d 285, *supra*). This rubric also applies generally to controversies involving prenuptial agreements (*see, Matter of Phillips',* 293 N.Y. 483, 488, 58 N.E.2d 504). Indeed, as an incentive toward the strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements (*see, Matter of Davis',* 20 N.Y.2d 70, 74, 281 N.Y.S.2d 767, 228 N.E.2d 768; *Matter of Phillips',*

supra, at 491, 58 N.E.2d 504; EPTL 5–1.1, formerly Decedent Estate Law § 18), this Court has eschewed subjecting proponents of these agreements to special evidentiary or freighted burdens (*see, Matter of Sunshine,* 40 N.Y.2d 875, 876, 389 N.Y.S.2d 344, 357 N.E.2d 999).

***345** Importantly, however, neither *Sunshine* in 1976 (*supra*) nor *Phillips'* in 1944 (*supra*) entirely insulates prenuptial agreements from typical contract avoidances. That proposition includes the kind of counterpoint advanced by the surviving spouse in this case to offset her stepchildren's use of the prenuptial agreements against her claim for her statutory elective share (*see, Matter of Davis, supra,* at 76, 281 N.Y.S.2d 767, 228 N.E.2d 768; Rhodes [editor], New York Actions and Remedies, Family Law, Wills and Trusts, Marriage and Dissolution, § 2.10; 3 Lindey, Separation Agreements and Antenuptial Contracts §§ 90.03, 90.06).

[4] This Court has held, in analogous contractual contexts, that where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest, as in this case) to disprove fraud or overreaching (*see, e.g., Matter of Gordon v Bialystoker Ctr. & Bikur Cholim, supra,* at 698–699, 412 N.Y.S.2d 593, 385 N.E.2d 285; *Christian v. Christian,* 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Sharp v. Kosmalski,* 40 N.Y.2d 119, 121–122, 386 N.Y.S.2d 72, 351 N.E.2d 721; *see also,* I Farnsworth, Contracts § 4.11, at 452 [2d ed.]).

As an illustration, in *Gordon* (*supra*), the administrator of the decedent's estate challenged the transfer of funds by the decedent, one month before her death, to the nursing home in which she was a patient. The Court restated its applied guidance, as part of the invalidation of the transfer, as follows:

> "Whenever * * * the relations between the contracting parties appear to be of such a character as to render it certain that * * * either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, * * * *it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood* " (*Gordon v Bialystoker Ctr. & Bikur Cholim,* at 698–699, 412 N.Y.S.2d 593, 385 N.E.2d 285 [emphasis added], quoting *Cowee v. Cornell,* 75 N.Y. 91, 99–100).

This enduring, nuanced balance of fair assessment can be applicable in the context of prenuptial agreements (*see, Matter of Sunshine, supra,* at 876, 389 N.Y.S.2d 344, 357 N.E.2d 999; *Matter of Davis', supra,* at 76, 281 N.Y.S.2d 767, 228 N.E.2d 768; *Matter* ***346** *of Phillips', supra,* at 491, 58 N.E.2d 504; *****897** ****755** *Graham v. Graham,* 143 N.Y. 573, 579–580, 38 N.E. 722). We emphasize, however, that the burden shift is neither presumptively applicable nor precluded. We eschew absolutist rubrics that might ill serve the interests of fair conflict resolution as between proponents or opponents of these kinds of ordinarily useful agreements.

This Court's role here is to clarify, harmonize and find a happy medium of views reflected in the cases. For example, *Graham* has been read as holding that prenuptial agreements were presumptively fraudulent due to the nature of the relationship between prospective spouses. *Phillips',* on the other hand, has been urged to suggest that prenuptial agreements may never be subject to burden-shifting regardless of the relationship of the parties at the time of execution and the evidence of their respective conduct.

Graham was decided in 1894 and indicated that prospective spouses stand in a relationship of confidence which necessarily casts doubt on or requires strict scrutiny concerning the validity of an antenuptial agreement. Its outdated premise, however, was that the man "naturally" had disproportionate influence over the woman he was to marry (*Graham v. Graham, supra,* at 580, 38 N.E. 722; *see,* 3 Lindey, Separation Agreements and Antenuptial Contracts § 90.03).

[5] A century later society and law reflect a more progressive view and they now reject the inherent inequality assumption as between men and women, in favor of a fairer, realistic appreciation of cultural and economic realities (*see, e.g.,* Domestic Relations Law § 236[B]; *O'Brien v. O'Brien,* 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712). Indeed, the law starts marital partners off on an equal plane. Thus, whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based, particularized inequality before a proponent of a prenuptial agreement suffers the shift in burden to disprove fraud or overreaching. This rule is less rigid than *Graham's* presumptive equation.

Phillips' tugs in the opposite direction from *Graham.* On close and careful analysis, however, *Phillips'* does not upset the balanced set of operating principles we pull together by today's decision. While holding that antenuptial

agreements are not enveloped by a presumption of fraud, the Court in *Phillips'* indicated that some extra leverage could arise from the "circumstances in which the agreement was proposed" (*Matter of Phillips', supra,* at 491, 58 N.E.2d 504). This language does not turn its back entirely on *Graham.* Rather, it is generous enough to encompass ***347** the unique character of the inchoate bond between prospective spouses—a relationship by its nature permeated with trust, confidence, honesty and reliance. It allows further for a reasonable expectation that these relationships are almost universally beyond the pale of ordinary commercial transactions. Yet, the dispositive tests of legitimacy and enforceability of their prenuptial agreements need not pivot on the legalism or concept of presumptiveness. Instead, a particularized and exceptional scrutiny obtains.

[6] The Appellate Division's approach here did not allow for the calibration and application of these legal principles. Therefore, this Court is satisfied that the most prudent course for the fair resolution of this case is a remittal of the case to that court for its determination. A specific frame of reference for that court should be whether, based on all of the relevant evidence and standards, the nature of the relationship between the couple at the time they executed their prenuptial agreements rose to the level to shift the burden to the proponents of the agreements to prove freedom from fraud, deception or undue influence. Additionally, since the Appellate Division expressly declined to reach other issues raised by the parties in that court, it will now have that opportunity. We note finally that this Court's reversal and remittal reflect and imply no view of or preference concerning the ultimate factual evaluation and fair resolution by the Appellate Division within its plenary intermediate appellate court powers.

Accordingly, the order of the Appellate Division should be reversed, with costs to all parties appearing and filing separate briefs payable out of the estate, and the matter *****898** ****756** should be remitted to that court for further proceedings in accordance with this opinion.

KAYE, C.J., and SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.
Order reversed, etc.

All Citations

92 N.Y.2d 341, 703 N.E.2d 752, 680 N.Y.S.2d 894, 1998 N.Y. Slip Op. 09251

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97 N.Y.2d 188
Court of Appeals of New York.

Marshall BLOOMFIELD, Appellant,
v.
Barbara BLOOMFIELD, Respondent.

Decided Nov. 27, 2001.

Husband initiated divorce proceedings, and wife filed counterclaim demanding, inter alia, equitable distribution. The Supreme Court, Bronx County, Judith Gische, J., held that parties' 1969 prenuptial agreement was void, and husband appealed. On grant of reargument, the Supreme Court, Appellate Division, affirmed, 281 A.D.2d 301, 723 N.Y.S.2d 143. After permission to appeal was granted, the Court of Appeals, Smith, J., held that: (1) wife was not time-barred from challenging validity of prenuptial agreement; (2) agreement effected a waiver only of her right to distribution of property either then owned or later acquired, and did not result in a waiver of husband's maintenance or support obligations; and (3) matter would be remanded to allow determination whether agreement was unconscionable.

Appellate Division reversed, and matter remitted.

West Headnotes (12)

[1] **Limitation of Actions**
Set-offs, counterclaims, and cross-actions

Wife was not time-barred from challenging validity of prenuptial agreement during divorce proceeding commenced after over 25 years of marriage, where her argument arose from, and directly related to, husband's claim that the agreement precluded the equitable distribution of his assets. McKinney's CPLR 203(d).

11 Cases that cite this headnote

[2] **Limitation of Actions**
Set-offs, counterclaims, and cross-actions

Claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by statute of limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced. McKinney's CPLR 203(d).

18 Cases that cite this headnote

[3] **Husband and Wife**
Validity of settlement in general

Duly executed prenuptial agreements are accorded the same presumption of legality as any other contract.

17 Cases that cite this headnote

[4] **Contracts**
Freedom of contract

There is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements.

23 Cases that cite this headnote

[5] **Husband and Wife**
Validity of settlement in general

As with all contracts, courts assume that a deliberately prepared and executed prenuptial agreement reflects the intention of the parties.

9 Cases that cite this headnote

[6] **Contracts**
Language of contract

While courts in interpreting a contract must be concerned with what the parties intended, the parties' intent generally may be considered only to the extent that it is evidenced by their writing.

4 Cases that cite this headnote

[7] **Contracts**
Construction to give validity and effect to contract

When evidence is lacking that both parties intended to violate the law, a contract that may be construed both lawfully and unlawfully should be construed in favor of its legality.

1 Cases that cite this headnote

[8] **Husband and Wife**

Release of wife's rights in property

Prenuptial agreement entered by parties prior to their 1969 marriage, in which wife agreed to waive and renounce any and all rights that, and to which, she would otherwise be entitled to because of marriage, "to any and all property which [husband] has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated," effected a waiver only of her right to distribution of property either then owned or later acquired, and did not result in a waiver of husband's maintenance or support obligations.

2 Cases that cite this headnote

[9] **Divorce**

Non-property provisions in general

A waiver of rights to present and future interests in a spouse's property, without more, does not constitute a waiver of the right to receive spousal support.

1 Cases that cite this headnote

[10] **Husband and Wife**

Release of wife's rights in property

Prenuptial agreement entered by parties prior to their 1969 marriage, in which wife agreed to waive and renounce any and all rights that, and to which, she would otherwise be entitled to because of marriage, "to any and all property which [husband] has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated," simply waived any present interest wife may have had in husband's property when the agreement was executed, and any future property rights she might acquire through subsequent changes in the law.

2 Cases that cite this headnote

[11] **Husband and Wife**

Validity of settlement in general

Noncompliance with execution formalities contained in Domestic Relations Law would not render invalid a prenuptial agreement made prior to the effective date of statutory provisions in question. McKinney's DRL § 236, Pt. B, subd. 3.

3 Cases that cite this headnote

[12] **Contracts**

Contravention of law in general

General principle that the validity of a contract depends upon the law that existed at the time the contract was made does not appertain to variations of the law that are made due to changes in public policy.

3 Cases that cite this headnote

Attorneys and Law Firms

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***190** Blank Rome Tenzer Greenblatt, L.L.P., New York City (Donald Frank, Norman S. Heller, Ilysa M. Magnus, Jennifer Falstrault and Margaret L. Canby of counsel), for respondent.

***191 OPINION OF THE COURT**

SMITH, J.

This case requires us to determine the scope and enforceability of a prenuptial agreement executed over 30 years ago. For reasons that follow, we hold that the agreement does not constitute a waiver of maintenance but must be reviewed by the trial court as to whether it is unconscionable.

The facts concerning the prenuptial agreement are largely undisputed. Plaintiff husband, now a 62–year–old practicing attorney, and defendant wife, a 55–year–old self-employed antiques dealer, were married on May 30, 1969. The parties separated in January 1995. Before the parties married, plaintiff drafted, and requested that defendant sign, a prenuptial agreement in which she waived her spousal property and elective rights. Specifically, in pertinent part, defendant agreed to "WAIVE AND RENOUNCE ANY AND ALL RIGHTS that, and to which, [she] would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which [plaintiff] has now, or which he may acquire in the future, ***192** whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated." *

*****652 **952** At the time the agreement was executed, plaintiff was 30 years old, a practicing attorney, and the son of a practicing attorney who owned various real estate properties that he placed in plaintiff's name. Defendant was 24 years old and had completed one year of college. Defendant claims that the parties were alone in her apartment when she signed the agreement. Plaintiff claims they were at his father's office with a notary present. Notably, the parties do not dispute that defendant was not represented by counsel in the negotiating, drafting or signing of the document, nor that she signed the document.

Twenty-five years later, in 1995, plaintiff initiated divorce proceedings. Defendant answered and counterclaimed demanding equitable distribution. Two years into the discovery phase of the action, plaintiff first raised the existence of the prenuptial agreement and asserted his intent to rely on that agreement as a defense to defendant's claim for equitable distribution.

Supreme Court adjudged the prenuptial agreement void on its face both because it violated the 1969 version of General Obligations Law § 5–311, which prohibited a wife from waiving her entitlement to support, and because it lacked compliance with the execution formalities under the current Domestic Relations Law § 236(B)(3). The Appellate Division affirmed, finding that the agreement contained broad waiver language that necessarily constituted an impermissible waiver of support. The Appellate Division further found that even if the agreement were not void on its face, the parties' marriage would toll the Statute of Limitations, thus allowing defendant to challenge the validity of the agreement on other grounds. Because we conclude that the agreement does not encompass a waiver of support, we reverse. However, we remit the case to Supreme Court for a determination of whether the agreement is unconscionable.

[1] [2] Initially, we note that defendant is not time-barred from challenging the validity of the prenuptial agreement because ***193** this particular argument arises from, and directly relates to, plaintiff's claim that the agreement precludes equitable distribution of his assets. It is axiomatic that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced (CPLR 203[d]; *118 E. 60th Owners v. Bonner Props.*, 677 F.2d 200, 202–204; *Rebeil Consulting Corp. v. Levine*, 208 A.D.2d 819, 820, 617 N.Y.S.2d 830; *Maders v. Lawrence*, 2 N.Y.S. 159, 49 Hun 360; *see generally*, 1 Weinstein–Korn–Miller, N.Y. Civ Prac ¶ 203.25, at 2–140—2–142).

[3] [4] [5] [6] [7] Duly executed prenuptial agreements are accorded the same presumption of legality as any other contract (*Matter of Sunshine*, 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999, *affg.* 51 A.D.2d 326, 381 N.Y.S.2d 260). Indeed, there is a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Matter of Greiff*, 92 N.Y.2d 341, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752). Thus, as with all contracts, we assume a deliberately prepared and executed agreement reflects *****653 **953** the intention of the parties. Further, while we must be concerned with what the parties intended, we generally may consider their intent only to the extent that it is evidenced by their writing (*Rodolitz v. Neptune Paper Prods.*, 22 N.Y.2d 383, 386–387, 292 N.Y.S.2d 878, 239 N.E.2d 628). When evidence is lacking that both parties intended to violate the law, a contract that may be construed both lawfully and unlawfully should be construed in favor of its legality (*Galuth Realty Corp. v. Greenfield*, 103 A.D.2d 819, 478 N.Y.S.2d 51; *see also Great N. Ry. Co. v. Delmar Co.*, 283 U.S. 686, 691, 51 S.Ct. 579, 75 L.Ed. 1349 [concluding, " where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law"]).

[8] [9] Applying these settled principles to the instant appeal, we find that the plain language of the agreement indicates that defendant waived only her right to distribution of property either then owned or later acquired. The

agreement neither expressly nor implicitly refers to a release of plaintiff's support obligations to defendant. A waiver of rights to present and future interests in plaintiff's property, without more, does not constitute a waiver of the right to receive support. The courts below incorrectly construed the provision to be a waiver of the right to receive support, which would have invalidated the agreement under the 1969 version of the General Obligations Law § 5–311. This construction, however, belies the intent of the parties, who never contested plaintiff's duty to provide support until the courts below voided the agreement by grafting into the property waiver an additional waiver of support.

[10] ***194** Mindful of the fact that, under New York law, wives had no legal interest in their husbands' property in 1969, we read the agreement to state defendant simply waived any present interest she may have had in plaintiff's property when the agreement was executed and also waived any future property rights she might acquire through subsequent changes in the law.

[11] [12] Even if the Appellate Division correctly concluded that defendant's waiver encompassed her right to receive support, the validity of support waivers in marital agreements is governed by the newly enacted version of General Obligations Law § 5–311, not the version of General Obligations Law § 5–311 that was repealed by the New York State Legislature. The general principle that the validity of a contract depends upon the law that existed at the time the contract was made does not appertain to variations of the law that are made due to changes in public policy (*Goldfarb v. Goldfarb,* 86 A.D.2d 459, 461–462, 450 N.Y.S.2d 212; *see also, Compania de Inversions Internacionales v. Industrial Mtge. Bank,* 269 N.Y. 22, 26, 198 N.E. 617). We would have applied the version of General Obligations Law § 5–311 that was in effect at the time plaintiff attempted to enforce the agreement. This version, which still exists today, allows either spouse to contract to relieve the other of a requirement of support except to the extent that the spouse may become a public charge, and represents a change in the public policy of this State. We further note that noncompliance with the execution formalities contained in Domestic Relations Law § 236(B)(3) does not invalidate the prenuptial agreement, given that the agreement was made prior to the effective date of that subdivision (*see,* Domestic Relations Law § 236[B][3]).

Supreme Court did not address the issue of unconscionability. While the Appellate Division concluded that "it also appears that the agreement could be held unconscionable" and was "manifestly unfair"" *****654** ****954** (281 A.D.2d 301, 305, 723 N.Y.S.2d 143), these considerations were not essential to its ruling. Defendant should now be permitted to contest the conscionability of the agreement before the trial court.

Accordingly, the order of the Appellate Division should be reversed, with costs, the matter remitted to Supreme Court for further proceedings in accordance with this opinion and the certified question answered in the negative.

Chief Judge KAYE and Judges LEVINE, CIPARICK, WESLEY, ROSENBLATT and GRAFFEO concur.
Order reversed, etc.

All Citations

97 N.Y.2d 188, 764 N.E.2d 950, 738 N.Y.S.2d 650, 2001 N.Y. Slip Op. 09352

Footnotes

* The agreement contained a second provision in which defendant further agreed to "WAIVE THE RIGHT OF ELECTION to take, or to make any demand for, contrary to the provisions of [plaintiff's] last will and testament, pursuant to the provisions of § 5–1.1 of the Estates, Powers and Trusts Law of the State of New York, as said section now exists or may hereinafter be amended."

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11 N.Y.3d 573
Court of Appeals of New York.

Claire VAN KIPNIS, Appellant,
v.
Gregory VAN KIPNIS, Respondent.

Dec. 18, 2008.

Synopsis

Background: Wife sued for divorce and ancillary relief. The Supreme Court, New York County, Judith Gische, J., granted husband's motion to assert French prenuptial agreement as defense to equitable distribution. The Supreme Court, Appellate Division affirmed, 8 A.D.3d 94, 778 N.Y.S.2d 153. Subsequently, the Supreme Court confirmed referee's finding that French agreement was valid and enforceable, and upheld referee's recommendations regarding maintenance and legal fees. Wife appealed. The Supreme Court, Appellate Division, affirmed, 840 N.Y.S.2d 36, and leave to appeal was granted.

Holdings: The Court of Appeals, Graffeo, J., held that:

[1] parties' French prenuptial agreement unambiguously precluded equitable distribution of the parties' separate property upon their divorce, and

[2] wife was not precluded from recovering legal fees for services provided in opposing her husband's successful affirmative defense predicated on parties' prenuptial agreement.

Affirmed as modified.

West Headnotes (8)

[1] **Husband and Wife**
Validity of settlement in general

Duly executed prenuptial agreements are generally valid and enforceable given the strong public policy favoring individuals ordering and deciding their own interests through contractual arrangement.

16 Cases that cite this headnote

[2] **Husband and Wife**
Intention of parties

Husband and Wife
Enforcement

As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing; consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

14 Cases that cite this headnote

[3] **Husband and Wife**
Evidence

Extrinsic evidence of the parties' intent may not be considered when construing a prenuptial agreement unless a court first finds that the agreement is ambiguous.

13 Cases that cite this headnote

[4] **Husband and Wife**
Antenuptial Settlements

The Domestic Relations Law contemplates two basic types of prenuptial agreement that affect the equitable distribution of property: first, parties may expressly waive or opt out of the statutory scheme governing equitable distribution; second, parties may specifically designate as separate property assets that would ordinarily be defined as marital property subject to equitable distribution. McKinney's DRL § 236(B).

5 Cases that cite this headnote

[5] **Husband and Wife**
Intention of parties

Under Domestic Relations law provision governing prenuptial agreements, the intent of the parties must be clearly evidenced by the writing. McKinney's DRL § 236(B).

8 Cases that cite this headnote

[6] **Husband and Wife**
Property included or affected

Parties' French prenuptial agreement unambiguously precluded equitable distribution of the parties' separate property upon their divorce; although agreement did not expressly waive equitable distribution, it specified that separate ownership of assets applied not only to the property that each party had acquired at the time of the marriage, but also to property that they "may come to own subsequently by any means whatsoever," and the parties did not commingle their separately owned assets throughout their 38–year marriage. McKinney's DRL § 236(B).

4 Cases that cite this headnote

[7] **Husband and Wife**
Validity of settlement in general

Husband and Wife
Property included or affected

The Domestic Relations Law contains no categorical requirement that a prenuptial agreement must set forth an express waiver of equitable distribution; rather, when read together, Domestic Relations Law provisions governing prenuptial agreements provide that assets designated as separate property by a prenuptial agreement will remain separate after dissolution of the marriage. McKinney's DRL § 236(B)(1)(d)(4), (B)(5)(b).

5 Cases that cite this headnote

[8] **Divorce**
Stipulations and agreements

Wife was not precluded from recovering legal fees under Domestic Relations Law provision governing counsel fees and expenses for services provided in opposing her husband's successful affirmative defense predicated on parties' prenuptial agreement, where neither party sought to set aside the prenuptial agreement, and their dispute instead centered on whether the terms of the contract applied to the ownership of assets upon divorce. McKinney's DRL § 237.

2 Cases that cite this headnote

Attorneys and Law Firms

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Gartner + Bloom, PC, New York City (Stuart F. Gartner and Arthur P. Xanthos of counsel), for respondent.

***575 **978 OPINION OF THE COURT**

GRAFFEO, J.

The principal issue in this matrimonial case is whether the parties' foreign prenuptial agreement precludes the equitable distribution of certain property under New York law. Like the courts below, we conclude that it does.

Plaintiff Claire Van Kipnis (wife) and defendant Gregory Van Kipnis (husband) were married in Paris, France in 1965. At the time of the parties' marriage, wife was a Canadian citizen from Quebec studying at the Sorbonne and husband was a citizen of the United States, having recently completed college. Prior to the marriage ceremony, wife had a "Contrat de Mariage" drafted under the French Civil Code and arranged for legal counsel to explain the terms of the prenuptial agreement in English to husband. The agreement was executed by the parties on September 30, 1965.

Under the provisions of the Contrat de Mariage, the parties opted out of the community property scheme (the governing custom in France) in favor of a separation of estates regime. In relevant part, the agreement provides:

> "The future spouses declare that they are adopting the marital property system of separation of estates, as established by the French Civil Code.
>
> "Consequently, each spouse shall retain ownership and possession of the chattels and real property that ***576** he/she may own at this time or may come to own subsequently by any means whatsoever.

"They shall not be liable for each other's debts established before or during the marriage or encumbering the inheritances and gifts that they receive.

"The wife shall have all the rights and powers over her assets accorded by law to women married under the separate-estates system without any restriction."

After the wedding, the parties moved to New York where they resided during their 38–year marriage. Husband was employed ****979** *****428** in finance while wife worked as a professor at Cooper Union and later as a cultural counselor for the Quebec government. Wife was also the primary caretaker of the parties' two children, now emancipated. Throughout their marriage, the parties maintained separate accounts and assets, with the exception of the joint ownership of their two homes—a $625,000 house in Massachusetts and a cooperative apartment in Manhattan valued at $1,825,000.

In 2002, wife commenced this action for divorce and ancillary relief. [1] Following discovery, but before trial, Supreme Court granted husband's motion to amend his answer to assert the 1965 prenuptial agreement as a defense to wife's equitable distribution claims. After the Appellate Division affirmed the order permitting the amendment (8 A.D.3d 94, 778 N.Y.S.2d 153 [2004]), Supreme Court appointed a Special Referee to conduct a hearing on the issues of equitable distribution, maintenance and counsel fees.

The Referee determined that the French contract provided for the separate ownership of assets held in the parties' respective names during the course of the marriage. As a result, husband retained his liquid assets of approximately $7 million and wife kept her assets ranging from $700,000 to $800,000. But as to the jointly held properties, which the parties agreed were subject to equitable distribution, the Referee recommended that wife be awarded the Manhattan apartment, together with $75,000 in reimbursement for repairs, and husband be awarded the country home in Massachusetts. After reviewing the statutory factors related to maintenance, the Referee proposed that wife receive $7,500 per month in maintenance until either ***577** husband or wife dies or wife remarries. Finally, the Referee concluded that legal fees expended in connection with wife's challenge to the prenuptial agreement were not compensable under Domestic Relations Law § 237. After deducting that portion of wife's claim for counsel fees attributable to contesting the agreement, the Referee awarded wife $92,779.57 in attorneys' fees. Supreme Court confirmed the Referee's report. The Appellate Division, with one Justice dissenting, affirmed (43 A.D.3d 71, 840 N.Y.S.2d 36 [2007]), and we granted wife leave to appeal (10 N.Y.3d 705, 857 N.Y.S.2d 38, 886 N.E.2d 803 [2008]).

Wife contends that all of the parties' property should be subject to equitable distribution under Domestic Relations Law § 236(B)(5). She asserts that the 1965 agreement, drafted and executed in France, was intended to apply to property ownership during the course of the marriage, but not to the distribution of property in the event of a divorce. In her view, the primary purpose of the agreement was for each spouse to avoid liability for the other's debts. Relatedly, wife posits that a prenuptial agreement cannot waive a party's right to equitable distribution under the Domestic Relations Law absent an explicit waiver. Husband counters that the agreement unambiguously provides that the parties shall retain their property separately throughout their marriage and, as a result, all property not held in joint names must be treated as separate property and excluded from equitable distribution.

[1] **[2]** **[3]** It is well settled that duly executed prenuptial agreements are generally valid and enforceable given the "strong ****980** *****429** public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001] [internal quotation marks and citation omitted]). As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing. Consequently, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v. Philles Records,* 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002]). Extrinsic evidence of the parties' intent may not be considered unless a court first finds that the agreement is ambiguous.

Prenuptial agreements addressing the ownership, division or distribution of property must be read in conjunction with Domestic Relations Law § 236(B), enacted in 1980 as part of New York's Equitable Distribution Law. The statute provides that, ***578** unless the parties agree otherwise in a validly executed prenuptial agreement pursuant to section 236(B)(3), upon dissolution of the marriage marital property must be distributed equitably between the parties while separate property shall remain separate (*see* Domestic Relations Law § 236 [B][5][a]-[c]). [2] As relevant here, separate property is defined to include "property described as separate property by written agreement of the parties pursuant to subdivision

three of this part" (Domestic Relations Law § 236[B][1][d][4]). Under the statute, a prenuptial agreement may include a "provision for the ownership, division or distribution of separate and marital property" and is valid and enforceable if it "is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (Domestic Relations Law § 236[B][3]; *see also Matisoff v. Dobi,* 90 N.Y.2d 127, 130, 659 N.Y.S.2d 209, 681 N.E.2d 376 [1997]). [3]

[4] [5] The Domestic Relations Law therefore contemplates two basic types of prenuptial agreement that affect the equitable distribution of property. First, parties may expressly waive or opt out of the statutory scheme governing equitable distribution (*see e.g. Bloomfield,* 97 N.Y.2d at 193, 738 N.Y.S.2d 650, 764 N.E.2d 950; *Housset v. Housset,* 200 A.D.2d 508, 509, 606 N.Y.S.2d 680 [1st Dept.1994]). Second, parties may specifically designate as separate property assets that would ordinarily be defined as marital property subject to equitable distribution under Domestic Relations Law § 236(B)(5). Such property would then remain separate property upon dissolution of the marriage. In either case, the intent of the parties "must be clearly evidenced by the writing" (*Tietjen v. Tietjen,* 48 A.D.3d 789, 791, 853 N.Y.S.2d 118 [2d Dept.2008]).

[6] [7] Here, the parties' written agreement, adopting a "separation of estates" scheme, falls within the second prenuptial ****981** *****430** agreement category. The agreement specifies that separate ownership of assets applies not only to the property that each party had ***579** acquired at the time of the marriage, but also to property that they "may come to own subsequently by any means whatsoever." It further assures that "wife shall have all the rights and powers over her assets accorded by law to women married under the separate-estates system without any restriction." Contrary to wife's argument, the Domestic Relations Law contains no categorical requirement that a prenuptial agreement must set forth an express waiver of equitable distribution. Rather, when read together, Domestic Relations Law § 236(B)(1)(d)(4) and (5)(b) provide that assets designated as separate property by a prenuptial agreement will remain separate after dissolution of the marriage. Such is the case here. Indeed, as recognized by the Appellate Division, with the exception of two jointly owned residences (which were distributed as marital property), the parties did not commingle their separately owned assets throughout their 38–year marriage. We therefore agree with the courts below that the agreement constitutes an unambiguous prenuptial contract that precludes equitable distribution of the parties' separate property, rendering it unnecessary to resort to extrinsic evidence.

Turning to the issue of maintenance, which was not addressed by the prenuptial agreement, wife contends that the courts below improperly weighed the factors listed in Domestic Relations Law § 236(B)(6)(a), resulting in an inadequate monthly maintenance award. The record here, however, supports the affirmed findings of the courts below and we perceive no abuse of discretion in their calculation.

[8] Finally, wife submits that the courts below erred in precluding her recovery of legal fees under Domestic Relations Law § 237 for services provided in opposing her husband's affirmative defense predicated on the prenuptial agreement. Neither party here seeks to set aside the prenuptial agreement; instead, their dispute centers on whether the terms of the contract apply to the ownership of assets upon divorce. In this respect, her request is similar to the fee application in *Ventimiglia v. Ventimiglia,* 36 A.D.3d 899, 830 N.Y.S.2d 210 (2d Dept.2007), where attorneys' fees were awarded to a party who contested her spouse's affirmative defense based on an antenuptial agreement. Remittal to Supreme Court for reconsideration is therefore necessary because this portion of wife's fee application should not have been excluded as a matter of law.

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further ***580** proceedings in accordance with this opinion and, as so modified, affirmed.

Order modified, etc.

Chief Judge KAYE and Judges CIPARICK, READ, SMITH, PIGOTT and JONES concur.

All Citations

11 N.Y.3d 573, 900 N.E.2d 977, 872 N.Y.S.2d 426, 2008 N.Y. Slip Op. 09862

Footnotes

1 Husband had also commenced an action for divorce in Massachusetts that resulted in an ex parte, no-fault divorce. The Massachusetts court referred the parties' economic issues to wife's pending proceeding in New York.

2 Marital property is defined as

> "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, *except as otherwise provided in agreement pursuant to subdivision three of this part* " (Domestic Relations Law § 236[B][1][c] [emphasis added]).

3 Noncompliance with the execution formalities outlined in Domestic Relations Law § 236(B)(3) does not invalidate prenuptial agreements that predate the effective date of that subdivision (*see Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 194, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001]). Here, wife concedes that the prenuptial agreement was validly executed.

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43 A.D.3d 776
Supreme Court, Appellate Division,
First Department, New York.

Lili STAWSKI, Plaintiff–Appellant,
v.
Axel STAWSKI, Defendant–Respondent.

Sept. 27, 2007.

Synopsis

Background: Wife, an American citizen, brought action to set aside prenuptial agreement executed in Germany. The Supreme Court, New York County, Marian Lewis, Special Referee, denied the application, and wife appealed.

[Holding:] The Supreme Court, Appellate Division, held that conclusions, that agreement was valid and enforceable, were based on a fair interpretation of the evidence.

Affirmed.

West Headnotes (4)

[1] **Divorce**
Validity of agreement

Divorce
Weight and Sufficiency of Evidence

Special Referee's conclusions, in action seeking to set aside prenuptial agreement executed in Germany, that agreement was valid and enforceable, were based on a fair interpretation of the evidence; there was no evidence of duress, agreement was fair, neutral and valid on its face, and wife, an educated person, was not credible in her testimony that she did not understand the agreement when she signed it, particularly since she did not ask any questions before signing the agreement, but acted in accordance with its terms throughout the marriage.

2 Cases that cite this headnote

[2] **Appeal and Error**
Inferences from facts proved

The decision of a fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses.

Cases that cite this headnote

[3] **Divorce**
Presumptions and Burden of Proof

Husband and Wife
Evidence

Public policy favors individuals ordering and deciding their own interests through contractual arrangements, and thus, duly executed prenuptial agreements, including agreements executed in a foreign country, are accorded the same presumption of legality as any other contract.

3 Cases that cite this headnote

[4] **Husband and Wife**
Evidence

A party attacking the validity of a prenuptial agreement has burden of coming forward with evidence showing fraud, which will not be presumed, and must have as its basis evidence of overreaching, i.e., concealment of facts, misrepresentation or some other form of deception.

8 Cases that cite this headnote

Attorneys and Law Firms

****545** Dobrish Zeif Gross & Wrubel, LLP, New York (Robert Z. Dobrish of counsel), for appellant.

Hogan & Hartson LLP, New York (Stanley Plesent of counsel), for respondent.

TOM, J.P., SAXE, BUCKLEY, McGUIRE, JJ.

Opinion

***776** Order, Supreme Court, New York County (Marian Lewis, Special Referee), entered March 29, 2006, which denied plaintiff's application to set aside a prenuptial agreement, and determined that agreement to be valid and enforceable, affirmed, without costs.

Plaintiff, an American citizen who married defendant, a German citizen, in 1975, seeks to set aside a prenuptial agreement executed by the parties in Germany shortly before they wed. The agreement, in accordance with German law, provides for a "separation of property" regime, i.e., it requires that each spouse retain ownership of all property held at the time of the marriage or acquired thereafter.

The evidence, as credited by the Special Referee, established that the agreement was signed on December 19, 1974 in the presence of an official representative of a German "notar," a neutral official who explained the agreement, which was written in German, and its consequences prior to ****546** its execution. After hearing the testimony and observing the witnesses, the Special Referee found that the notar's representative was a "very credible witness." Accordingly, she credited his testimony that he spoke English fluently in 1974, was able to converse with plaintiff in both German and English and explained the agreement to her in English. Additionally, he testified that when he met with the parties he determined that they understood the language as well as the contents and consequences of the agreement and he would not have proceeded with the execution if it appeared otherwise.

[1] Plaintiff, who was 22 years old and a graduate student at ***777** New York University at the time she executed the agreement, asserts that she did not understand the agreement or its consequences, but admits that she signed it voluntarily. She did not show any signs of duress during the execution of the agreement and did not ask the notar's representative any questions about the agreement. Furthermore, despite her asserted lack of understanding, she acted in accordance with the terms of the agreement throughout the marriage, maintaining separate bank accounts in her own name in which she deposited income from properties she inherited from her family, which properties were themselves also retained by plaintiff solely in her name.

[2] "[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v. Penthouse Intl.*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978, 606 N.E.2d 1369 [1992] [internal quotation marks omitted]). It cannot be said that the Special Referee's conclusions were not based on a fair interpretation of the evidence, and there is thus no basis for reversal. The agreement is fair, neutral and valid on its face and the issue determined by the Special Referee was therefore solely one of credibility.

[3] [4] Furthermore, the public policy of this State favors " 'individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v. Van Kipnis,* 43 A.D.3d 71, 76–77, 840 N.Y.S.2d 36 [2007], quoting *Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001]), and thus, duly executed prenuptial agreements, including agreements executed in a foreign country, are accorded the same presumption of legality as any other contract (*see Greschler v. Greschler,* 51 N.Y.2d 368, 434 N.Y.S.2d 194, 414 N.E.2d 694 [1980]). A party attacking the validity of the agreement has the burden of coming forward with evidence showing fraud, which will not be presumed, and must have as its basis evidence of overreaching—the concealment of facts, misrepresentation or some other form of deception (*see Matter of Sunshine,* 51 A.D.2d 326, 381 N.Y.S.2d 260 [1976], *affd.* 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999 [1976]). Plaintiff completely failed to meet that burden.

The numerous circumstances cited by plaintiff as irregularities, including her alleged lack of fluency in the German language, defendant's superior education, the fact that she was unrepresented by counsel and that the agreement was written by a law firm that had previously done business with defendant's family, do not establish overreaching on defendant's part, especially in view of the uncontradicted testimony that the agreement was explained to plaintiff in English. In reaching the opposite ***778** conclusion, the dissent adopts a highly skewed version of the facts in the course of ****547** portraying plaintiff as a naive individual who was the victim of elaborate "machinations" that were calculated to induce her to sign an agreement she did not understand. However, at the time the agreement was executed, plaintiff had received her B.A. from a prestigious

university, New York University (where she took such courses as "International Law," "Ideas & Action I: Law in Society," "International Politics" and "US Foreign Policy") and was pursuing a master's degree in political science from that same university.

The dissent not only understates plaintiff's sophistication, knowledge and intellect, it attempts to transform a simple document—drafted from Germany's equivalent of a Blumberg form—that employs a common property concept into a highly complex legal document. Contrary to the dissent's assertion, the concept of the separate property regime is not a difficult one to understand. Because complexities can arise, it hardly follows that the basic concept is abstruse. In short, the evidence amply supports the Special Referee's conclusion that plaintiff is properly charged with knowledge of the agreement's contents (*see Stein–Sapir v. Stein–Sapir,* 52 A.D.2d 115, 382 N.Y.S.2d 799 [1976]).

In *Stein–Sapir,* the defendant husband sought to set aside a prenuptial agreement that was written in Spanish, a language he did not speak, and was executed in Mexico immediately prior to the marriage ceremony. Although neither party spoke Spanish, the law of the State of Guerrero, where the parties were married, required that they present an agreement with respect to property they presently owned as well as property that might be acquired during the marriage. Mexican law further required that a civil official "carefully explain to the parties all that they may need to know to the effect that the agreement may be duly drawn up" (*id.* at 117, 382 N.Y.S.2d 799). The plaintiff wife testified that the agreement was fully explained in English; the defendant husband, an attorney and Fulbright scholar, denied that any such explanation had been given but admitted that the signatures on the document looked like his signature and that of the plaintiff.

This Court upheld the agreement in *Stein–Sapir,* finding that if defendant "did not read or understand the agreement, or have any explanation of the same, his conduct evidenced a degree of carelessness or negligence not to be expected of a sophisticated and mentally brilliant person" (*id.*). One need not be an attorney or a Fulbright scholar to know the folly of signing a legal document without an understanding of its import. As the dissent acknowledges, plaintiff was "a bright, intelligent ***779** young woman" at the time she signed the agreement. Accordingly, her claimed ignorance of the meaning of the document she concededly signed without protest is incredible. [1]

The dissent criticizes the notar's representative, asserting that he was an inexperienced apprentice who did not have any customary practices at the time of the execution of the agreement. This assertion ignores the testimony that the notar's representative began working with and observing his mentor, an attorney and notar, in the autumn of 1972, assisted with or observed more than 300 notarial transactions and handled six or seven transactions on his own during the two years prior to the execution of the agreement. Based on ****548** this testimony, the Special Referee properly relied on the notar's representative's description of his customary practices (*see Halloran v. Virginia Chems.,* 41 N.Y.2d 386, 393 N.Y.S.2d 341, 361 N.E.2d 991 [1977]).

As the Special Referee noted, plaintiff's only potentially viable claim is one for fraud based on her assertion that she was told that the purpose of the agreement was to protect defendant in the event of bankruptcy. However, plaintiff admitted that she could not identify the person who allegedly provided this explanation and the Special Referee did not credit plaintiff's testimony in this regard. Furthermore, the Special Referee made a specific finding on this subject, crediting defendant's testimony that he did not provide that explanation to plaintiff. Not surprisingly, plaintiff has abandoned this argument on appeal. Accordingly, the dissent's reliance on this alleged statement in support of the position that plaintiff was the victim of fraud or overreaching is misplaced.

Although the dissent essentially accepts plaintiff's version of the relevant facts, the Special Referee clearly did not credit plaintiff's version of the facts. Consistent with its approach, the dissent writes that plaintiff "in fact was entirely unaware of the purpose of the visit prior to arriving at the lawyers' office" in Frankfurt, Germany. As the Special Referee stated, however, "[t]he most credible scenario is that defendant did discuss the execution of the separation of property document with plaintiff's father, as she requested, and it was plaintiff's father ... who did not object, and advised his daughter that at some point, she would be signing a document that 'had something to do with bankruptcy.' " As the Special Referee immediately went on to ***780** observe, moreover, "[b]ut even if this is not what occurred, if plaintiff did not understand the document, she should not have signed it."

We have considered plaintiff's remaining contentions and find them unavailing.

All concur except SAXE, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting).

In December of 1974, an affianced young American woman in the bloom of love, traveling with her German fiancé to his parents' home in Frankfurt, en route to a skiing vacation in Switzerland, experienced a sudden and unexpected detour to a lawyer's office in Frankfurt, where she was presented with a prenuptial agreement. Her execution of that document, and its enforceability, form the basis for this appeal.

The Special Referee, who was requested to hear and determine the controversy, held that the agreement is enforceable, and the majority agrees. However, in my view, the confluence of various questionable practices and procedural irregularities surrounding the execution of the agreement makes this the exceptional case in which an antenuptial agreement should be set aside. The evidence establishes that plaintiff's signature was obtained through a combination of deception and overreaching, causing an unknowing waiver of unexplained rights. Accordingly, I dissent.

Plaintiff wife and defendant husband are children of Holocaust survivors; the parents met in a displaced persons camp outside Frankfurt, Germany after World War II, and ultimately settled there. Plaintiff's family moved to the United States 3 ½ years later, and settled in New York City, where plaintiff was born. Defendant's family remained in Germany. He was educated in England beginning at age 10 and received a law degree from Birmingham **549 University in England. After briefly meeting at a dance in Frankfurt in the 1960s when she was 12 and he was 14, plaintiff and defendant met again in 1971, when she was 19 and an undergraduate at New York University and he was 21 and studying for a Masters Degree in International Law at the same university. They became engaged in the summer of 1974 and married in 1975.

In December 1974, the affianced couple traveled together from New York to Frankfurt, where defendant's parents lived, in anticipation of a winter ski vacation. Upon their arrival in Germany, defendant told plaintiff that before they left for Switzerland, it was necessary for both of them to attend a meeting with a lawyer. The parties dispute the exact explanation provided to plaintiff as to the need for this meeting; she testified that the reason defendant gave her was the necessity of *781 "signing a piece of paper for bankruptcy." Plaintiff also testified that she and defendant had no prior discussions regarding the signing of any agreement having to do with their marital or property rights. For his part, defendant testified that he brought up the subject of a premarital agreement with plaintiff in the autumn of 1974 and that she asked him to discuss the matter further with her father, which he testified he did, although both plaintiff and her father disputed this assertion.

The couple went to the office of a law firm in Frankfurt. It is undisputed that the law firm represented defendant's family in various legal matters. The parties appeared before Dr. Nikolas Hensel, who, aside from being an attorney, was apprentice to a notar. In Germany, a notar is a public official before whom certain types of transactions, including marital agreements, must be executed in order for them to be valid. A notar serves as an independent consultant for the parties to the transaction, and is responsible for exploring and ensuring the parties' understanding of the transaction and its legal consequences. At the time, Dr. Hensel was not yet officially a notar, but was apprenticed to an older notar, Dr. Rudolph Boergner, for whom he was properly substituting on the date of execution of the agreement.

After exchanging pleasantries with the parties, Dr. Hensel showed them the agreement, which was written in German. Apparently, neither of the parties had seen either the final document or even a draft of the document before the visit. Dr. Hensel initially read the agreement to the young couple in German. The agreement was not a long one. It stated that the signatories (plaintiff and defendant) planned to get married in 1975 and, as translated into English, that:

> "We hereby agree that for the time of our marriage we exclude the legal regime of joint ownership of any increase in property. Instead we will adopt the regime of legal separation of property. The notar's representative informed us on the legal significance of such a decision."

Thirty years later, in a court in New York, it is this language that is relied upon to bar plaintiff from sharing at all in increases in the value of defendant's separately-owned property during the course of the marriage.

New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950 [2001] [internal quotation marks omitted]). "Duly executed prenuptial agreements are accorded the same presumption of legality as any other contract" (*id.*), and thus "is presumed to be valid in the absence of fraud" (***782** ****550** *Matter of Sunshine,* 51 A.D.2d 326, 327, 381 N.Y.S.2d 260 [1976], *affd.* 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999 [1976]). The party challenging the agreement "bears the very high burden of showing that it is manifestly unfair and that this unfairness was the result of overreaching" (*Bronfman v. Bronfman,* 229 A.D.2d 314, 315, 645 N.Y.S.2d 20 [1996]).

Nevertheless, the presumption of validity and burden of proof articulated in these cases does not "entirely insulate[ ] prenuptial agreements from typical contract avoidances" (*Matter of Greiff,* 92 N.Y.2d 341, 345, 680 N.Y.S.2d 894, 703 N.E.2d 752 [1998]). In *Greiff,* the couple got married when the wife was 65 and the husband was 77. Prior to the marriage, they executed reciprocal prenuptial agreements containing waivers of the statutory right of election; three months later, the husband died, and the wife sought to claim her elective share, which the husband's children disputed. The Surrogate found that "the husband 'was in a position of great influence and advantage' in his relationship with his wife-to-be," and that he had " 'exercised bad faith, unfair and inequitable dealings, undue influence and overreaching when he induced the [wife] to sign the proffered antenuptial agreements,' particularly noting that the husband had 'selected and paid for' the wife's attorney" (*id.* at 344, 680 N.Y.S.2d 894, 703 N.E.2d 752). Despite these findings, the Second Department initially reversed, holding that the wife had not satisfied her burden of proof by showing that her execution of the document was procured by fraud or overreaching (242 A.D.2d 723, 663 N.Y.S.2d 45 [1997]). The Court of Appeals remitted the matter to the Appellate Division, explaining that the burden of proof may in appropriate circumstances be placed on the party who obtained the other spouse's agreement to the waiver. The *Greiff* court observed:

> "This Court has held, in analogous contractual contexts, that where parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed (or to the proponent of the party's interest, as in this case) to disprove fraud or overreaching (*see e.g. Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim,* [45 N.Y.2d 692,] *supra,* at 698–699 [412 N.Y.S.2d 593, 385 N.E.2d 285 (1978)]; *Christian v. Christian,* 42 N.Y.2d 63, 72 [396 N.Y.S.2d 817, 365 N.E.2d 849 (1977)]; *Sharp v. Kosmalski,* 40 N.Y.2d 119, 121–122 [386 N.Y.S.2d 72, 351 N.E.2d 721 (1976)]; see also, I Farnsworth, Contracts § 4.11 at 452 [2d ed.])." (92 N.Y.2d at 345, 680 N.Y.S.2d 894, 703 N.E.2d 752).

It therefore instructed the Appellate Division that "[a] specific frame of reference for that court should be whether, based on all of the relevant evidence and standards, the nature of the relationship between the couple at the time they executed their prenuptial agreements rose to the level to shift the burden to the proponents of the agreements to prove freedom from fraud, deception or undue influence" (*id.* at 347, 680 N.Y.S.2d 894, 703 N.E.2d 752).

When the Second Department, on remand, reassessed the evidence ***783** in *Greiff* in accord with these directions, it still reversed the Surrogate's determination setting aside the agreement as a product of overreaching, rejecting the wife's claim that she "was not advised of the effect of the prenuptial agreement, failed to comprehend it, or entered into it unwillingly" (262 A.D.2d 320, 321, 691 N.Y.S.2d 541 [1999], *lv. denied* 93 N.Y.2d 817, 697 N.Y.S.2d 564, 719 N.E.2d 925 [1999]).

The facts of the case before us stand in sharp contrast. Numerous factors combine here to establish that defendant and ****551** his family intentionally orchestrated the presentation of the prenuptial agreement so that plaintiff was neither fully advised of its effect nor fully able to comprehend the waiver it involved. On the record before us, not only does the evidence warrant a shifting of the burden to defendant to establish a lack of fraud, deception, or overreaching, but upon an independent factual weighing of all the evidence, I would find that defendant's family, with the help of its legal retainers, engaged in machinations calculated to exact acquiescence to a premarital agreement from a trusting young, inexperienced woman. As a result, plaintiff relinquished rights that were not fully or even adequately explained.

A basic tenet underlying the general rules favoring premarital agreements is that, like other agreements, such contracts, being "deliberately prepared and executed," are presumed to reflect the intention of the parties (*see Haynes v. Haynes,* 200 A.D.2d 457, 457, 606 N.Y.S.2d 631 [1994], *affd.* 83 N.Y.2d 954, 615 N.Y.S.2d 863, 639 N.E.2d 402 [1974]). However, that presumption, too, is called into question by the entirety of the circumstances here. Indeed, aspects of the document itself

lend further support to the conclusion that it bore no relation to the intention of the signatories, but was instead prepared solely by others, for the benefit of others, and was presented to plaintiff in a manner and context that ensured she would sign it without understanding the waiver contained within it.

To begin: the agreement was prepared by the law firm that represented defendant's father. It was never seen by either party in final or draft form before the date it was executed. Indeed, the fact that it listed the address of defendant's parents as the parties' home address further establishes that the parties had no part in its drafting.

Despite the differing accounts of exactly what explanation plaintiff was given for the need to visit the law firm's office in Frankfurt, it is apparent that she had no part in discussions as to the need for, or the proposed provisions to be contained in, a prenuptial agreement, and in fact was entirely unaware of the purpose of the visit prior to arriving at the lawyers' office. Her testimony that she was given the explanation that day as to the ***784** need for the visit as something to do with bankruptcy was even supported by the testimony of the notar's representative that agreements such as the one in question are needed for family-owned businesses to forestall bankruptcy when a part-owner gets a divorce.

Next, importantly, the document plaintiff was asked to sign was written in a foreign language. The evidence fails to support the Special Referee's conclusion that at the time the agreement was executed in 1974, plaintiff's German, although not proficient, was functional. The Special Referee relied on the fact that German was one of the languages spoken in plaintiff's home, but the testimony to that effect was merely that while growing up in her English-speaking household, she heard "a lot of Yiddish, Polish, Hebrew, German and some French" since her mother was "very versed in languages." From that statement it cannot be inferred that those languages were understood by plaintiff. Indeed, plaintiff also testified that prior to her meeting defendant, there were no occasions when she spoke German. Further, plaintiff also established that in May and June of 1974, she took an introductory course in basic German, and that when she was required to take a language for her Master's program in 1975—six months after the parties' marriage—a proficiency ****552** test in German placed her in an "intermediate" (i.e. 2nd year) German class.

So, at the time plaintiff signed the prenuptial agreement, while she may have had an understanding of basic German, and an ability to communicate using what she described as "pidgin" German, that is a far cry from being able to understand a German legal document, when it is read aloud in German. To the extent that defendant, his father, his sister, and his business partner testified that plaintiff was fluent in German at the time, the direct financial interest they each had in the outcome of the hearing calls that assertion into question; notably, that testimony was not relied upon by the Special Referee.

In view of plaintiff's limited understanding of German, the extent to which she understood the essential content of the document becomes relevant. Interestingly, Dr. Hensel, the notar's representative who presented the document to the young couple and obtained their signatures, testified that he read the agreement aloud in German, and did not directly translate it into English, but rather, described it in English. While there appears to be some disagreement on this point, in that plaintiff testified that Dr. Hensel translated the document into English for her, and defendant testified that Dr. Hensel did not translate the document for her, their testimony is actually reconcilable: ***785** plaintiff might have thought Dr. Hensel's summary or description was tantamount to a translation, while defendant, who had heard and fully understood the German, would have known that it was not.

Not only was the document in a language foreign to plaintiff, but it employed the foreign legal terminology of "property regimes" which, even as explained in English, would warrant legal advice as to its ramifications before it could be deemed to be understood. Although from Dr. Hensel's testimony it appears that the proponents of these documents view these standard form agreements as simple, short and straightforward, the legal concepts they represent, when new and unfamiliar to an individual, are far less so.

Members of the legal profession in this country are, of course, familiar with such concepts as community property, marital property, separate property, and how an increase in the value of separate property may constitute marital property; however, these concepts are not necessarily self-evident to even a bright, college-educated young person. Dr. Hensel's testimony as to the explanation he provided of German law, under which a married couple may select from among several "property regimes" regarding how their property will be treated, failed to rise to the level of establishing that plaintiff could or should have understood the waiver she was being asked to execute.

It is also appropriate to consider the parties' differing levels of knowledge as to the transaction and its terms (*cf. Groper v. Groper,* 132 A.D.2d 492, 497, 518 N.Y.S.2d 379 [1987]). Defendant had a superior knowledge and ability with the German language and a law degree from an English law school, and he was working toward a graduate degree at the New York University School of Law. In addition, since the document was drawn up at his father's behest, defendant, in contrast to plaintiff, undoubtedly had advance knowledge of the nature and contents of the document with which he and his fiancée were presented by Dr. Hensel. In contrast, while plaintiff's completion of her undergraduate education at New York University certainly establishes her general intelligence and education, neither that fact nor the titles of particular courses she took demonstrates a degree of rigor or a particular expertise that might establish ****553** her ability to comprehend the nature of the German document presented to her.

The execution process was also flawed in various ways by Dr. Hensel's failure to observe the proper formalities typically employed to protect the rights of signatories. Indeed, the deficiencies in connection with the execution of this agreement are startling.

***786** The notar has an obligation under German law to safeguard the rights of both signatories to an agreement, ensuring that errors are avoided and that the inexperienced and unskilled are not disadvantaged. Indeed, Dr. Hensel portrayed himself as a neutral, impartial figure who was merely presenting the parties with a simple, insignificant document to sign. Yet, *he was employed at the law firm representing defendant's family;* not only can we not assume his neutrality, but in fact, it was in his interest to ensure that the will of his firm's client be carried out. The absence of the required impartiality is, indeed, further demonstrated when we consider that the potential ramifications of the document were substantial, and yet no warning was given to plaintiff as to such possibilities.

The Special Referee saw this situation as amounting to merely a lack of independent counsel on plaintiff's side; however, I view it as more insidious. Where all knowledge and power are located on one side, the problem is far worse than the other side merely lacking independent legal representation. Plaintiff was given no indication that this was an avenue she might pursue, nor any opportunity to consult a trusted advisor such as her father—not even after the document's execution but before the wedding.

One of the flaws of the document execution process was Dr. Hensel's failure to verify with the parties their current addresses, instead leaving intact the incorrect information that the parties resided at defendant's parents' address in Germany. As a result of this superficially minor failure, copies of the executed agreements were sent to the German address, and plaintiff never saw the agreement again until after she commenced the divorce litigation. Had the address been corrected, plaintiff could have had her father, and perhaps New York counsel, review the agreement in advance of the wedding.

Dr. Hensel also failed to ascertain whether plaintiff had discussed the concepts and terms of the property agreement with her own counsel in the United States, or anyone else, prior to its execution. Had the question been asked, and had Dr. Hensel been informed that plaintiff was viewing the agreement and hearing about its terms for the first time, his own standard procedures might have required him to have been more solicitous regarding her position.

Additionally, as discussed previously, Dr. Hensel made no independent determination of the extent of plaintiff's German language skills. Had he comprehended plaintiff's lack of real fluency in German, and taken the time to determine that she was unfamiliar with the rights she was waiving by placing her signature on the document, in the interest of promoting the ***787** proper execution of a fair agreement he might have adjourned its execution, provided plaintiff with an English translation and advised her to seek independent counsel.

The Special Referee was satisfied to accept Dr. Hensel's explanation that he would have stopped the proceeding if he had thought plaintiff did not comprehend his explanation. However, this factual finding was based on the Special Referee's acceptance of his purported customary practice. The trouble with the Referee's conclusion in this regard is that at the time ****554** of the agreement's execution, Dr. Hensel was an inexperienced, apprenticed notar, and, frankly, it cannot be said that he had any customary practices at all. To judge Dr. Hensel's customary practices as an experienced notar and to transmute them into his practices as a young, inexperienced notar is an improper use of habit evidence (*cf. Lindeman v. Slavin,* 184 A.D.2d 910, 585 N.Y.S.2d 568 [1992]). Therefore, the Special Referee's conclusion that Dr. Hensel "would have accurately explained the basic legal import of the document" to the parties is aspirational, and not based on any proper view of his habit in similar circumstances. Dr.

Hensel simply cannot be assumed to have handled his tasks so early on in his career with the competence and abilities that he acquired over later decades. Indeed, from the deficiencies in the document and the surrounding circumstances, it is apparent that at that time he was less thorough than he would later become.

In concluding that the agreement is enforceable, the Special Referee, citing to *Stein–Sapir v. Stein–Sapir,* 52 A.D.2d 115, 382 N.Y.S.2d 799 [1976], observed that plaintiff was a sophisticated and educated person, capable of understanding that the agreement had legal significance. But, the factual underpinnings of this matter are vastly different than the facts in *Stein–Sapir.* There, the couple, opting to get married in Mexico, was required by that country's law to choose one of the various options available for assigning property rights and to sign a prenuptial agreement incorporating that option; although neither one spoke Spanish, they opted for the community property agreement, and signed it (*id.* at 116, 382 N.Y.S.2d 799). When the question of the applicability of the agreement arose in the context of the couple's divorce, the husband complained that there was no translation of the Spanish-language document and that they had not intended to be bound by it.

This Court in *Stein–Sapir* held the prenuptial agreement valid, observing that the husband was an attorney and Fulbright scholar, and said that "[i]f defendant, as a lawyer, did not read or understand the agreement, or have any explanation of the same, his conduct evidenced a degree of carelessness or ***788** negligence not to be expected of a *sophisticated and mentally brilliant* person" (*id.* at 117, 382 N.Y.S.2d 799 [emphasis supplied]). In the matter now before us, plaintiff, while obviously a bright, intelligent young woman, was lacking the legal background that defendant possessed, as well as his advance knowledge of the contents of the document. She also lacked the language fluency that might have assisted her comprehension or her ability to recognize that the concept under discussion was more complex than the document's brevity implied.

The Special Referee apparently accepted the assertion that the contents of the agreement are simple, and that the waiver it contains was therefore necessarily given with full knowledge of the rights being waived. This view fails to recognize the true complexity of the superficially simple agreement. At the hearing, Dr. Hensel testified that he explained the alternative property regimes; his complete explanation, as he described it, was approximately six sentences. He told the parties that under German law, when a couple does not make any agreement, each spouse's assets remain their own sole property, "but in case of a divorce, you have to balance out any unequal accrued gains made during the marriage. If the man had a higher gain, he has to give something to the woman to equalize it, or if the woman had higher gains, she has to give something to the man." The other two options he described were, "you can exclude this balancing ****555** out like it was done here, or you can make an agreement that you have a joint ownership of everything, which is very seldom."

The language used by Dr. Hensel in discussing the "balancing out" of "unequal accrued gains" demonstrates just how unclearly a purportedly knowledgeable individual can be when explaining the law's treatment of increased value of separate property in case of divorce. From what Dr. Hensel described as his explanation, it is inconceivable that a person hearing these concepts for the first time would understand what rights she was waiving. Plaintiff's assertion that she did not comprehend the nature of the document she signed is credible, and, indeed, understandable. Nor may doubt appropriately be cast upon plaintiff's credibility by her testimony at the hearing that, at that time, she still did not understand the terms of the agreement. Given the nature of the litigation, plaintiff undoubtedly understood by the time of the hearing exactly what the legal *effect* of the agreement would be if it were enforced; however, she had good reason to express continued doubt as to the meaning of the words themselves.

Moreover, during the cross-examination of Dr. Hensel regarding ***789** the effect of a separate property regime, it became apparent that he was not fully aware of the legal impact the separate property regime would have under certain hypothetical situations. Specifically, he was unsure about whether an increase in the value of separately owned shares of stock during the marriage would be treated as "accrued gains," and about the impact of losses in the value of separate property during the marriage. Moreover, defendant's own expert in German family law indicated that Dr. Hensel was wrong in his understanding of how appreciation in value of separately owned real estate would be treated under the standard regime.

The agreement recites that "the notary's representative informed us on the legal significance of such a decision." Yet, from the testimony, it is difficult to avoid the inference that Dr. Hensel's original cursory explanation must have been inadequate to actually inform plaintiff of the legal

significance of the agreement. If the official who had the obligation to ensure that the parties understood the terms of the agreement, particularly the all-important waiver of rights, did not himself understand those rights, we should not accept the bare assertion that those rights were properly explained to plaintiff.

Indeed, the development of the law of marital and separate property in New York State since the enactment in 1980 of the Equitable Distribution Law (L. 1980, ch. 281, § 9) highlights the complexity of deciding under which circumstances increases in the value of separate assets should be divided between spouses (*see e.g. Hartog v. Hartog,* 85 N.Y.2d 36, 46, 623 N.Y.S.2d 537, 647 N.E.2d 749 [1995]; *Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986]).

In view of the foregoing, the short description of the separate property regimes given by Dr. Hensel was simply inadequate under the circumstances to inform plaintiff of the rights she was waiving. It cannot have been incumbent upon plaintiff to question Dr. Hensel on the consequences of such a property regime, but based upon my understanding of a notar's responsibilities, it was derelict of Dr. Hensel not to raise some of the complex issues that might later surround such a separate property regime. The failure to adequately explain the ramifications of the regime being selected when plaintiff signed the agreement was critical here, since under German law, in the absence of the agreement, ****556** any increase in value during the marriage of each party's property would be joint property, to be divided equally upon marital dissolution.

In conclusion, the manner in which plaintiff's signature was obtained creates a clear inference of overreaching; the burden must certainly be placed on defendant to prove that there was ***790** no overreaching, and defendant failed to meet that burden. The facts are that plaintiff, with no advance notice, was brought to the office of defendant's family's lawyers, and presented with a German document that, while purporting to be simple, dealt with unfamiliar concepts of German marital property "regimes," in German. The purportedly neutral Dr. Hensel, whose obligation was to ensure that everything was handled fairly and properly, failed to check that plaintiff, a United States citizen, was fluent in German, or understood the concept of the property regime she purportedly was selecting, or had received any legal advice or explanation of the document in advance. He even failed to ensure that the signatories' addresses were correct so that they would receive copies of the final document, leaving plaintiff without even the possibility of consulting with others about the terms of the agreement *after* signing it but before the wedding took place. The evidence establishes a classic case of overreaching, and the agreement should be vacated.

All Citations

43 A.D.3d 776, 843 N.Y.S.2d 544, 2007 N.Y. Slip Op. 07057

Footnotes

1 A related claim plaintiff made at the hearing casts additional doubt on her credibility. As the Special Referee noted, even though plaintiff was represented at the hearing by prominent matrimonial counsel, she nevertheless claimed at the hearing that she still did not understand the legal import of the agreement.

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RP LAW ACKNOWLEDGMENT

KeyCite Yellow Flag - Negative Treatment
Distinguished by J.R. v. E.M., N.Y.Sup., July 21, 2014

93 A.D.3d 506
Supreme Court, Appellate Division,
First Department, New York.

Stanley COHEN, Plaintiff–Respondent,
v.
Pauline COHEN, Defendant–Appellant.

March 15, 2012.

Synopsis

Background: In divorce proceeding, the Supreme Court, New York County, Saralee Evans, J., denied wife's motion to vacate and declare void and/or set aside prenuptial agreement, and denied her motion for injunction with respect to certain assets, and she appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] wife was not entitled to vacate or set aside parties' prenuptial agreement, and

[2] agreement satisfied requirement that it contain acknowledgment sufficient to entitle real property deed to be recorded.

Affirmed.

West Headnotes (2)

[1] **Husband and Wife**
Validity of settlement in general

Prenuptial agreement was valid and enforceable, even though wife was pregnant and not represented by counsel at time it was executed, and husband threatened to cancel wedding if she did not sign, where agreement was prepared by independent public official, agreement was executed in France and written in wife's native tongue, and there was no evidence of fraud, duress, or overreaching with respect to agreement, and no evidence that husband concealed or misrepresented any financial information or agreement's terms.

9 Cases that cite this headnote

[2] **Husband and Wife**
Execution, acknowledgment, and delivery

Requirement that prenuptial agreement contain acknowledgment sufficient to entitle real property deed to be recorded was satisfied by husband's filing, at court's direction, of certificate of conformity attesting to credentials of French official who drafted agreement, and certifying that his proof of acknowledgment of agreement conformed to laws of France. McKinney's DRL § 236(B)(3); McKinney's Real Property Law § 301–a.

3 Cases that cite this headnote

Attorneys and Law Firms

****251** David Scott, New York (Paul Biedka of counsel), for appellant.

Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for respondent.

MAZZARELLI, J.P., FRIEDMAN, RICHTER, ABDUS–SALAAM, JJ.

Opinion

***506** Order, Supreme Court, New York County (Saralee Evans, J.), entered September 20, 2010, which, in this action for divorce, denied defendant's motion to vacate and declare void and/or set aside a prenuptial agreement or to set the matter down for a hearing on the circumstances surrounding its execution, and denied her motion for an injunction with respect to certain assets, unanimously affirmed, without costs.

[1] The motion to vacate or set aside the parties' prenuptial agreement was properly denied without a hearing, as defendant failed to meet her burden of presenting evidence of fraud, duress or overreaching with respect to the agreement, which was executed in France and written in defendant's native tongue (*see Stawski v. Stawski,* 43 A.D.3d 776, 777, 843 N.Y.S.2d 544 [2007]; *Forsberg v. Forsberg,* 219

A.D.2d 615, 616, 631 N.Y.S.2d 709 [1995]). Defendant's contradictory affidavit and her doctor's letter do not support her suggestion that, because of her pregnancy, she lacked the mental capacity to understand or execute the agreement. Further, plaintiff's alleged threat to cancel the wedding if defendant refused to sign the agreement does not constitute duress (*Colello v. Colello,* 9 A.D.3d 855, 858, 780 N.Y.S.2d 450 [2004], *lv. denied* 11 A.D.3d 1053, 783 N.Y.S.2d 896 [2004]). Nor does the absence of legal representation establish overreaching or require an automatic nullification of the agreement (*see id.*), especially as the evidence shows that the agreement was prepared by an independent public official unaligned with either party. Plaintiff's alleged failure to fully disclose his financial situation is also insufficient to vitiate the prenuptial agreement (*Strong v. Dubin,* 48 A.D.3d 232, 233, 851 N.Y.S.2d 428 [2008]). Indeed, there is no ***507** evidence that plaintiff concealed or misrepresented any financial information or the terms of the agreement (*id.*).

[2] To the extent the prenuptial agreement, to be enforceable in New York, must contain an acknowledgment sufficient to entitle a real property deed to be recorded (*see* Domestic Relations Law § 236[B][3]), this requirement was satisfied by plaintiff's filing, at the direction of the court, of a certificate of conformity attesting to the credentials of the French official who drafted the agreement, and certifying that his proof of acknowledgment of the agreement conformed to the laws of France (*see* Real Property Law § 301–a).

There was no basis for restraining the subject assets, as defendant failed to show that they are not owned by plaintiff separately under the terms of the prenuptial agreement (*see Guttman v. Guttman,* 129 A.D.2d 537, 539, 514 N.Y.S.2d 382 [1987]).

All Citations

93 A.D.3d 506, 940 N.Y.S.2d 250, 2012 N.Y. Slip Op. 01870

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103 A.D.3d 766
Supreme Court, Appellate Division,
Second Department, New York.

Elizabeth CIOFFI–PETRAKIS, respondent,
v.
Panagiotis PETRAKIS, appellant.

Feb. 20, 2013.

Synopsis

Background: In action to set aside prenuptial agreement, following nonjury trial, the Supreme Court, Nassau County, Bennett, J., found in favor of wife. Husband appealed.

[Holding:] The Supreme Court, Appellate Division, held that determination that husband fraudulently induced wife to execute prenuptial agreement was supported by the evidence.

Affirmed.

West Headnotes (5)

[1] **Contracts**
Freedom of contract

New York has a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements; however, this right is not and has never been without limitation.

3 Cases that cite this headnote

[2] **Marriage**
Power to regulate and control

The State is deeply concerned with marriage and takes a supervisory role in matrimonial proceedings.

1 Cases that cite this headnote

[3] **Husband and Wife**
Validity of settlement in general

Husband and Wife
Validity of transactions in general

While there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties, an agreement between spouses or prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct.

7 Cases that cite this headnote

[4] **Appeal and Error**
Credibility of witnesses; trial court's superior opportunity

Appeal and Error
In equity or on trial by court or referee

In reviewing a trial court's findings of fact following a nonjury trial, the appellate court's authority is as broad as that of the trial court and includes the power to render the judgment it finds warranted by the facts, bearing in mind that due regard must be given to the decision of a trial judge who was in the position to assess the evidence and the credibility of witnesses.

Cases that cite this headnote

[5] **Husband and Wife**
Evidence

Determination that husband fraudulently induced wife to execute prenuptial agreement was supported by the evidence, as required to set aside prenuptial agreement; trial court found that wife's testimony was "credible," "convincing," "unequivocal," and consistent with additional corroborative evidence, and that any inconsistencies in her testimony related to insignificant matters, and by contrast, found husband's "credibility to be suspect," due in part, to his "patent evasiveness."

2 Cases that cite this headnote

Attorneys and Law Firms

****153** Gassman Baiamonte Betts, P.C., Garden City, N.Y. (Stephen Gassman and Cheryl Y. Mallis of counsel), for appellant.

Weg and Meyers, P.C., New York, N.Y. (Dennis T. D'Antonio and Derek M. Zisser of counsel), for respondent.

DANIEL D. ANGIOLILLO, J.P., SANDRA L. SGROI, JEFFREY A. COHEN, and ROBERT J. MILLER, JJ.

Opinion

***766** In an action, inter alia, to set aside a prenuptial agreement, the defendant appeals, as limited by his brief, from so much of a ***767** judgment of the Supreme Court, Nassau County (Bennett, J.), entered February 6, 2012, as, upon a decision of the same court (Falanga, J.), dated December 12, 2011, made after a nonjury trial, is in favor of the plaintiff and against him setting aside the prenuptial agreement.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

[1] [2] [3] In general, New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Matter of Greiff,* 92 N.Y.2d 341, 344, 680 N.Y.S.2d 894, 703 N.E.2d 752; *see Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 193, 738 N.Y.S.2d 650, 764 N.E.2d 950). "However, this right is not and has never been without limitation" (*Kessler v. Kessler,* 33 A.D.3d 42, 45, 818 N.Y.S.2d 571). "[T]he State is deeply concerned with marriage and takes a supervisory role in matrimonial proceedings.... Indeed, in numerous contexts, agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general" (*id.* at 46, 818 N.Y.S.2d 571 [citation omitted]). Thus, while "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties" (*Brassey v. Brassey,* 154 A.D.2d 293, 295, 546 N.Y.S.2d 370), an agreement between spouses or prospective ****154** spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct (*see Christian v. Christian,* 42 N.Y.2d 63, 73, 396 N.Y.S.2d 817, 365 N.E.2d 849; *Petracca v. Petracca,* 101 A.D.3d 695, 956 N.Y.S.2d 77; *Weinstein v. Weinstein,* 36 A.D.3d 797, 798, 830 N.Y.S.2d 179; *Lombardi v. Lombardi,* 235 A.D.2d 400, 652 N.Y.S.2d 549).

[4] "In reviewing a trial court's findings of fact following a nonjury trial, this Court's authority is as broad as that of the trial court and includes the power to render the judgment it finds warranted by the facts, bearing in mind that due regard must be given to the decision of a trial judge who was in the position to assess the evidence and the credibility of witnesses" (*D'Argenio v. Ashland Bldg., LLC,* 78 A.D.3d 758, 758, 910 N.Y.S.2d 550).

[5] Here, the Supreme Court reasonably resolved credibility issues in favor of the plaintiff, and its determination that the defendant fraudulently induced the plaintiff to execute the prenuptial agreement was supported by the evidence. With respect to the material facts underlying the plaintiff's claim, the Supreme Court found that the plaintiff's testimony was "credible," "convincing," "unequivocal," and consistent with "additional corroborative evidence," and that any "inconsistencies" in her testimony related to "insignificant" matters. By contrast, the Supreme Court found the defendant's "credibility to be suspect," due in part, to his "patent evasiveness." The Supreme ***768** Court's credibility findings are supported by the record. The plaintiff's claim in this case rested largely on the credibility of the parties, and we decline to disturb the Supreme Court's determination with respect thereto (*see Reid v. Reid,* 57 A.D.3d 960, 870 N.Y.S.2d 455). On the particular facts of this case, the Supreme Court correctly determined that the plaintiff sustained her burden of establishing grounds to set aside the prenuptial agreement (*cf. Petracca v. Petracca,* 101 A.D.3d at 695, 956 N.Y.S.2d 77).

The defendant's remaining contentions are without merit.

All Citations

103 A.D.3d 766, 960 N.Y.S.2d 152, 2013 N.Y. Slip Op. 01057

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BETH DIN OF AMERICA
BINDING AGREEMENT

STANDARD VERSION

This agreement consists of two pages and a notarization page. Instructions for filling out this document may be found on page 4. It is important that the instructions be carefully read and followed in completing the form.

THIS AGREEMENT made on the _____ **day of the month of** _____

in the year 20_____**, in the City/Town/Village of** _____**, State of** _____

between Husband-to-Be: _____

residing at: _____

and Wife-to-Be: _____

residing at: _____

The parties, who intend to be married in the near future, hereby agree as follows:

I. Arbitration. Should a dispute arise between the parties after they are married, so that they do not live together as husband and wife, they agree to submit to binding arbitration before the Beth Din of America (currently located at 305 Seventh Avenue, Suite 1201, New York, New York 10001; www.bethdin.org), which shall have exclusive jurisdiction to decide all issues relating to a *get* (Jewish divorce), the *ketubah* and *tena'im* (Jewish premarital agreements) entered into by the Husband-to-Be and the Wife-to-Be, any issues and obligations arising from or in connection with this Agreement (including under paragraphs II, III and VI hereof) and any disputes relating to the enforceability, formation, conscionability, and validity of this Agreement (including any claims that all or any part of this Agreement is void or voidable) and the arbitrability of any disputes arising hereunder.

SECTION II: Financial and Custody Issues. Paragraph II:A regarding additional financial issues is optional. Parties may select II:A(1), II:A(2) or II:A(3) (but not more than one of these paragraphs). Unless one of these options is chosen, the Beth Din of America will be without jurisdiction to address matters of general financial disputes between the parties. For more information, see the instructions.

II:A(1). The parties agree that the Beth Din of America is authorized to decide all monetary disputes (including division of property and maintenance) that may arise between them. We choose to have paragraph II:A(1) apply to our arbitration agreement.

Signature of Husband-to-Be _____

Signature of Wife-to-Be _____

II:A(2). The parties agree that the Beth Din of America is authorized to decide all monetary disputes (including division of property and maintenance) that may arise between them based on principles of equitable distribution law customarily employed in the United States as found in the Uniform Marriage and Divorce Act. We choose to have paragraph II:A(2) apply to our arbitration agreement.

Signature of Husband-to-Be _____

Signature of Wife-to-Be _____

II:A(3). The parties agree that the Beth Din of America is authorized to decide all monetary disputes (including division of property and maintenance) that may arise between them based on principles of community property law customarily employed in the United States as found in the Uniform Marriage and Divorce Act. We choose to have paragraph II:A(3) apply to our arbitration agreement.

Signature of Husband-to-Be _____

Signature of Wife-to-Be _____

SECTION II:B regarding parenting disputes is optional. Unless this option is chosen, the Beth Din of America will be without jurisdiction to address matters of parenting disputes between the parties. For more information, see the instructions.

II:B. The parties agree that the Beth Din of America is authorized to decide all disputes, including child custody, child support, and visitation matters, as well as any other disputes that may arise between them.

We choose to have Section II:B apply to our arbitration agreement.

Signature of Husband-to-Be _____

Signature of Wife-to-Be _____

II:C. The Beth Din of America may consider the respective responsibilities of either or both of the parties for the end of the marriage, as an additional, but not exclusive, factor in determining the distribution of marital property and maintenance, should such a determination be authorized by paragraph II:A or paragraph II:B.

INITIALS _____ _____

III. Support Obligation. Husband-to-Be acknowledges that he recites and accepts the following:

I hereby now (me'achshav) *obligate myself to support my Wife-to-Be from the date that our domestic residence together shall cease for whatever reasons at the rate of $150 per day (calculated as of the date of our marriage, adjusted annually by the Consumer Price Index–All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics) in lieu of my Jewish law obligation of support so long as the two of us remain married according to Jewish law, even if she has another source of income or earnings. Furthermore, I waive my* halakhic *rights to my wife's earnings for the period that she is entitled to the above-stipulated sum, and I recite that I shall be deemed to have repeated this waiver at the time of our wedding. I acknowledge that I have now* (me'achshav) *effected the above obligation by means of a* kinyan *(formal Jewish transaction) in an esteemed* (chashuv) *Beth Din as prescribed by Jewish law.*

However, this support obligation shall terminate if Wife-to-Be refuses to appear upon due notice before the Beth Din of America or in the event that Wife-to-Be fails to abide by the decision or recommendation of the Beth Din of America. Furthermore, Wife-to-Be waives her right to collect any portion of this support obligation attributable to the period preceding the date of her reasonable attempt to provide written notification to Husband-to-Be that she intends to collect the above sum. Said written notification must include Wife-to-Be's notarized signature. This support obligation under Jewish law is independent of any civil or state law obligation for spousal support, or any civil or state law imposed order for spousal support, and shall be determined only by the Beth Din of America.

IV. Opportunity for Consultation. Each of the parties acknowledges that he or she has been given the opportunity prior to signing this Agreement to consult with his or her own rabbinic advisor and legal advisor. Each of the parties further acknowledges that he or she has been fully informed of the terms and basic effect of this Agreement as well as the rights and obligations he or she may be giving up by signing this Agreement. Each of the parties expressly waives, in connection with this Agreement, (i) any right to consult with his or her legal counsel to the extent they have not done so and (ii) any right to disclosure of the property or financial obligations of the other party beyond any disclosures that have been provided. The obligations and conditions contained herein are executed according to all legal and halakhic requirements.

V. Governing Law. The decision of the Beth Din of America shall be made in accordance with Jewish law (*halakha*) or Beth Din ordered settlement in accordance with the principles of Jewish law (*peshara krova la-din*), except as specifically provided otherwise in this Agreement.

VI. Rules, Default Judgment and Costs. The parties agree to appear in person before the Beth Din of America, at a location mutually convenient to the arbitrators and the parties, at the demand of the other party, to cooperate with the adjudication of the Beth Din of America in every way and manner, and to abide by the published Rules and Procedures of the Beth Din of America (available at www.bethdin.org), which are in effect at the time of the arbitration. If either party fails to appear before the Beth Din of America upon reasonable notice, the Beth Din of America may issue its decision despite the defaulting party's failure to appear, and may impose costs and other penalties as legally permitted. Both parties obligate themselves to pay for the services of the Beth Din of America. Failure of either party to perform his or her obligations under this Agreement shall make that party liable for all costs, including reasonable attorney's fees, incurred by one side in order to obtain the other party's performance of the terms of this Agreement.

VII. Jurisdiction; Enforceability. By execution and delivery of this Agreement, each party consents, for itself and in respect of its property, to the exclusive jurisdiction of the Beth Din of America with respect to the issues set forth in paragraph I. Each of the parties agrees that he or she will not commence any action or proceeding relating to such issues in any court, rabbinical court or arbitration forum other than the Beth Din of America. This Agreement constitutes a fully enforceable arbitration agreement, and any decision issued pursuant to this Agreement shall be fully enforceable in secular court. Should any provision of this Agreement be deemed unenforceable, all other provisions shall continue to be enforceable to the maximum extent permitted by applicable law. As a matter of Jewish law, the parties agree that to effectuate this Agreement they accept now (through the Jewish law mechanism of *kim li*) whatever minority views determined by the Beth Din of America are needed to effectuate the obligations, procedures and jurisdictional mandates contained in this Agreement.

VIII. Counterparts. This Agreement may be signed in one or more duplicates, each one of which shall be considered an original.

In witness of all the above, the Husband-to-Be and Wife-to-Be have entered into this Agreement.

Signature of Husband-to-Be		Signature of Wife-to-Be	
Signature of Witness		*Signature of Witness*	
Signature of Witness		*Signature of Witness*	

Notarization forms appear on the next page. For further information about notarization, see the instructions.

Notarization Forms

Acknowledgment for Husband-to-Be

State of _____ County of _____
On the _____ day of _____ in the year _____ before me, the undersigned personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that he executed the agreement.

Notary Public

Acknowledgment for Wife-to-Be

State of _____ County of _____
On the _____ day of _____ in the year _____ before me, the undersigned personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that she executed the agreement.

Notary Public

In New York State, the officiating rabbi is qualified to notarize a prenuptial agreement, and he may use the following form.
For other states, please check local rules and regulations.

State of _____ County of _____
On the _____ day of _____in the year _____ , before me, the undersigned, a person authorized to solemnize a marriage pursuant to Domestic Relations Law § 11(1), personally appeared _____ , personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that he executed the same in his capacity, and that by his signature on the arbitration agreement, the individual executed the agreement.

Officiating Clergy/Rabbi (print and sign name)

Address

State of _____ County of _____
On the _____ day of _____ in the year _____, before me, the undersigned, a person authorized to solemnize a marriage pursuant to Domestic Relations Law § 11(1), personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to within this agreement and acknowledged to me that she executed the same in her capacity, and that by her signature on the arbitration agreement, the individual executed the agreement.

Officiating Clergy/Rabbi (print and sign name)

Address

INSTRUCTIONS

INTRODUCTION. Mazal tov on your upcoming marriage! This Agreement is intended to facilitate the timely and proper resolution of certain marital disputes. When a couple about to be married signs this Agreement they thereby express their concern for each other's happiness, as well as their concern for all couples marrying in accordance with Jewish law. To enter into the agreement, follow these five steps:

❶ Read the agreement. A detailed guide explaining the provisions of the agreement is also available at www.theprenup.org, and you can also discuss the agreement with an attorney. You can also call or e-mail the Beth Din of America (212-807-9042; info@bethdin.org) with any questions.

❷ Sign the agreement in front of witnesses and a notary. Put your initials on the bottom of page 1, and sign the agreement on the bottom of page 2. (Section II contains some optional provisions that you do not have to sign, but if you want these provisions to be effective you should sign the appropriate provisions.)

❸ Have the witnesses sign in the spaces provided beneath your signatures. The same people can witness each signature and sign twice, once under the signature of the Husband-to-Be, and once under the signature of the Wife-to-Be, or four witnesses can be used, each signing once.

❹ Have the notary complete the notary block on page 3, sign it at the bottom, and affix his or her notary stamp. Notaries can usually be found in banks, law offices, etc. In New York State, the officiating rabbi can notarize the agreement, even if he is not a notary. In New Jersey, any attorney who is licensed to practice law in New Jersey can serve as the notary.

❺ Husband-to-Be and Wife-to-Be should keep his or her own copy of this Agreement in a safe place. In addition, scan the signed agreement, or take a picture of it, and e-mail it to prenup@bethdin.org or fax it to (212) 807-9183. The Beth Din of America will retain a copy of your signed agreement in its confidential files in case it is ever needed.

These *Tenaim Achronim* (premarital agreement) should be discussed, and then signed, as far ahead of the wedding day itself as is practically feasible. While it is preferable that the *mesader kiddushin* (i.e., supervising rabbi at the wedding) take responsibility for explaining the background for, and then implementing the agreement itself, any other knowledgeable rabbi or individual, or the couple themselves, may coordinate the process. Advice of proper legal counsel on both sides is certainly encouraged.

BINDING CIVIL COURT EFFECT. When properly executed, this Agreement is enforceable as a binding arbitration agreement in the courts of the United States of America, as well as pursuant to Jewish law (*halakha*). The supervising rabbi should explain this to the parties. This Agreement should only be used when the parties expect to reside in the United States upon marriage. Parties should contact the Beth Din of America to inquire about appropriate forms when they will be residing outside the United States. For those who will reside in the United States, the Beth Din will appoint the proper *dayanim* (arbitrators) to hear and resolve matters throughout the country.

CHOICE OF OPTIONS. The document has been designed to cover a range of decisions which the Husband-to-Be and Wife-to-Be may make regarding the scope of matters to be submitted for determination to the Beth Din. These alternatives are set forth in Section II. The *Tenaim Achronim* will be valid whether or not any of the alternatives are chosen. If none of such alternatives are chosen, the Beth Din will decide matters relating to the *get*, as well as any issues arising from this Agreement or the *ketubah* or the *tenaim*. The Uniform Marriage and Divorce Act Section 307 is a general statement of the principles of equitable distribution or community property proposed as a model law. It is not the law of any particular state. Parties who wish greater certainty as to possible future divisions of property (for example, persons with substantial assets at the time of marriage or persons interested in taking advantage of the particular decisions of a state where they will be married) should sign a standard prenuptial agreement with the advice of counsel and incorporate this arbitration agreement by reference.

Section II:A deals with financial matters related to division of marital property. If Section II:A is chosen, the Beth Din will be authorized to decide financial matters related to division of financial property. The Beth Din can decide these financial matters in one of three ways. The couple may choose one, but not more, of those ways. If more than one is chosen, all choices are void. If none of such paragraphs are selected, the Beth Din of America will not be authorized to resolve any additional monetary disputes between the parties.

Section II:B deals with matters related to child custody and visitation. If the parties choose to refer matters of child custody and visitation to the Beth Din for resolution, they may do so by signing this Section II:B. They must, however, understand that in many states secular courts retain final jurisdiction over all matters relating to child custody and visitation. Section II:C deals with the question of whether the Beth Din may take into consideration the respective parties' responsibility for the ending of the marriage when Sections II:A or II:B are chosen. Section II:C only applies if the parties have authorized the Beth Din under Section II:A or Section II:B, but then it applies as a matter of course, reflecting normal Beth Din procedure. Thus Section II:C will apply to all decisions authorized under Section II, unless the parties strike it out. Striking out Section II:C, while discouraged by Jewish law, will not render the entire Agreement invalid or ineffective.

ADDITIONAL FORMS. Some couples, for financial or other reasons, sign other prenuptial agreements. In such cases they may find it useful or practical to sign this document and incorporate this arbitration agreement by reference into any additional agreement. Additional copies of this document and other materials can be obtained from the offices of the Beth Din of America, or by visiting www.theprenup.org.

FURTHER INFORMATION. Further information regarding this Agreement, or further information concerning the procedures to be followed for resolution of any matters or disputes covered by this Agreement, may be obtained from the Beth Din of America, which has disseminated this form Agreement. Background information is available at www.theprenup.org.

BETH DIN of AMERICA
בית דין דאמריקא

Beth Din of America
305 Seventh Ave., Suite 1201, New York, NY 10001
Tel: (212) 807-9042 Fax: (212) 807-9183
Email: info@bethdin.org
Web: www.bethdin.org www.theprenup.org

In an Emergency: Outside of normal business hours, questions may be addressed to Rabbi Shlomo Weissmann, Director of the Beth Din of America, at (646) 483-1188.

BINDING ARBITRATION AGREEMENT

LANGUAGE FOR CIVIL PRENUP

Recommended Language For Inclusion in a General Prenuptial Agreement

The following language contains provisions intended to facilitate the timely and proper resolution of certain marital disputes. The language may be incorporated into a general prenuptial agreement. For more information about the terms of these provisions, please visit www.theprenup.org or www.bethdin.org.

1. At the request of either party, the other shall grant, or, as the case may be, accept a "Get" if the giving of the Get is deemed appropriate by the Beth Din of America (or by any other Beth din which is mutually agreeable to the parties) so that there shall be no impediment to the remarriage of either party under Orthodox Jewish law.

2. In accordance with the recommended guidelines of the Rabbinical Council of America and its affiliate Beth Din, the Beth Din of America, regarding Jewish pre- and post-nuptial agreements, the parties have agreed to the following:

    a. [Husband] hereby obligates himself to support [wife] if the parties do not continue domestic residence together for whatever reasons in the amount of one hundred and fifty ($150) dollars per day linked to the CPI-U for all consumers in lieu of his Jewish law obligation for support so long as [husband] and [wife] remain married according to Jewish law. Except as otherwise provided herein, this obligation shall be payable weekly and shall be payable under any circumstances, even if [wife] has another source of income or earnings. However, this obligation (to provide support) shall terminate if [wife] refuses to appear upon due notice before the Beth Din of America, or any other beth din (rabbinical court) designated in writing by that beth din, for purposes of a hearing, concerning the parties dissolution of their Jewish marriage or concerning any other outstanding dispute relating to the obligation set forth in this Paragraph based on Jewish law, or in the event that she fails to abide by the decision of recommendation of such Beth Din. Furthermore, [wife] waives her right to collect any portion of this support obligation attributable to the period preceding the date of her reasonable attempt to provide written notification to [Husband] that she intends to collect the above sum. Said written notification must include [Wife's] notarized signature.

    b. If both parties waive the support obligation set forth in the above paragraph, said obligation shall be suspended for the period of any such waiver.

    c. The daily obligation of the above paragraph is, for the purposes of Jewish law, independent of any civil proceeding, if any, and shall not foreclose determination of other support payments.

    d. Questions of interpretation of the above paragraph shall be determined by the Beth Din of America, or any other Beth din designated in writing by that Beth Din, which shall have jurisdiction limited to the provision of that paragraph.

The Down Town Association
60 Pine Street
New York, NY 10005

Enforcement and Registration of Orders

The Honorable Dianna Gould-Saltman,
Los Angeles, California
Mia Reich Sjögren, Göteborg, Sweden
Sylvia Goldschmidt, New York, New York

ENFORCEMENT AND REGISTRATION OF ORDERS

Hon. Dianna J. Gould-Saltman (Los Angeles, CA)
Sylvia Goldschmidt, Fellow (New York, NY)
Mia Marie-Louise Reich-Sjögren, Fellow (Goteborg, Sweden)

THE JUDICIAL PERSPECTIVE

- MAKE THE COMPLEX SIMPLE.

TYPES OF RELEVANT ISSUES

- Child custody
- Child support
- Spousal support (alimony)
- Arrears
- Equalization
- Asset division
- Specific performance

WHY THE COURT NEEDS TO KNOW

- What is this court being asked to do?
- -enforce?
- -modify?
- -terminate a prior order?

WHY THE COURT NEEDS TO KNOW

- What gives this court the authority to do that thing?

WHY THE COURT NEEDS TO KNOW

- What gave the originating court the authority to make the original order?

WHY THE COURT NEEDS TO KNOW

- Whose law applies?

WHY THE COURT NEEDS TO KNOW

- Do any orders conflict with State or U.S. law such that comity can not be given?

ROAD BLOCKS YOU MAY ENCOUNTER

- Jurisdiction versus substantive ruling
- Common law versus civil law
- The prism of this judge's experience of the law

EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Expert on the foreign law

EFFECTIVE MEANS OF PROVIDING THE INFORMATION

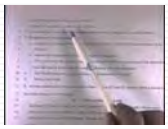
- Glossary of terms

EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Legal, not colloquial, translations

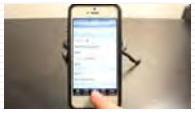
EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Points and Authorities



EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Contact information



EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Cultural context

EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Advance warning

EFFECTIVE MEANS OF PROVIDING THE INFORMATION

- Proposed Orders

INEFFECTIVE MEANS OF PROVIDING THE INFORMATION

- LITERAL, NOT LEGAL TRANSLATIONS
- Some similar words have different legal meanings in different jurisdictions
- Some words have different colloquial meanings than their legal ones
- Some jurisdictions have legal terms which have no English equivalent

INEFFECTIVE MEANS OF PROVIDING THE INFORMATION

- NON-EXPERT TESTIMONY REGARDING THE FOREIGN LAW OR ITS IMPACT
  - No way to judge its accuracy
  - No foundation
  - In a dispute, no way to assess which is correct. This is not a credibility determination.

Conclusion

Questions/Discussions

- 1. Why would one register a foreign decree?

Questions/Discussions

- 2. How does registering a foreign decree differ from domesticating a court order or judgment from a different state within the United States?

Questions/Discussions

- 3. What are the mandatory components necessary to register a foreign decree?

Questions/Discussions

- 4. Are the other things one might include which, although not mandatory, might be helpful to include when registering a foreign decree?

Questions/Discussions

- 5. How would one go about registering a decree from the United States in a foreign country?

Questions/Discussions

- 6. What are some of the most common provisions which need to be enforced in a foreign decree?

Questions/Discussions

- 7. What are some of the most common problems you've encountered when trying to enforce a U.S. decree in another country?

Questions/Discussions

- 8. What are some of the most common problems you've encountered when trying to enforce a foreign decree in the U.S.?

Questions/Discussions

- 9. Are there provisions of foreign decrees that are not likely to be enforced in the U.S. even if valid in the granting jurisdiction? Which ones?

Questions/Discussions

- 10. What are the common problems, and best practices to overcome these problems, when trying to enforce a decree from a Civil Law jurisdiction in a Common Law jurisdiction and vice versa?

Questions/Discussions

- 11. What are some of the strategic considerations in determining where to enforce a decree, if it can be enforced in more than one place? Does the selection of a location in which to enforce prevent enforcement in another location? When and how?

The Down Town Association
60 Pine Street
New York, NY 10005

Discovery of International Financial Documentation

Neil Beaton, Seattle, Washington
William Longrigg, London, England
Michael Stutman, New York New York

DISCOVERY OF INTERNATIONAL FINANCIAL DOCUMENTATION

NEIL J. BEATON – ALVAREZ & MARSAL VALUATION SERVICES, LLC
WILLIAM LONGRIGG – CHARLES RUSSELL SPEECHLYS LLP
MICHAEL STUTMAN – MISHCON DE REYA NEW YORK LLP

2016 INTERNATIONAL FAMILY LAW – NEW YORK
APRIL 15, 2016

NORTH AMERICA EUROPE MIDDLE EAST LATIN AMERICA ASIA

Neil J. Beaton,
CPA/ABV/CFF, CFA, ASA
Managing Director
Alvarez & Marsal Valuation Services, LLC

Neil is a Managing Director with Alvarez & Marsal Valuation Services, LLC. Previously, he was the Global Lead of Complex Valuation with Grant Thornton LLP. He has over 25 years of experience analyzing both closely and publicly held companies. Neil has appeared as an expert witness across the country, is a frequent lecturer at local universities, an instructor for the AICPA's business valuation courses, and speaks nationally on business valuation with a special emphasis on early stage and high technology companies. He has served on a number of AICPA Committees and Task Forces. Neil has a Bachelor of Arts Degree in Economics from Stanford University and a Masters of Business Administration in Finance from National University. In addition to his formal education, Neil is a Certified Public Accountant, Accredited in Business Valuation, Certified in Financial Forensics, a Chartered Financial Analyst and an Accredited Senior Appraiser in business valuation from the American Society of Appraisers.

Much of the information in this presentation came from a 2012 presentation Mr. Beaton co-presented with Laura Dale of Laura Dale & Associates, P.C.

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I. INTERNATIONAL MARITAL ESTATES: THE FIRST STEPS[1]

Initial questions to consider

- Is the U.S. the most favorable venue?
- Is the U.S. the most practical venue?
- Are there constraints?
- Does foreign counsel need to be retained?
- Are there resources for locating competent foreign counsel?
- The State Department Bureau of Consular Affairs provides a link to lists of English speaking attorneys for many foreign countries. http://travel.state.gov/law/judicial/judicial_2510.html
- The International Academy of Matrimonial Lawyers is perhaps the best source for finding local counsel. Attorney biographies and contact information are available for attorneys around the world. http://www.iaml.org/
- Will a foreign court accept the grounds for personal jurisdiction over the parties?
- Are the assets subject to division under foreign law?

Alvarez & Marsal |

II. CONDUCTING INTERNATIONAL DISCOVERY

- **Cross-border discovery can be a significant legal and practical obstacle to the valuation of foreign assets.**
- **There are two routes for seeking discovery in a foreign country**
  1. Domestic discovery procedures
  2. International treaties

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Hague Convention on the Taking of Evidence Abroad

- Cross-border discovery vs. national sovereignty – a conflict of interests!
- A growing number of people need to quickly and efficiently gather evidence in foreign countries:
  - Populations are more mobile
  - International work forces
- Countries want to preserve the integrity of their own internal laws and procedures, and protect their citizens.
- The 1970 Hague Convention on the Taking of Evidence Abroad (Hague Evidence Convention) attempts to balance these two competing interests.
- The text of the Hague Convention, list of member states, explanatory reports and other helpful resources are available at the Hague Conference website: http://www.hcch.net/index_en.php?act=conventions.text&cid=82

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Hague Convention on the Taking of Evidence Abroad

What is the Purpose of the Hague Evidence Convention?

- It is a system that strives to be "tolerable" for the country executing the discovery requests and "utilizable" for the country where the action is pending.
- It was developed to "reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with regard to the taking of evidence.

What is the practical result of the Convention?

- A slow and contentious process.
- A process that is very fact and country specific.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Hague Convention on the Taking of Evidence Abroad

There are 2 primary methods of issuing discovery:

- **Chapter I** – Letters of Request
- **Chapter II** – taking of evidence by a diplomatic officer, consular agent or commissioner

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Reservations and Declaration:
- Each Contracting State has the opportunity to make "reservations" and "declarations" to the Convention.

General Clauses:
- The source of most of these "reservations and declarations" is Chapter III of the Convention, known as the General Clauses. These reservations and declarations determine a country's particular requirements for discovery conducted under both Chapters I and II.

Examples:
- Under Article 33, a country may submit a reservation to the requirement under Article 4 that all Contracting States accept requests in English or French.
- The country may instead dictate that requests be translated into one or more of that country's official languages.
- South Africa, for example, requires that all requests must be in one of its eleven official languages.[1]

[1] http://www.hcch.net/index_en.php?act=status.comment&csid=557&disp=resdn

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Resources & Tips

- An alphabetized list of each Contracting States with links to practical information about their Central Authorities, Reservations and Declarations, is available at http://www.hcch.net/index_en.php?act=authorities.details&aid=484.
- The U.S. State Department also provides helpful information about conducting discovery in most countries on its Country Specific Information page: http://travel.state.gov/law/judicial/judicial_2510.html.
- The country profiles include information about any reservations and declarations in effect for each signatory country.
- **PRACTICE TIP: Before commencing discovery under either Chapter I or II of the Convention, practitioners should review both of these resources, as well as consult with local counsel.**

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Chapter 1: Letters of Request

- **Article 1** of the Convention permits a contracting State to send a Letter of Request to a competent authority of another Contracting State in order to obtain evidence, or to perform some other judicial act. Each contracting state must designate a Central Authority charged with the intake and execution of all Letters of Request. [2]
- **PRACTICE TIP: The Convention provides a checklist of what a Letter of Request must contain and other practical requirements.**
- **Article 3** specifically requires that each Letter of Request specify the following:
  - The authority requesting its executing and the authority requested to execute it, if known to the requesting authority
  - The names and addresses of the parties to the proceedings and their representatives
  - The nature of the proceedings for which the evidence is required
  - The evidence to be obtained or other judicial act to be performed

[2] Article 2

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Chapter 1: Letters of Request

- **And when appropriate, Article 3 also requires the following:**
  - The names and addresses of the persons to be examined;
  - The questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined
  - The documents or other property, real or personal, to be inspected
  - Any requirement that the evidence to be given on oath or affirmation, and any special form to be used;
  - Any special method or procedure to be followed under Article 9
- **The Request must be in either English or French, *unless* the recipient country specifically requires that the Request and all other documents be in a specified language or translated into a specified language.**

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

What laws apply: there's or ours?

- The Convention allows the recipient to somewhat adhere to its own internal law and procedure when executing the Request.
- Article 9, states that the executing judicial authority applies its own internal procedures, *unless* that is, unless the Letter of Request specifically identifies a "special method or procedure" that it would like the executing authority to follow.
  - This ensures the information obtained is in an admissible form under the laws of the requesting state, but…
  - The request must be compatible with the internal law of the executing country.
  - An individual or entity may also refuse to comply with the requests by asserting **privileges** available under "the law of the State of Execution."

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Privileges under the law of the State of Execution

Some of the most commonly invoked privileges include:

- Switzerland's protection of *secret bancaire* and *secret professional*,
- Israel's privilege of bank statements, and
- France's *interdiction de temoigner*.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Once received, the Convention requires that all Letters of Request must be executed "expeditiously."[3]

- In the context of international discovery, this may be at least several months.
- Based on a 2008 survey of Contracting States, the Hague Conference determined
  - 80% of outgoing Letters of Request are executed within 6 months and
  - 63% of incoming Letters of Request are executed within 6 months[4]

[3] Article 9.
[4] Summary of Responses to the Questionnaire of May 2008 Relating to the Evidence Convention, with Analytical Comments, Hague Conference on Private International Law, available at http://www.hcch.net/upload/wop/2008pd12e.pdf (last visited February 21, 2012).

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Countries may also refuse entirely to execute a Letter of Request.

- **Article 12** provides a country can only refuse to execute a Letter of Request to the extent that:
  - in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or
  - the State addressed considers that its sovereignty or security would be prejudiced.
- **HOWEVER, Article 23** grants executing authorities very broad discretion **to deny Letters of Request issued by a United States court**. This article also provides that a contracting state may at the time of signature, ratification or accession, **declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[5]**

PRACTICE TIP: practitioners should review a country's reservations and declarations, as well as the State Department profile to determine the scope of a country's declaration under this article.

[5] Article 23.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

After consulting with local counsel and reviewing a country's reservations and declarations…here are the basic steps to follow:

1. Draft a Letter of Request pursuant to the specifications of Article 3.
2. Determine whether it is necessary to include in the Letter a specific request under Article 9 that the foreign judicial authority follow a special method or procedure in executing the Letter of Request (e.g. do they need to obtain something similar to a business records affidavit in order to authenticate requested records?)
3. Submit the Letter of Request to the court by filing a Motion to Issue a Letter of Request. In federal court, this motion is submitted pursuant to FRCP 28(b). In Texas, this motion is submitted pursuant to TRCP 201.1
4. If the court grants the motion, the court must sign and attach its seal to the Letter of Request. To ensure proper authentication of the request, it is prudent to also affix an *apostille*.
5. Obtain proper translations of the Request under Article 4.
6. Identify the Central Authority or other authorized authority to which you should send the Letter of Request.
7. Enlist local counsel to monitor the status of the request.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Chapter II: Taking of Evidence by a Diplomatic Officer or Commissioner

Under Article 15

- A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.
- **Limitations:** A U.S. consular agent's ability to take depositions in a foreign country is usually determined by the law of his own country. Their abilities are limited to the following:
  - Taking evidence from American citizens;
  - In the country where he or she has been assigned to perform consular functions;
  - Without any compulsion;
  - Only with respect to proceedings that are pending in the U.S.[6]
  - A consular agent can only take depositions from nationals of the executing country if the competent authority in that country gives its permission.[7]

[6] See Ph W. Amram, Explanatory Report, available at http://www.hcch.net/upload/expl20e.pdf
[7] Article 16

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Chapter II: Taking of Evidence by a Diplomatic Officer or Commissioner

- In such cases, a consular agent must comply with whatever conditions and limitations have been specified by the authority of the executing state.[8]
- In the event that a U.S. consular agent needs to compel a response to discovery from Americans or nationals of the executing state, the agent must ask the executing state for assistance.[9]

Specific Requirements: Article 21 sets out the specific requirements (and limitations) that govern every taking of evidence by a consular agent.

- The agent may take "all kinds of evidence which are not incompatible with the law of the State where the evidence is taken."
- If the evidence sought is barred from disclosure under the internal law (e.g. the equivalent of the attorney-client privilege), an agent cannot obtain it.
- The person from whom the evidence is sought must also receive notice of the right to have legal counsel.

[8] Article 16.
[9] Article 18

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Is there an easier way? Yes, but….

Article 27 – one of the most important articles of the Convention

- This article allows Contracting States to enact more permissive, "user-friendly" procedures to obtain discovery abroad.
- Under Article 27, a country can declare that Letters of Request may be sent directly to judicial authorities other than those designated as a "Central Authority" under Article 2 **(i.e. court to court).**
- This circumvents some of the middle men.
- Countries can also choose to permit "methods of taking evidence other than those provided for in this Convention" and to enact less restrictive conditions for those methods already enumerated in the Convention.

PRACTICE TIP: When beginning discovery in with a contracting state practitioners should always check if that country made any Article 27 declarations.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Yes, but…. Article 23!

- Yet, even when more permissive means of discovery are available under Article 27, Article 23 can make discovery very difficult, if not impossible.
- **Article 23** provides that a contracting state may at the time of signature, ratification or accession, declare that it will **not** execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.[10]

[10] Article 23.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Why?

- Extensive pretrial discovery, as in the U.S. is practically unheard of elsewhere.[11]
- In many Civil Law countries, it is the court that conducts discovery, not the parties.[12]
- The concept of discoverable information is vastly different.
- Under our rules, we may seek any information reasonably calculated to lead to the discovery of admissible evidence...not so in other countries!
  - **United Kingdom** - parties are only required to disclose documents that directly support or adversely affect any party's case;
  - **Belgium, Germany and Italy** - parties need only disclose exhibits relied upon at trial;
  - **Brazil, France and Spain** - you only have to produce those documents you believe will support your case;
  - **Japan** - parties are only entitled to documents which they specifically request from the other party.[13]

[11] See Caylor, supra note 2 at 364.
[12] Ann Laquer Estin, International Family Law Desk Book at 15 (2012).
[13] Chris Jacobs and Jessica Masterson, "Addressing U.S. Discovery Obligations in a Global Economy,"

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

- Article 23 protects the receiving State's internal laws and procedures from intrusive "American-style" discovery, and the privacy of its citizens.
- The U.S. sees this as a misunderstanding about the nature of pre-trial discovery in America.
- The U.S. claims that many signatories "mistakenly believed" that pre-trial discovery means that a lawsuit has not even been filed.[14]
- Unfortunately, for U.S. litigants, misunderstanding is still very prevalent despite a U.S. campaign to ease the effects of Article 23.
- Broad reservations under Article 23 limit the utility of the Convention for U.S. litigants. [15]
  - Only ten countries had no reservation under Article 23.[16]
    - ✓ **Barbados, Belarus, Bosnia and Herzegovina, Czech Republic, Israel, Latvia, Russian Federation, Slovak Republic, Slovenia and the U.S.**[17]
  - Many more countries preclude all requests for pre-trial discovery:
    - ✓ **Australia, Denmark, Greece, Italy, Luxembourg, Monaco, Portugal, South Africa, Spain and Sweden.**

[14] See Synopsis, *supra* note 4 at 8-9.
[15] Id.
[16] Id.
[17] Id.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

- Other countries have taken a middle-of-the-road approach that still drastically limits the scope of discovery for U.S. litigants.
- France, for example, has stated in its reservation that it will only execute Letters of Request for pre-trial discovery if the "documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure."[18]
- The practical result of such reservations is that the requesting party must identify the sought after documents in the Letter of Request.[19]
- Even the United Kingdom, a common law country, has issued a reservation under Article 23.[20]

[18] Id; Pierre Grosdidier, "The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery," at 7.
[19] Didier, *supra* note 14 at 7.
[20] http://www.hcch.net/index_en.php?act=status.comment&csid=564&disp=resdn

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

THE U.S. SUPREME COURT TO THE RESCUE!

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa

- Due in part to the crippling effect of Article 23, the U.S. Supreme Court has determined that parties to U.S. litigation are not limited to conducting discovery under the Hague Evidence Convention.
- In Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. Iowa, the Supreme Court specifically considered the relationship of the Hague Convention with the availability of international discovery under the Federal Rules of Civil Procedure.
  - U.S. plaintiffs sued a French corporation and issued discovery under the Federal Rules of Civil Procedure.
  - The French litigants complied with those requests to the extent that the material or information was located in the U.S., but contended that discovery of all material or information located in France was governed by the Convention.[21]
  - The Court held that the Hague Convention is ***not mandatory*** and, therefore, is not the exclusive means of obtaining discovery.[22]
  - The court further held that a party is not required to use the Hague Convention before attempting to use procedures of the Federal Rules.[23]

[21] Id. at 525-26.
[22] 482 U.S. 522, 529, 542-44 (1987).
[23] Id.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa

- As long as a court can exercise personal jurisdiction over a party or non-party in a manner consistent with due process, a party issuing discovery is not necessarily required to adhere to the Convention as the exclusive means of discovery.[24]
- Instead, district courts faced with international discovery requests must determine whether the "demands of comity" require litigants to utilize the Convention procedures instead of domestic discovery procedures. [25]
- The Supreme Court did not provide any specific rules to guide this comity analysis, but only stated that courts must scrutinize the facts of each case and the likelihood that resort to the Convention "will prove effective." [26]
- Essentially, a trial court's decision of whether international discovery should be conducted under the Hague Convention or domestic procedures is entirely within a trial court's discretion.

[24] Id. at 541.
[25] Id. at 544.
[26] Id.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Domestic Discovery Procedures

1. Parties to U.S. based litigation are not required to use the Convention as the exclusive means of discovery.
2. Litigants may use state rules of civil procedure to obtain information regarding marital assets, *if the party or non-parties are subject to the court's personal jurisdiction.*
   - For example, if the party or non-party is subject to the court's personal jurisdiction, the issuing party (in Texas) may request discovery through interrogatories, request for production and request for admissions.
   - Texas law also permits international discovery under Tex. R. Civ. P. 201, which provides that depositions of a foreign person or entity may be obtained by notice, letter of request, *letters rogatory*, or by agreement of the parties, but, Texas law also limits who may take the deposition of a witness residing outside the United States.
   - Under the Texas Practice and Remedies Code, foreign depositions may only be taken by
     (1) a minister, commissioner, or *charges d'affaires* of the United States who is a resident of and is accredited in the country where the deposition is taken;
     (2) a consul general, consul, vice consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country where the deposition is taken; or
     (3) any notary public.[27]

[27] Tex. Prac. & Rem. Code § 20.001(c).

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Foreign laws obstruct discovery despite the Supreme Court's ruling in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*

- In addition to privileges, many countries have laws that prohibit, and ***even criminalize***, the disclosure of information for purposes of international discovery conducted outside of the Hague Convention.
- In 1995, The EU enacted the ***Data Protection Directive*** to limit the transfer of data to other countries considered to have inadequate privacy protection measures.[28]
- The scope of the Directive extends only to data that is automated or processed or "intended to be contained in a specific filing system."[29]
- It does not apply to the processing of data "by a natural person in the court of purely personal or household activities."[30]
- **Under this definition, relevant data processed by a financial institution is protected from disclosure.**

[28] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML
[29] Id.
[30] http://europa.eu/legislation_summaries/information_society/data_protection/l14012_en.htm

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Effects of the EU's *Data Protection Directive and "Blocking Statutes"*

- Article 26(d)(1) of the Directive does permit the transfer of data to a third party country if the "transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defense of legal claims."
- Given the dramatically divergent views on the scope of permissible pre-trial discovery, it is not clear whether the EU Directive permits the disclosure of materials or information in pre-trial discovery issued under U.S domestic procedures.
- Many countries also have their own "**blocking statutes**," which vary widely in scope, severity and frequency of enforcement.
  - France has one of the most often cited examples of a "blocking statute" that is purposefully designed to impede discovery from abroad (especially the United States).
  - Article 1A of French Penal Code Law, No. 80-538 states that, subject to any treaties (i.e. the Hague Convention):
    - it is prohibited for any person to request, to investigate or to communicate in writing, orally, or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as part of such proceedings.[31]

[31] See Grosdidier, *supra* note 15, at 3.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Blocking Statutes

- The purpose of such blocking statutes is to force foreign litigants to adhere to the internal laws governing the taking of evidence.
- For the French, and other countries with broad blocking statutes, the Hague Convention is the only permissible means of obtaining discovery of materials or information from within their borders.[32]
- Yet, as previously discussed, many countries severely limit the scope of discovery under Article 23.
- The result of this statute is that parties may not even agree to a deposition or the disclosure of information or materials located in France without criminal implications (unless they follow the procedures of the Convention).
- In comparison, other countries have much more narrowly drafted blocking statutes, that are not automatically triggered, but selectively applied by the appropriate authorities.

[32] See id. at 4.

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Not so fast, France… the Supreme Court addressed the French blocking statute in *Societe Nationale*.

- In addition to arguing that the Hague Convention dictates the exclusive procedures for international, pre-trial discovery, the French litigants contended that the blocking statute prohibited them from responding to discovery issued under domestic U.S. procedures.[33]
- The Court determined, however, that the existence of the blocking statute did not affect its findings.[34]
- The Court relied on well-settled law that foreign statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[35]
- Rather, a blocking statute is just another factor for a court to consider in determining whether the principles of comity preclude the use of domestic procedures.[36]

[33] *Societe Nationale*, 482 U.S. 522, 526 (1987)
[34] *Id.* at 544.
[35] *Id.* at 544, fn 9 (citing *Societe Internationale Pour Participations Industrielles et Commerciels, S.A. v. Rogers*, 357 U.S. 197, 204-06 (1958)).
[36] *Id.*

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

Not so fast, France… the Supreme Court addressed the French blocking statute in *Societe Nationale*.

- Since *Societe Nationale*, numerous lower federal courts and state courts have applied the Supreme Court's comity analysis to determine the proper discovery procedures.
- Most courts are generally unsympathetic to claims that foreign laws prohibit discovery.[37]
- In *Volkswagen, A.G. Relator v. The Honorable Rogelio Valdez*, for example, the Texas Supreme Court held that the trial court abused its discretion by compelling responses to discovery when there was a Germany privacy law that protected the requested information.[38]

PRACTICE TIP: Before assuming that a state court will permit discovery under domestic procedure, practitioners must carefully review the jurisprudence of their respective states.

[37] See Chris Jacobs and Jessica Mederson, "Addressing U.S. Discovery Obligations in a Global Economy" (2011)
[38] 909 S.W.2d 900, 902 (1995)

II. CONDUCTING INTERNATIONAL DISCOVERY (CONT'D.)

- Given the common inclination to find against the extension of comity to blocking statutes, domestic discovery procedures are frequently the easiest, most efficient way to conduct international discovery.
- American attorneys should still consult with local counsel to determine what liability exists under the foreign law for issuing discovery outside of the Hague Convention and the likelihood that the foreign law would be enforced.

III. COORDINATING WITH YOUR VALUATION EXPERTS

What about valuation?

- Once the attorneys determine what is subject to division, attorneys need to meet early in the process with valuation experts and foreign counsel to discuss what kind of information the valuators need the attorneys to get in order for them to do their job and what roadblocks to expect.
- As just discussed, such roadblocks may include difficulty obtaining the necessary information through discovery.
- There may also be problems with **divergent valuation practices between the countries.**
- If familiar with these potential hiccups, attorneys and valuation experts can better plan ahead to ease the complications of the valuation process.

IV. A SNAPSHOT OF THE U.K. PENSION SYSTEM

- In many countries, one of the most significant assets that spouses may acquire during the course of a marriage is a pension.
- Pensions provide a simple example of the kinds of issues that may arise in the valuation and division of an international marital estate.
- This paper uses the pension system in the United Kingdom as an example to demonstrate the general questions that attorneys need to raise with valuation experts and foreign counsel.

What kinds of pensions have the spouses acquired?

- In the United Kingdom, there are multiple forms of pensions. There is the basic state pension, the Additional State Pension, private occupational pensions and personal "stakeholder" pensions, public sector pensions, and self-administered pensions.

Are pensions subject to division?

- While rarely divided under U.K. law, it may be possible to divide these assets pursuant to a Qualified Domestic Relations Order in the U.S.

IV. A SNAPSHOT OF THE U.K. PENSION SYSTEM (CONT'D.)

How are these different pension plans valued?

- Both public and private pension plans in the United Kingdom are required to provide valuations to pension holders on an annual basis. These values are calculated under a common method called the Cash Equivalent Value (CEV) or Cash Equivalent of Benefits (CEB). The CEV/CEB represents the value of the pension holder's interest if the pension is to be transferred elsewhere. Such valuations are usually provided free by the pension plan administrator. However, the CEV/CEB values can be misleading. If there is any doubt as to the calculated value of the pension, it is possible for a pension holder to obtain an explanation of the calculation of benefits. The request is known as a "Form P."
- Self-administered pensions do not use the CEV/CEB value system and the values can usually be obtained from the account statements.

Is the CEV/CEB an accurate and acceptable method of valuation? Should we use this value or do we need to revalue the pension?

IV. A SNAPSHOT OF THE U.K. PENSION SYSTEM (CONT'D.)

- **Are accounts statements, CEV/CEB statements and Form P calculations of benefits discoverable under the Hague Convention?**
  - The United Kingdom has made a declaration under Article 23, which requires that the Letter of Request identify the specific documents sought for production.[39] For example, it would be possible to request all CEV/CEB annual valuations for the Respondent's Additional State Pension from 2000-2012.
- **Does the United Kingdom have any relevant blocking statutes?**
  - The United Kingdom has two narrow blocking statutes: (1) the Evidence Act 1975 and (2) the Protection of Trading Interests Act 1980. The former prevents execution of a letter of request if the Secretary of State signs a certificate that execution of the request would be prejudicial. The latter is targeted toward anti-trust proceedings. It is unlikely that either of these would apply to the disclosure of pension documents.[40]

[39] Declarations, Notifications, Reservations by the United Kingdom, available at http://www.hcch.net/index_en.php?act=status.comment&csid=564&disp=resdn
[40] Synopsis of Responses, supra note 8 at 20.

IV. A SNAPSHOT OF THE U.K. PENSION SYSTEM (CONT'D.)

- **Are there any organizations or professionals who can assist in the valuation of pension plans in the United Kingdom?**
  - Actuaries are member of a regulated professional in the United Kingdom who are specially trained in the valuation of pensions, as well as other areas. http://www.actuaries.org.uk/
- **What is the process for enforcing a QDRO for the division of a pension in the United Kingdom?**
  - A pension plan may refuse to respond to a QDRO and will most likely require an order from an British court. To obtain a British order for the division of the pension, the party seeking to enforce the QDRO must submit an application to the court under the Matrimonial and Family Proceedings Act 1984. In order to submit the application, the party must first obtain leave of court. In most cases, leave is readily granted. It may be possible, however, that there is no jurisdiction to divide the pension under the above statute if neither party is domiciled or habitually residing in the United Kingdom.

V. INTERNATIONAL VALUATION ISSUES

The valuation industry is well-established in the U.S. with a number of publications discussing a variety of valuation topics and 5 major valuation associations:

- The AICPA
- The American Society of Appraisers
- The CFA Institute
- The National Association of Certified Valuation Analysts and the Institute of Business Appraisers.

V. INTERNATIONAL VALUATION ISSUES (CONT'D.)

Internationally, however, the business valuation profession is less mature and there are few, if any, consistent standards that apply across foreign jurisdictions.

- One organization, the International Association of Consultants, Valuators and Analysts does provided valuation training in a number of countries, but their reach is still minimal.
- As a result, many valuations are performed by professionals with a wide variety of skills and competencies.
- The International Valuation Standards Council is attempting to bring some order to the valuation industry internationally, but progress remains slow and is still not universal.
- ***The International Financial Reporting Standards*** contain some valuation guidance, and if adopted by the U.S., will serve as a guide for valuation professionals in some areas of financial reporting and possibly beyond.

V. INTERNATIONAL VALUATION ISSUES (CONT'D.)

What challenges are there to valuation of foreign assets?

Limited available data:

- In performing cross-border valuations, the availability of data sources is often limited.
- As noted in the foregoing sections on discovery, even if the information is available within the country, it may not be accessible from the U.S.

Variable data:

- Valuation professionals in the U.S. have a plethora of data sources to choose from, and most are reliable.
- However, depending on the country where the asset is located, stock exchange data may be limited and government statistics may be misleading, dated or unreliable.
- Furthermore, attempting to obtain transaction data on deals in a foreign country is often impossible without the assistance of a local valuation expert.
- In business valuation, risk is a major factor that needs to be assessed in determining an appropriate discount rate to apply to a stream of cash flows and this analysis can vary between countries.

V. INTERNATIONAL VALUATION ISSUES (CONT'D.)

Additional Risk Assessment

Besides the common risks of a valuing a business such as the economy, customers, markets and technology, performing cross-border valuations also requires the analyst to assess country risk, legal risk and sovereign risk. Country risk relates to the unique risks inherent in a specific country, for example:

- **War**: Investing in Israel brings with it the unique risk of attacks from hostile countries without notice. The same risks can be found in other war-torn countries.
- **Religious restriction**: In some countries, the valuation analyst has to consider religious restrictions on investing that may not exist in other countries or tax structures that are completely different from country to country.
- **Legal risks**: must also be taken into consideration in valuing companies in foreign countries.
- **Treaties**: Cross border agreements may trigger international legal issues and become a factor in the valuation.
- **Business practices**: practices that might be considered fraud in the U.S. are often tolerated, if not expected, in many foreign countries.
- **Civil unrest**: Greece is a good example of this type risk.
- **Sovereign risk**: Is there a risk that the subject company or asset could be confiscated by the local government?
- **Source of funding**: may also be an issue if it comes from local government that creates a government claim on part or all of the company.

V. INTERNATIONAL VALUATION ISSUES (CONT'D.)

- A final thought in performing valuations in foreign countries is the developmental stage of the country and its economic infrastructure.
- What are known as the BRIC countries: Brazil, Russia, India and China, all have unique valuation environments that need to be assessed appropriately.
- The cost of capital will be different in each of these countries and the growth prospects, a major value driver, will also be much different country to country.
- The securities industries of these countries are still young and developing, so getting solid and reliable information on public companies is not always assured.
- The recent accounting scandals in China and India also point to a regulatory environment that is not nearly as robust as we have here in the U.S.
- The Securities & Exchange Commission, except for a few high profile failures, has done a great job of maintaining integrity in the U.S. securities markets.
- Not so in the BRIC countries.
- Nonetheless, it is improving.

VI. CONCLUSION

- There are a multitude of unique factors that attorneys must address when the division of an international marital estate is at issue.
- These issues range from forum selection, to discovery, to valuation methods, to enforceability.
- Insight into some of these issues my be gained by conferring with competent foreign counsel and valuation experts.
- One of the most significant hurdles from the perspective of an attorney is the process of international discovery. Given the potentially long list of hurdles, international discovery may seem daunting, but it is not impossible, and a times, can be incredibly simple.
- Practitioners must be aware and prepare in advance for possible complications.
- Many hurdles can be anticipated and addressed by coordinating early on with local counsel and valuation experts.
- If the hurdles are too great, it may be in your client's best interest to seek an alternative forum where he or she can obtain similar relief in a more cost and time-efficient manner.
- The techniques in valuing a company in the U.S. are not much different than the techniques in valuing companies operating in foreign countries, with the exception of risk assessment, however, the amount, reliability and accessibility of information needed to value these companies is often very limited.

QUESTIONS???

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International Academy of Family Lawyers
International Family Law Conference
The Down Town Association
New York, New York

Discovery of International Financial Documentation

WILLIAM LONGRIGG

APRIL 15 2016

DUTY OF DISCLOSURE IN FINANCIAL PROCEEDINGS ON DIVORCE IN ENGLAND

- The parties are under a duty of full and frank disclosure
- This duty overrides commercial duties and confidentiality.
- Failure to give full disclosure may result in the court drawing adverse inferences or a party being found in contempt of court. Al-Baker –v- Al Baker [2015] EWHC 3229 (Fam). A husband abroad refused to accept the court's jurisdiction and repeatedly breached disclosure order and was given a nine month prison sentence for contempt. Mostyn J took the view that a European arrest warrant was appropriate.

DUTY OF DISCLOSURE IN ENGLAND AND WALES …. CONT'D

- Sharland –v- Sharland 2015 UKSC 60 and Gohil –v- Gohil 2015 UKSC 61 clarified that failing to disclose an accurate picture of one's financial position may be grounds for re-opening cases and setting aside financial orders.
- To be enough to set aside an order, the breach must be "material" and "would have led to a substantially different order being made in the first instance".
- To be distinguished from unforeseen change of circumstances (Barder v Barder [1987] 2 FLR 480).

USUAL METHODS OF ELICITING INFORMATION

- Form E, Questionnaires, Inspection appointments, Directions hearings.
- "Self help" has been curtailed by Tchenguiz –v- Imerman [2010] EWCA Civ 908.
- Whether the court chooses to exclude information unlawfully obtained will be fact specific.
- Lawyers have to be extremely careful about confidential documents obtained by one of the parties.
- The court has the power to order individuals to produce documents from all over the world.

FREEZING ORDERS

- Assets throughout the world can be frozen but mirror orders generally need to be obtained in each jurisdiction where the assets lie.
- Anton Piller order – rare in family law cases.
- Inspection appointments, family proceedings rules 21.2. The court may order a person not a party to the proceedings to disclose documents and attend court.
- FPR 24 permits the court to issue a witness summons, including where an individual is in another jurisdiction (rule 24.12). Charman –v- Charman [2005] EWCA Civ 1606.

LETTERS OF REQUEST

- Where oral evidence is to be taken, all documents required, from an individual in another jurisdiction, a letter of request (also referred to as a request for international judicial assistance) should be issued by the court to the court of the other jurisdiction.
- Evidence (proceedings in other jurisdictions) Act 1975.
- Equivalent method between EU jurisdictions (Taking of Evidence Regulation 1206/2001/EC.
- Hague Convention governing provision of assistance for taking evidence abroad.

LETTERS OF REQUEST .... CONT'D

- In England and Wales, there is a guidance note from the Treasury Solicitor's Department telling lawyers the basis on which such applications should be made.
- Charman –v- Charman: The Bermuda courts refused to make an order following a letter of request from the English court.
- Jennings –v- Jennings 2010 WTLR 215 held that an English order for a letter for a letter of request to Bermuda should stand.
- The principles for determining an order for an inspection appointment and for an order giving effect to a letter of request are the same, as confirmed in Panayiotou and Sony Music Entertainment UK Ltd [1994] CH142.

GENERAL POINTS ON INTERNATIONAL CASES

- Some offshore jurisdictions wish to develop a reputation for being reluctant to provide information about resources under their administration
- Most courts will be unwilling to make orders against third parties/non-spouse entities if it is considered that they will be unenforceable in other jurisdictions but they will make wide orders against the individual spouse.
- Be careful about joining third parties to proceedings; it can backfire and be very expensive.

GENERAL POINTS ON INTERNATIONAL CASES ... CONT'D

- Third parties (eg trusts) would not usually be joined for the purposes of disclosure.
- Submitting to the jurisdiction – third parties often have a fear of the consequences of this which can make them even more unco-operative regarding disclosure.

International Academy of Family Lawyers
International Family Law Conference
The Down Town Association
New York, New York

Discovery of International Financial Documentation

WILLIAM LONGRIGG

APRIL 14 2016

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International Financial Support Issues

Justice Laura Drager, New York, New York
Mudita Chawla, New York, New York
Sandra Verburgt, The Hague, Netherlands

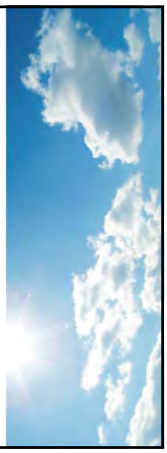
"International Financial support"

EU Maintenance Regulation 4/2009
Hague Protocol 2007

Sandra Verburgt

DELISSEN MARTENS

ADVOCATEN BELASTINGADVISEURS MEDIATION



International Financial Support

Experiences with the EU Maintenance Regulation 4/2009 & Hague Protocol 2007

- Introduction

- Jurisdiction and applicable law
  - Authentic instruments: choice of law and forum

- Recognition and enforcement
  - Role of the Central Authority vs. individual application
  - Protocol vs. non-Protocol states
  - Authentic instruments

- Effect of Maintenance Regulation on non-EU members

DELISSEN MARTENS

Introduction: why?

"(…) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. For the gradual development of such area, the Community is to adopt, among others, measures relating to judicial cooperation in civil matters having cross-border implications, in so far as necessary for the proper functioning of the internal market. (…)"

International Financial Support

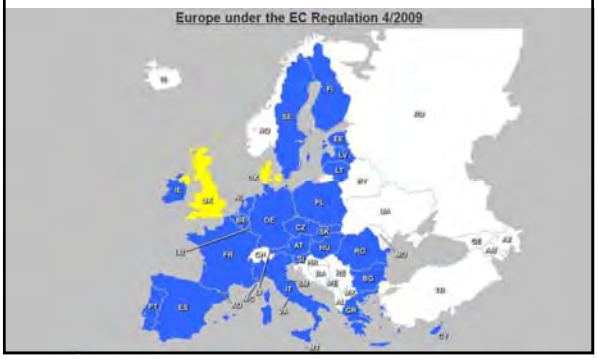
ADVOCATEN BELASTINGADVISEURS MEDIATION

Art 24 HP 2007: Declaration EU

- *Exercises competence over all the matters governed by the Protocol. Its Member States shall be bound by the Protocol by virtue of its conclusion by the EC;*
- *EC does not include Denmark and UK;*
- *will apply the rules of the Protocol provisionally from 18 June 2011, the date of application of Council Regulation (EC) No 4/2009, if the Protocol has not entered into force on that date.*

International Financial Support

"Two-speed Europe"



Jurisdiction and applicable law

General rules on jurisdiction and applicable law:

- *Jurisdiction: art. 3, 5 and 6 EMR*
- *Applicable law: art. 15 EMR jo. 3 HP*

International Financial Support

Jurisdiction: choice of court, article 4 (1)

a. court / courts of the MS in which one of the parties is habitually resident;
b. court / courts of the MS of which one of the parties has the nationality;
c. spouses:
   - the court which has jurisdiction in matrimonial matters;
   - the court / courts of the last common habitual residence for at least 1 year.

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATION

Jurisdiction: choice of court, article 4 (1)

Other conditions:

- the conditions mentioned above have to be met at the time the choice of court agreement is concluded or at the time the court is seised;
- in writing;
- not towards obligations related towards minors;

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATION

International Financial Support

A Choice of court clause in a pre or ante nuptial agreement is a form of divorce planning"

"Divorce planning is forum shopping?
or
Divorce planning prevents forum shopping?"

ADVOCATEN BELASTINGADVISEURS MEDIATION

Applicable law: choice of law, art 15 EMR jo art 7 and 8 HP 2007

- *article 7 HP: choice of law for a particular proceeding;*
- *article 8 HP: choice of law, unlimited application*

International Financial Support

Applicable law: conditions art 7 HP 2007

- *always choice of law for the law of the forum and only for that particular proceedings;*
- *re maintenance obligations towards children under 18 and adults;*
- *in writing or in any medium, the information contained in which is accessible so as to be usable for subsequent reference.*

International Financial Support

Unlimited choice of law: art 8 HP 2007

- *choice of law: "at any time";*
  a. *law of the nationality of one of the parties;*
  b. *law of the habitual residence of one of the parties*
  c. *law to be applied or in fact applied to matrimonial property regime;*
  d. *law to be applied or in fact applied to their divorce or legal separation.*

International Financial Support

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Other conditions art 8 HP 2007

- *at the time of designation;*
- *in writing or in any sustainable medium;*
- *signed by both parties;*
- *not in relation to children under 18 or vulnerable adults;*
- *whether renunciation is allowed, will be determined by law of habitual residence*
- *fully informed and aware of consequences*

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATION

DELISSEN MARTENS

International Financial Support

"a maintenance obligation, drawn up in a Dutch notarial deed, signed by both parties, is directly enforceable in any Member State, without any exequatur. The same applies for a Dutch divorce covenant approved by the court"

"What about a maintenance waiver in an English pre or ante-nuptial agreement?"

ADVOCATEN BELASTINGADVISEURS MEDIATION

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Authentic documents, art 2 (3) & 48 (1) EMR

- *a document … relating to maintenance obligations, … formally drawn up or registered as an authentic instrument in the member state of origin;*
- *an arrangement relating to maintenance obligations concluded with administrative authorities of the member states of origin or authenticated by them*

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATION

Authentic documents, art 2 (3) & 48 (1) EMR

- *court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised… and enforceable… in the same way as decisions…*

International Financial Support

International Financial Support Issues

Recognition and enforcement

- *EMR only deals with the recognition and enforcement of maintenance orders*
- *Abolishes exequatur (almost): art. 17 and 26 EMR, i.e. direct enforceability; no declarations of enforceability (except UK and Dk) (Two-speed Europe)*
- *Central Authorities: assistance and information, art. 51, 53 (including pre-action) + art. 61 EMR*
- *Free Legal Aid for CA in case of financial support for minors (<21), art. 46*

International Financial Support

International Financial Support Issues

Recognition and enforcement

- *Enforcement by the recipient State, art. 41*
- *No review as to substance, art. 42*
- *Access to Justice + right legal aid , art. 44-47*
- *Maintenance not status, art. 22*
- *EMR takes precedence over Hague Maintenance Convention in EU, art. 69*
- *Nationality / domicile UK/Ireland: art. 2 (3)*

International Financial Support

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International Financial Support Issues

Recognition and enforcement

- *Getting an order/enforcing it: out-/ingoing*
- *Not just orders, but also:*
  - *Court decisions, art. 2(1) (1)*
  - *Court settlements, art 2(1)(2)*
  - *Authentic instruments, art. 2 (3) + art. 48: see below*
  - *Court, incl. administrative authorities: art. 2 (2) + Annex X;*
- *Not just spouses / children: R (11)/A.1; but also other relationships*

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATION

DELISSEN MARTENS

International Financial Support Issues

Recognition and enforcement

- *Article 11 MR:*

"(…) The scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purpose of this Regulation, the term 'maintenance obligation'should be interpreted autonomously."

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATION

DELISSEN MARTENS

International Financial Support

"What jurisdiction does a Dutch Court have to deal with maintenance for a Dutch wife who has lived in New York for 10 years with her American husband and now returns to the Netherlands with her Dutch children after serious domestic violence from the husband in the USA?"

ADVOCATEN BELASTINGADVISEURS MEDIATION

DELISSEN MARTENS

International Financial Support Issues

Effect of EMR on non-EU members

- *unification of recognition and enforcement of orders in Europe*
- *Effect on non-European states? Decision ECJ in Owusu (C-281/02); NJ 2007, 369; [2005] QB 801*
- *EMR has precedence over Hague Maintenance Convention in EU, art69 (2)*

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATOR

DELISSEN MARTENS

International Financial Support Issues

Thank you!

Sandra Verburgt
Divorce lawyer and mediator
verburgt@delissenmartens.nl

International Financial Support

ADVOCATEN BELASTINGADVISEURS MEDIATOR

S.L.A. (SANDRA) VERBURGT

senior lawyer

Called to the bar	:	2000
Fields of Expertise	:	(International) Family Law
Specialist Associations	:	Dutch Association of Family Law Lawyers and Divorce Mediators (vFAS) International Academy of Matrimonial Lawyers (IAML)

Practice

With more than 15 years experience in all kind of family law matters Sandra is a senior lawyer in the Family and Mediation Team of Delissen Martens. She is also a member of the International Desk, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. Her practice includes divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Sandra deals also with other complex international family disputes related to custody and parentage. Since 2007 Sandra also deals with cross border disputes. She works closely with accredited family law specialists in Europe and the United States of America.

Publications

Sandra is co-author of the chapter on Private International law and Maintenance law in the explanatory commentary "*SDU Commentaar Relatierecht" (SDU, February, 2014)* and the online equivalent of Dutch Legal Publisher SDU.

Furthermore she has written several publications in Dutch and English law journals:

- *Dossier Divorce dans le monde (1re partie), Pays-Bas*, in the French Family Law Magazine *AJ Famille* (Dalloz, November 2015, p. 596-597)
- *"Bevoegdheid, erkenning en tenuitvoerlegging onder Alimentatieverordening 4/2009"* in the Dutch Family Law Magazine "*Relatierecht en Praktijk" (SDU, November 2012)*.
- "*Marital Agreements: International lawyers neglect jurisdictional developments at their peril*" in International Family Law (Jordans, September 2011)
- *"Double Dutch? – The relevance of Hague Conventions to Marital Contracts and Maintenance*" in International Family Law (Jordans, June 2010)

Sandra is also a member of the editorial board of the IAML Online News, in which E-journal she publishes frequently.

Events

Sandra is serving on the Co-ordination Team of DM Academy, dealing with the operational control of DM Academy, the Training Establishment of Delissen Martens, certified by the Dutch Bar Organisation with effect of 1 January 2014. Sandra is also a trainer of DM Academy.

Furthermore Sandra has been asked several times as a speaker on international family law topics:

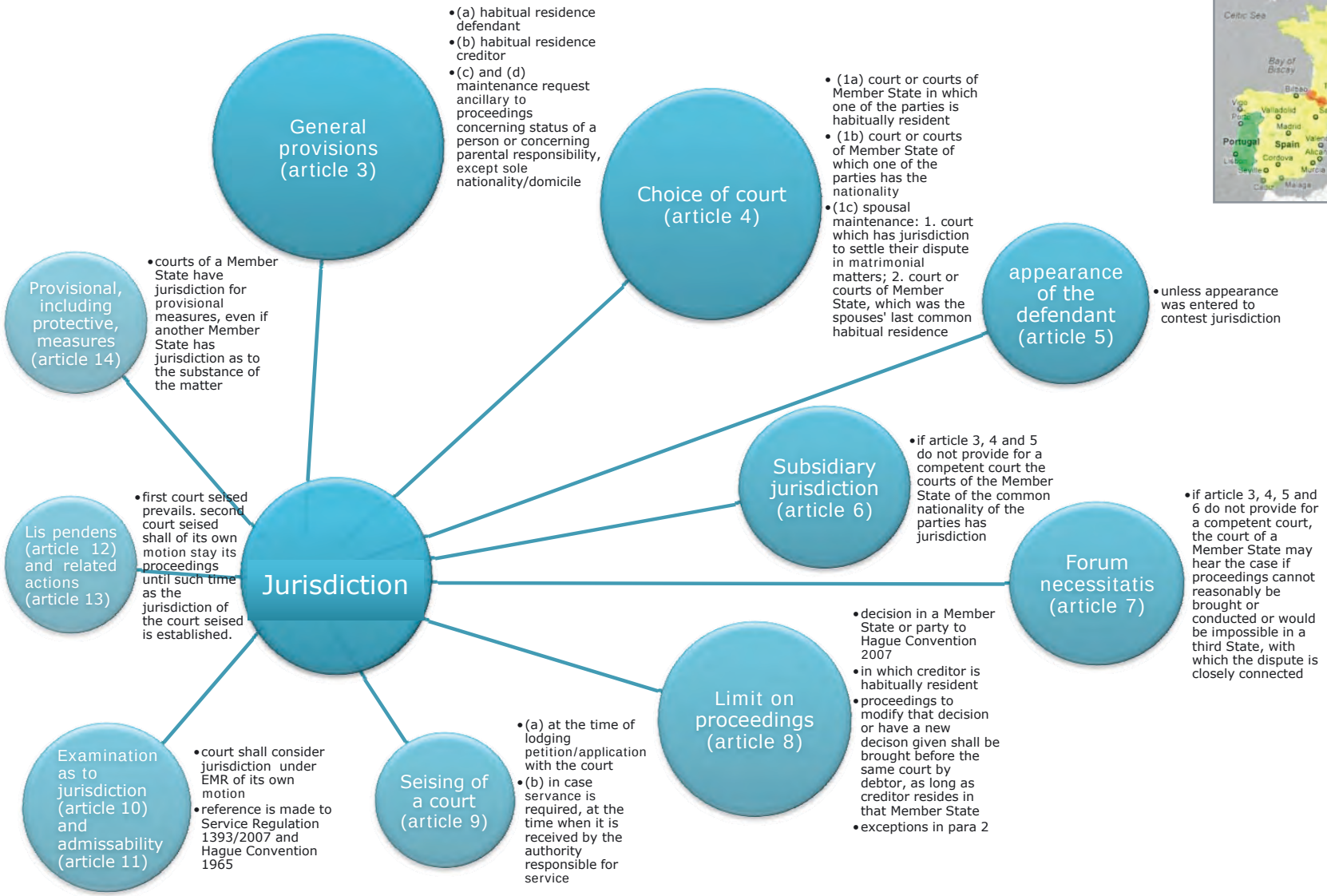
- IAML symposium "Introduction to European Family Law" (26-27 November 2015) Berlin, where she held a lecture on the EU Service Regulation *"Are you being served?"*;
- IAML Surrogacy Symposium (17-19 May 2015) London, where she presented the latest legal information and developments with regard *surrogacy in The Netherlands*;
- IAML Annual Meeting 2014 in (10-14 September 2014) in Budapest, where she has been participating in a panel on *same sex marriage around the world.*
- IAML European Family Law Conference *"Families around borders"* (16 and 17 June 2014) in Budapest, where she lectured on the "*Financial aspects of breakdown of marriage and cohabitation".*
- IAML European Chapter Conference meeting 2013 in Salzburg where she has been participating in a panel of Family Lawyers from around Europe as they take part in a comparative discussion *about their respective matrimonial property regimes, how they treat foreign regimes, and what this means for international couples*.
- IAML European Chapter Conference meeting 2012 (15 April 2012 - 22 April 2012) in Elounda, Crete (Greece) where she held lectures *"EU Maintenance Regulation: Minotaur or Magnifique?"* and *"Marge and the Maintenance Regulation"* with English Family Law barrister Tim Amos QC.
- Experts4Expats Family law 27 January 2012, "*Experiences with the EU Maintenance Regulation 4/2009"* with English Family Law barrister Tim Amos QC
- Experts4Expats Family law 4 February 2011, **"***The Effectiveness of pre-nuptial agreements in England & Wales and The Netherlands***"** with English solicitor Simon Bruce
- Lecture on 18 November 2009 to the Family Team at Farrer & Co, London (*on the aspects of Dutch Private International Law, Hague Convention on the Law Applicable to Matrimonial Property Regimes 1978 and Dutch Law regarding prenuptial agreements*)

Memberships

Sandra is an accredited family lawyer/mediator and member of the Dutch Association of Family Lawyers and Divorce Mediators (vFAS) and a fellow of the International Academy of Matrimonial Lawyers (IAML), for which body she is serving as a Vice President of the European Chapter and further as a Co-ordinating Chair of the Hague Committees, member of the Editorial Board of the IAML Online News, the IAML Forced Marriage Committee and European Chapter Instruments Committee. Sandra will also chair the CLE of the IAML European Chapter Meeting in Amsterdam and The Hague in May 2015. Until recently she was also Chair of the UNICEF Regional Committee for The Hague and surrounding municipalities.

DELISSEN MARTENS

Marge and the Maintenance Regulation 4/2009



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verburgt@delissenmartens.nl

NO: [redacted]

[redacted]

IN THE HIGH COURT OF JUSTICE

THE FAMILY DIVISION

Matrimonial cause proceeding in the Principal Registry treated by virtue of section 42 of the Matrimonial and Family Proceedings Act 1984 as pending in a divorce county court

BETWEEN [redacted] Petitioner

AND [redacted] Respondent

Before [redacted] **sitting at the Royal Courts of Justice, The Family Division, Strand, London, WC2A 2LL on** [redacted]

UPON HEARING Counsel [redacted] for the Petitioner wife and Counsel (Mr. [redacted] for the Respondent husband on the Petitioner's application for maintenance pending suit (to include in respect of legal costs) dated [redacted] and upon a further directions appointment

AND UPON the Petitioner and the Respondent acknowledging and agreeing as follows:

(A) the sum of US$1,250,000 shall be released to the Petitioner in accordance with clause (E) below as follows:

(i) US$700,000 on account of her legal costs in these proceedings until the conclusion of the stay application due to commence on [redacted] and on account of her ultimate capital share and/or award and/or entitlement and/or equitable distribution regardless of whichever jurisdiction determines the ancillary financial proceedings;

(ii) US$550,000 on account of the Petitioner's deposed maintenance needs (without prejudice to either party's arguments in the future in either jurisdiction as to reasonableness, quantum, needs, reallocation, "add back" and including as to whether this sum should be treated as an advance on capital);

(B) the sum of US$1,250,000 shall be released to the Respondent as follows:

(a) US$700,000 from joint funds in accordance with clause (E) below;

(b) the balance from funds already held by the Respondent in his sole name;

(i) of the sum of US$700,000 to be released to the Respondent pursuant to clause (B)(a) above, the sum of US$300,000 shall be on account of his legal costs in these proceedings until the conclusion of the stay application due to commence on [redacted] and the said sum of US$300,000 shall be on account of his ultimate capital share and/or award and/or entitlement and/or equitable distribution

regardless of whichever jurisdiction determines the ancillary financial proceedings;

(ii) the balance referred to in clause (B)(b) plus the balance of US$400,000 (having deducted US$300,000 on account of the Respondent's legal costs pursuant to clause (B)(i) above) shall be without prejudice to either party's arguments in the future in either jurisdiction as to reasonableness, quantum, needs, reallocation, "add back" and including as to whether this sum should be treated as an advance on capital;

(C) the distribution to be made in accordance with clause (A)(ii) above is without prejudice to the Respondent's contention that the Petitioner's deposed maintenance needs are not reasonable and without prejudice to the Petitioner's contention that her deposed maintenance needs are reasonable;

(D) the sum to be paid to the Petitioner pursuant to clause (A)(i) above and US$300,000 of the sum to be paid to the Respondent pursuant to clause (B)(a) above shall be paid directly to the Petitioner's and to the Respondent's respective solicitors;

(E) the sums to be paid to the Petitioner pursuant to clause (A)(i) and (ii) above and to the Respondent pursuant to clause (B)(a) above shall be paid forthwith from HSBC Jersey (US dollar) account number [redacted] and shall be paid by each of them in the first instance respectively into an account that has already been disclosed;

(F) that each shall be held accountable (in appropriately broad terms consistent with any applicable duty of disclosure) for expenditure of the sums to be paid to the Petitioner and to the Respondent pursuant to clauses (A)(ii) and (B)(ii) respectively;

(G) they shall cooperate and take all steps necessary to close the Merrill Lynch CMA Pro-share account number [redacted] on the basis that the balance of the proceeds currently standing to the credit of that account (approximately US$46,165) shall be paid into HSBC (USA) account number [redacted] in the joint names of the parties;

(H) neither party shall seek to rely upon the fact that a further hearing has been listed in accordance with paragraph 4 below in any stay proceedings in either jurisdiction including at the hearing of the Respondent's application for a stay listed on [redacted]

(I) pursuant to US Internal Revenue Code Section 71(b)(1)(B) they shall designate and do designate all payments to be made to the Petitioner pursuant to clause (A) above as excludible and non-deductible payments (i.e. non-alimony;

(J) neither party shall seek to rely upon the application of clause (I) above in the future in either jurisdiction as affecting the proper classification of the payments to be made to the Petitioner pursuant to clause (A) above.

IT IS ORDERED THAT:-

1. Clauses (H)(d) and (e) in the preamble to the Order made by Mrs Justice [redacted] on [redacted] shall be discharged but otherwise the said Order and Undertakings shall remain in full force and effect;

2. The Respondent do file and serve by not later than 5.00pm on Friday [redacted]:

(i) his affidavit in response to the Petitioner's Fourth Affidavit sworn on [redacted] on the basis that he shall in addition in his affidavit respond to the allegations raised as to his whereabouts in the analysis of his Schedule of Movements and bank statements referred to in court on [redacted]

(ii) a corrected and updated Schedule of Movements up to and including [redacted];

(iii) copies of his BA flight records and USA and UK passport entries from [redacted]

(iv) a copy of the lease in relation to the property occupied by the Respondent's girlfriend ([redacted]) in [redacted];

(v) any report on New York law in response to that filed on behalf of the Petitioner by Mr. [redacted];

3. The hearing of the Respondent's application for a stay listed on [redacted] be extended by 1 day to 5 days on the basis that the first day (Monday) shall be a judicial reading day and the parties are not to attend;

4. This matter shall be further listed for consideration of maintenance pending suit (to include in respect of legal costs) on the first open date after [redacted] (time estimate 2 days) to be fixed by Counsel's clerks within 14 days of today;

5. The costs reserved by District Judge [redacted] on [redacted] of the Petitioner's application dated [redacted] and the costs of the Petitioner's application dated [redacted] for maintenance pending suit (to include in respect of legal costs) shall be further reserved and reserved to the Judge at the hearing of the Respondent's application for a stay listed on [redacted].

The Down Town Association
60 Pine Street
New York, NY 10005

Effective Prosecution of Hague Cases

Robert Arenstein, New York, New York

INTERNATIONAL ACADEMY OF FAMILY LAWYERS

EFFECTIVE PROSECUTION OF HAGUE CASES – FEDERAL AND STATE

HOW TO TRY AN INTERNATIONAL CHILD ABDUCTION CASE UNDER THE HAGUE CONVENTION

By Robert D. Arenstein[1]
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Introduction

As our society becomes increasingly globally connected through the ease of international air travel, the advent of the internet, and the strength of international commerce, it is inevitable that family relationships will also enjoy international diversity. However, when parents from diverse national origins decide to dissolve their matrimonial ties, parental preferences concerning where to raise the children of that marriage can result in conflict. In response to the growing problem of international child abduction, approximately 97 countries have now adopted the Hague Convention on the

[1] A Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. A Member of the New York, New Jersey, Florida and District of Columbia Bars. I have tried, advised, participated and served as an expert witness in over four hundred hague cases.

Civil Aspects of International Child Abduction [Hague Convention].[2] Since the Treaty is fairly new in the United States, the attorney's job is often twofold. First, the attorney must, as always, represent his or her client vigorously. Second, the attorney is often faced with the task of educating both the bench and the bar on the provisions and the proper application of the Convention.

Abduction of the Child[ren]

A parent in a Contracting State who discovers that his or her child[ren] has been wrongfully abducted to the United States or is being wrongfully retained in the United States usually contacts the Central Authority in the United States or in the State of the child[ren]'s habitual residence.[3] Either Central Authority will mail the Petitioner a **Request for Return** form which will be filled out[4] and returned to that Central Authority.[5] The United States Central Authority also forwards a pamphlet called "International Parental Child Abduction[6]." If the **Request for Return** has been filed with a foreign Central Authority it will be forwarded to the United States Central Authority.

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[2] Hague Convention, on the Civil Aspects of International Child Abduction, October 25, 1980, *reprinted in* 19 I. L. M. 1501 [hereinafter Hague Convention].

[3] Hague Convention, *supra* note 1, Article 8 ("Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.").

[4] Hague Convention, supra note I, Art. 8 (Lists all information that must be included on the **Request for Return** form).

[5] Alternatively, the Petitioner may apply for return directly to the United States Central Authority, the United States Department of State *Bureau of Consular Affairs* in Washington, D.C. or contact an attorney in the United States directly to assist in filing a **Request for Return** in the United States.

[6]Available from the U.S. Department of State.

Once the United States Central Authority has received the **Request for Return**, a Central Authority representative who handles cases from the child[ren]'s state of habitual residence[7], will try to put the Petitioner in touch with a lawyer in the state in which the child[ren]is most likely being retained.[8]

During the initial phone contact, the Petitioner will generally relate to the attorney his or her version of the story of the abduction or retention. The attorney should then explain the Petitioner's options.[9] Often the abducting parent has obtained an *ex parte* Order of Protection, Restraint or even Temporary Custody in the United States.[10] Such *ex parte* Orders are common in Hague Cases.[11] The abducting spouse often seeks the protection of the courts in his or her "new" country by alleging spousal abuse, child

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[7] The term "habitual residence" will be discussed in depth under the heading "Building the Case."

[8] It is of course preferable to retain an attorney who has experience with the Hague Convention, but this is not always possible. Although the Department of State is in contact with many attorneys who have handled Hague cases throughout the country, there is a shortage of attorneys who are comfortable taking a Hague case. Often attorney's network with each other for quick Hague educations.

[9] Such options may include the following: trying to obtain a voluntary return which can be negotiated by the Central Authority or an attorney; trying to settle out of court, which is easier on the children and less expensive; or filing a formal **Notice of Petition Under the Hague Convention** and **Petition for Return of Children to Petitioner Under the Hague Convention**.

[10] Hague Convention, *supra* note 1, Article 17 (The sole fact that a decision relating to custody has been given or entitled to recognition in the requested state, is not grounds for refusing to return the child[ren] under the Convention.); Meredith v. Meredith, 759 F.Supp. 1432 (D.Ariz1991), Mahoney v. Mahoney 02 CIV 981 (So. Dist NY Brieant J. 2002)

[11] Oftentimes the Petitioner has not been served with these *ex parte* orders, so the attorney should make a diligent effort to determine what procedural moves the abducting parent has taken in the United States. This will be most important if the left-behind parent comes to the United States and attempts to see the child[ren]. If there is an order keeping the Petitioner away from the abductor and/or the child[ren], the police may become involved and thereby complicate matters even further.

abuse or fear of re-abduction.[12] These Orders and proceedings may be stayed by the court entertaining the Hague Petition upon the bringing of an Order to Show Cause (discussed later). Such a stay is permitted, but not required. See Mahoney v. Mahoney, supra.

Role of the Fax Machine

The International Child Abduction Remedies Act [ICARA][13] establishes the procedures for the implementation of the Hague Convention in the United States. One of the more useful provisions of ICARA can be found in §6 whereby the rules of evidence are relaxed for Hague Convention cases.[14] §6 provides that documents need not be authenticated in order to be admitted into evidence in a Hague case,[15] therefore, the fax machine may be the lawyer's best friend in one of these cases. Due to distance problems and speed requirements[16] in Hague Convention cases, the United States

[12] One judge sitting on a Hague case said he would be surprised to find a case involving children and parents where there was no accusation of abuse.

[13] International Child Abduction Remedies Act, 22 U.S.C. 11601 et. seq. Public Law 100-300 100th Congress [H.R. 3971, 29 April 1988].

[14] Id., 22 U.S.C. 9005, §6 ("With respect to any application to the United States Central Authority, or any petition to a court under section 4, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.").

[15] Id.

[16] Hague Convention, *supra* note 1, Article 1 (It is the purpose of the Convention to secure a prompt return of abducted children.); *see also*, Hague Convention, *supra* note 1, Article 11 ("The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children."); *see also,* Hague Convention, *supra* note 1, Article 11 (A Hague Convention case should not exceed a six (6) week period from the date of commencement of the action until the proper authority has decided the case.).

courts have permitted documents with copies of signatures to be entered into evidence. The attorney may also fax his or her retainer agreement to the potential client and receive a signature within minutes. The client and the attorney can then make arrangements for the retainer fee to be deposited directly into the attorney's trust account by wire deposit. Representation can then start within a short period time.

EXPEDITED PROCEEDINGS.

The Convention's drafters envisioned a streamlined process that would lead to the abducted child's prompt return to his or her habitual residence. The Convention provides that "[c]ontracting [nation-]States shall act expeditiously in proceedings for the return of children. The goal of ICARA is that the Country Addressed will reach a decision as to where the custody hearings will take place within six weeks. If a determination has not been made in six weeks, then "[t]he applicant or the Central Authority of the requested State . . . shall have the right to request a statement of the reasons for the delay[ed proceedings]." Moreover, a reply from the Country Addressed shall be provided as to the reason for the delayed proceedings.

In a case involving the return of children to a parent in Mexico, the *March* court interpreted the term "prompt" to apply to the nature of the court proceedings. This ruling was confirmed by the appellate court. The *March* court stated that "[ICARA] provides a generous authentication rule." "No authentication of such application, petition, document or information shall be required in order for the application, petition, document or information to be admissible in court." The *March* court clarified that, "the provision served to expedite rulings on petitions for the return of children wrongfully

removed or retained. Expeditious rulings are critical to ensure that the purpose of the treaty—prompt return of wrongfully removed or retained children—is fulfilled."

CIVIL AND NONEXCLUSIVE REMEDY.

ICARA is intended as a civil remedy. Although the term "wrongful abduction" suggests criminal conduct, ICARA is not designed as an extradition treaty. Unlike the extradition process, where the criminal is returned to the United States to face charges, ICARA was enacted to facilitate return of the child to the nation of habitual residence.17 Upon the child's arrival at the location of habitual residence, the courts of the habitual residence may further resolve custody disputes.

In addition, ICARA is a nonexclusive remedy The Convention provides the Central Authority with "[t]he power… to order [the] return of the child at any time . For instance, in *Zajaczkowski,* the court ordered the prompt return of the child, adopting the writ of habeas corpus as a procedural device to be used in conjunction with ICARA remedies.

Elements of a Cause of Action under the Convention

In order to have a cause of action for return it must first be determined that the Convention is applicable to the particular case. Certain elements must first be met in order for the Convention to apply; i.e. the child[ren] sought must be under sixteen [16]years of age[18] and have been wrongfully removed or retained away from the habitual

.

[18] Hague Convention, *supra* note 1 Article 4

residence of the child[ren][19]. The Convention does not apply if either the country of habitual residence of the child[ren] or where the child[ren] is being retained is not a signatory to the Convention.[20]

Building the Case

The attorney representing the left-behind parent must show, by a preponderance of the evidence,[21] that a child[ren] under the age of sixteen (16) years [22] was removed from the child[ren]'s state of habitual residence,[23] in breach of a right of custody attributable to the Petitioner[24] which the Petitioner had been exercising[25] at the time of the wrongful removal.[26] Note that Article 12[27] permits the authority, hearing the case, to refuse to return a child[ren] who was wrongfully removed or retained if the Petitioner waited more than one year after the removal or retention to file the **Petition**[28] and the

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[19] Hague Convention, *supra* note 1 Article 3.

[20] Grimer v. Grimer, 1993 WL 142995 (USDC Kan. 19930), Currier v. Currier, 1994 WL392606(D.N.H. 1994).

[21] ICARA, *supra* note 12, 42 U.S.C. 11603(e), §4.

[22] Hague Convention, *supra* note 1, Article 4.
It is important to note that the Convention ceases to apply once the child[ren] attains the age of sixteen (16) years regardless of a pending petition.

[23] Hague Convention, *supra* note 1, Article 1.

[24] Hague Convention, *supra* note 1, Articles 3 and 5.

[25] Hague Convention, *supra* note 1, Article 3.

[26] Hague Convention, *supra* note 1, Article 1.

[27] Hague Convention, *supra* note 1, Article 12.

[28] This one year time period does not bar a Petitioner from bringing a case, but instead adds to the Respondent's defense that the child[ren] is well settled in his or her

child[ren] is settled in its new environment. The court, however, may still order a return, if it finds it appropriate, even if the child[ren] is settled in its new environment and more than one year has passed.

Habitual Residence

The attorney has to prove that the child[ren] was removed from or retained away from the country of habitual residence[29] of the child[ren]. Habitual residence was purposely left undefined by the drafters of the Convention in order to leave room for judicial interpretation and flexibility and in order to prevent mechanical application of the term.[30 1] Friedrich v. Friedrich 78 F3d 1060 (6th Cir. 1996) held that a person having valid custody rights to a child under the law of the country of the child's habitual residence cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once it determines that the parent exercised custody rights in any manner, the court should stop - completely avoiding whether the parent exercised the custody rights well or badly.

In Sealed Appellant v Sealed Appellee --- F.3d —, 2004 WL 2915345 (5th

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new state. This will be discussed further.

[29] Hague Convention, *supra* note 1, Article 4 ("The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody of access rights.").

[30] Perez-Vera Report, *supra* note 21, ¶III B (The Autonomous Nature of the Convention.); *see also*, In Re Bates, No. CA 122.89, High Court of Justice, Family Div'n. Ct. Royal Court Justice, United Kingdom (1989);, Mozes v. Mozes, 239 F.3d 1067(9th Cir, Jan. 2001), (Part of Materials) Levesque v. Levesque, 816 F.Supp. 662 (D.Kan. 1993), citing Meredith v. Meredith, 759 F.Supp. 1432, 1433 (D.Ariz. 1991), Matter of David B. v. Helen O.(Fam.Ct. N.Y. Cty., 1995) 164 Misc.2d 566.

Cir.(Tex.)) the Fifth Circuit Court of Appeals adopted the reasoning from Friedrich II and held that in the absence of a ruling from a court in the child's country of habitual residence, when a parent has custody rights under the laws of that country, even occasional contact with the child constitutes "exercise" of those rights. To show failure to exercise custody rights, the removing parent must show the other parent has abandoned the child. It held that under the law of Australia, the children's country of habitual residence, the father was "exercising" his rights of custody when the mother removed the children. It also held that no custody suit need be pending for the mother's removal to be wrongful under the Convention.

In Croll v Croll, 229 F.3d 133 (2d Cir.2000), Mrs. Croll removed her daughter from Hong Kong to the United States in violation of her custody agreement with Mr. Croll. Mr. Croll filed an ICARA petition seeking her return to Hong Kong. Under their agreement, Mrs. Croll maintained sole "custody, care, and control" of the child, and Mr. Croll had a right of "reasonable access." The agreement also provided that the child "not be removed from Hong Kong until she attains the age of 18 years" without leave of court or consent of the other parent. The district court concluded that this ne exeat clause created rights of custody under the Convention and granted Mr. Croll's petition. In reversing, the Croll majority relied on three main conclusions: (1) that Mr. Croll's ne exeat right was not a right to determine the child's place of residence, but only a limitation on Mrs. Croll's right to determine the child's place of residence; (2) that his ne exeat right could not be exercised absent removal; and (3) that the history and drafters' intent of the Hague Convention supported the view that a ne exeat right was not custodial. IThe Second circuit held that a ne exeat right is not custodial. In reaching

its view that the ne exeat right was only a limitation, the Court relied in part on how the particular agreement gave Mrs. Croll the sole "custody, care, and control" of the child, and thus the sole right to determine her place of residence within Hong Kong. The Fourth and Ninth Circuits had agreed with this conclusion. (See Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir.2003), cert. denied --- U.S. ----, 124 S.Ct. 805, 157 L.Ed.2d 732 (2003); Gonzalez v. Gutierrez, 311 F.3d 942, 954 (9th Cir.2002).

In Furnes v Reeves, 362 F.3d 702 (11th Cir., 2004), the Eleventh Circuit distinguished Croll because it involved Norwegian law and Plaintiff Furnes's ne exeat right had to be be considered in the context of his additional decision-making rights by virtue of his joint “parental responsibility" under Norwegian law. In reaching its view that the ne exeat right was only a limitation, the Croll majority relied in part on how the particular agreement in Croll gave Mrs. Croll the sole "custody, care, and control" of the child, and thus the sole right to determine Christina's place of residence within Hong Kong. The Eleventh Circuit noted that under Norways "Children Act", parental responsibility is broadly defined to include the right "to make decisions for the child in personal matters." Where parents exercise "joint parental responsibility" but the child lives with only one parent, the parent with whom the child resides has decision-making authority "concerning important aspects of the child's care," but not all aspects of the child's care. While the parent with whom the child resides has the authority to determine where the child will live within Norway, the Children Act grants a parent with joint parental responsibility, decision-making authority over whether the child lives outside Norway. Both parents must consent to the child moving abroad. This joint parental responsibility effectively gave the father the right, generally referred to as a "ne

exeat " right, to determine whether the child could live outside of Norway with her mother. The Eleventh Circuit held that Furnes's rights to his daughter under Norwegian law were the type of rights that entitled him to the return of his child under the express terms of the Hague Convention. The court held that “rights of custody" included "rights relating to the care of the person of the child," and in particular, "the right to determine the child's place of residence." Furnes's ne exeat right granted him the substantive right (albeit a joint right) to determine whether the child lives within or outside Norway, and thus the right to determine jointly with Reeves the child's place of residence. This ne exeat right in the context of Furnes's retained rights constitutes a "right of custody" as defined in the Convention.

Habitual residence is not defined by a specified period of time, it is more a state of being or a state of mind.[31] In that regard, it differs from the "home state" analysis under the UCCJA and the PKPA[32] which clearly uses six (6) months as a bench mark. Habitual residence can technically be established after only one day.[33] "The leading view is that habitual residence is the permanent physical residence of the child as distinguished from the legal residence or domicile."[34] If a family decides to move, permanently, to another country and thereafter the parents sell the family home, quit

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[31] Perez-Vera, *supra* note 21 .

[32] PKPA, *supra* note 38.

[33] Although a decision in the New York Supreme Court, Kings County (Cohen v. Cohen, Index No. 22490/93, August 1993) posed, but left unanswered, the following question, ". . .whether one party may change their mind as to a move to another country and thereby negate an apparent change in the child's habitual residence."

[34] William Hilton, Litigation under the Convention on the Civil Aspects of International Child Abduction, Done at the Hague on 25 Oct 1980: An Overview (1992) (on file with the author), See Mozes v. Mozes,, *supra*

their jobs and purchase a residence in another country, the family has effectively changed the habitual residence of the child[ren].[35] Therefore, if one parent then decides the move was not what he or she really wanted, the child[ren] cannot simply and unilaterally be removed from the "new" habitual residence.[36]

To establish a basis for asserting habitual residence the attorney must carefully gather all relevant data from the client. This may appear to be an obvious instruction, but it can often prove to be a difficult task. Aside from the common difficulties involved in getting unfavorable details from a client, the Hague attorney may confront cultural and lingual differences that hinder the communication process. Oftentimes it is difficult to explain to a client, in his or her second language, that the Hague proceeding is not a custody proceeding at all. The attorney must carefully explain that the Hague hearing will determine only where the custody hearing should take place, not who will have custody of the child[ren]. The attorney will also find that this rule must be reinforced time and again as the client insists on describing how negligent the other parent can be and has been.

To avoid certain misunderstandings, the attorney should attempt to collect any and all documents regarding the family such as affidavits from teachers and neighbors regarding how "settled" the child[ren] were in the foreign jurisdiction. To accomplish this, it may be necessary for the client to contact his or her foreign lawyer in order to obtain the pertinent documents.[37]

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[35] D'Assignies v. Escalante, (No. BD 051876, Super. Ct. of Cal. December 9, 1991) (citing In re Bates, HighCourt of Justice, Family Division, United Kingdom; February 23, 1989). Mahoney v. Mahoney, supra

[36] Cohen v. Cohen, supra note 31, But see Diorinou v. Mezitis 237 F3d 133 (2d Cir, 2001) where other parent acquiesced to change of residence.

[37] If the client does not have an attorney in his or her home country, it may be necessary to have the client obtain foreign counsel in order to make access to necessary documentation quicker and simpler.

The attorney has other sources of information that he or she may not be aware of. The Central Authority in the child[ren]'s state of habitual residence may have documents on record that will assist the attorney in building his or her case. For instance, the attorney may discover that it is difficult to show that the client had a right of custody of the child[ren] at the time of the removal. Based on information from the government and the American Embassy, the foreign Central Authority may be able to gain access to documents that the attorney and client cannot.

The issue of habitual residence can be a controlling factor as to whether an abduction will apply under the Hague Convention. In one case, Santiago v. Lopez[38], the court ruled that children, who lived with their parents on a United States military base in Germany for nine years, were not habitual residents of Germany. In contrast, in a more recent Federal Court of Appeals case, Friedrich v. Friedrich[39], the court ruled that under the case of Dare v. Secretary of the Air Force[40], children living on an army base were habitual residents of the country in which the base was located.[41]

Rights of Custody and Rights of Access

A right of custody and/or a right of access "may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[42] For example, if custody has already

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38 Index No.71083-91 (S.Ct.of New York, County of Bronx, August, 1992).

39 983 F.2d. 1396 (6thCir.1993), 78 F3d 1060 (6th Cir, 1996)

40 608 F.Supp. 1077 (D.Del.1985), *aff'd no opinion* (3rd Cir.1986).

41 This is true regardless of the fact that the parents may be citizens of another country or domiciled outside that country. In point of fact, military personnel retain, as their legal residence, their last place of residence prior to entry into service.

42 Hague Convention, *supra*. note 1, Article 3; *see* Roy Peter Costa v. Debra Jean Costa, (U.K. 1991) High Court of Justice, Family Division CA 518/91; *see also* In re C

been awarded to one parent then that parent has a right of custody. If the other parent has been granted visitation rights, then that parent has a right of access. This right of access, though, is not sufficient in and of itself to qualify as a right of custody sufficient to order a return under the Convention. In a very controversial case, the Second Circuit in a 2-1 decision ruled in the case of Croll v. Croll that a ne exeat order did not give a "right of custody" under the treaty.[43] In a stinging dissent, Justice Sotomayor is critical of the majority looking at "right of custody" as a pure custody terminology. The Croll decision was distinguished in a First Circuit Case, Whallon v. Lynn, [44], the court discusses that Croll's ne exeat clause was one of a negative right and in this case the ne exeat was a positive right

If one parent suspects that the other might abduct the child[ren], that parent may obtain a court order that prevents the other parent from leaving the jurisdiction with the child[ren]. This is known as a ne exeat order. This too may give the parent a right of custody as defined by Article 3 and 5 of the Hague Convention.[45]

There are times however when the notion of who has a right of custody becomes clouded.[46] If parents are married and have not begun any divorce or custody proceedings, and thus have joint custody, the United States views them as having an equal right of custody of the child[ren]. However, this may not be true in other countries. In a situation where the child was born out of wedlock, many countries will give a superior right of custody to the mother. Custody rights are defined by the laws of the

[43] Croll v. Croll, 229 F3d. 133 (2nd Cir, 2000) , 122 S.Ct. 340, 151 L.E. 2d 256. cert.denied (10/09/2001)

[44] Whallon v. Lynn 2000WL1610609 (1st Cir, 2000)

[45] Hague Convention, supra note 1, Article 3 & 5; *see* Costa *supra* note 40, but see Croll v. Croll *supra* note 41.

[46] It, therefore, becomes the job of the attorney to explain to the judge that the right of custody can mean different things.

country of the child's habitual residence,[47] so the attorney may have to do some research into rights of custody and access in the foreign jurisdiction prior to filing the petition.

A parent does not have to have actual physical custody to be exercising rights of custody. Decisions regarding the child's well-being, including the right to determine the place of residence of the child[ren], are considered rights of custody.[48] In the case of Costa v. Costa,[49] the court found that, "the right to determine a child's place of residence is therefore included among the rights of custody to which Article 3 applies.[50]" Therefore, if a court or a parent must approve a relocation of a child[ren], that very fact gives rise to a recognizable non-custodial "right of custody" within the meaning of the Convention[51]

In an Australian case, C v. C,[52] the court found that a clause in a custody order stating that "neither the husband or the wife shall remove the child from Australia without the consent of the other..." was sufficient to find that the father had rights of custody.[53] Although the father did not have the right to determine the place of residence within Australia, he did have the right to decide whether the child remained in Australia or lived anywhere outside that country.[54]

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47 Meredith v. Meredith, 759 F.Supp. 1432, 1434(D.Ariz.1991).

48 Hague Convention, *supra* note 1 Article 5.

49 Costa *supra* note 40.

50 Id.

51 Costa, *supra* note 40, but see Croll v. Croll, *supra* Note 41.

52 1 FLR 403 (1989), 1 WLR 654 (1989).

53 Id.

54 Id.

In some instances, it may be beneficial to obtain a custody decree prior to applying for return of the child[ren] under the Convention. An order which is based, in part, upon a finding that there was a wrongful removal or retention within the meaning of Article 3 may speed up the process of return.[55] Even if there is a custody decree, the Convention does not require its enforcement or recognition;[56] "it only seeks to restore the factual custody arrangements that existed prior to the wrongful removal or retention."[57]

Custody rights must have actually been exercised by the left-behind parent at the time of the breach by the abducting parent, or would have been exercised but for the breach, in order for the Convention to apply.[58] The burden is on the petitioner to prove that his or her custody rights were or would have been exercised. The burden is on the party opposing return to prove the nonexercise of custody rights.[59]

For example, in Meredith v. Meredith[60], Mrs. Meredith brought an action under the Hague Convention, in the United States, claiming that her child was wrongfully removed from England by the child's father. Mrs. Meredith had taken her child to France, on December 7, 1989, with the consent of the child's father. A few weeks later, she telephoned her husband and notified him that she would not be returning to Arizona with their child. Instead, she moved to England without notifying her husband and, with the help of her family, concealed her whereabouts from him.

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55 51 Fed. Reg. 10498, 10506 (1986).

56 Hague Convention, *supra* note 1, Article 17.

57 51 Fed. Reg. at 10507(1986).

58 Id.

59 Hague Convention, *supra* note 1, Article 13.

60 759 F.Supp. 1432 (D.Ariz.1991).

On April 26, 1990, Mr. Meredith was awarded custody by an Arizona court after Mrs. Meredith had been served with notice, through her parents, and given an opportunity to be heard to which she had not responded. A month later, Mr. Meredith, with the help of an attorney in England, regained physical custody of the child and brought her back to the United States. It was after the child's removal that Mrs. Meredith filed a petition under the Convention.

The Court determined that Mrs. Meredith only had physical possession of the child rather than legal rights of custody at the time of the removal, even though prior to the custody order both parents had legal custody and denied the petition.[61]

Article 15 Ruling - Decision of Wrongful Removal or Retention

Under Article 15, the Treaty provides that the judicial or administrative authorities, prior to issuing an order for the return of the child[ren], can request that the authorities of the state of habitual residence of the child[ren] issue a decision stating that the removal or retention was **wrongful** under their laws.[62] It is very helpful to have the Central Authority or the court of the foreign country issue such a determination prior to bringing the petition for return, if possible. It can be argued that this determination, though not binding, is certainly persuasive evidence on the issue of wrongful removal. If this has not been done in advance and the judge requests it, this could further unduly delay the return of the child[ren] until such a determination is rendered.

Immigration and the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction focuses on issues of residency, not citizenship. It is important to note that the Convention does not confer any immigration benefit. Anyone seeking to enter the United States who is not a

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61 Id. at 1436.

62 Hague Convention, *supra* note 1 Article 15.

United States citizen must fulfill the appropriate entry requirements, even if that person was ordered by a court to return to the United States. This applies to children and parents involved in any child abduction case including a Hague Convention case.

When a taking parent in a Hague Abduction Convention case is ineligible to enter the United States under United States immigration laws, the parent **may** be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole in order to participate in custody or other related proceedings in a United States court.

Drafting the Hague Convention Papers

It is important to stress that time is of the essence in a Hague Convention case.[63] The lawyer may and should begin drafting the petitioning papers immediately. The actual Hague **Petition** generally requires only a small amount of case specific information and therefore may be drafted before meeting with the client in the United States. For these purposes, the information in the **Request for Return** is often sufficient. The Petitioner usually wishes to come to the United States as soon as possible in order to see the child[ren]. In such a case it is necessary to obtain a stay of any Orders of Restraint or Protection quickly. Note that immediate contact with the abducting parent may not be advisable if the Petitioner believes the abductor may again flee with the child[ren]. The attorney should use his or her best judgment.

Warrant in Lieu of Writ of Habeas Corpus

[63] Hague Convention, *supra* note 1, Article 11 (The Convention requires that Hague cases proceed promptly and expeditiously); Hague Convention, *supra* note 1, Article 12 (Creates an additional defense if an action is not brought within one year between the abduction and the date of filing the **Petition for Return**.); Also, the more swiftly the attorney acts, the less time there is for the abducting parent to learn of the proceedings and re-abduct or secrete the child[ren].

If the client has an idea of where the abducting parent and child[ren] are, but is concerned that the abductor may flee again, an **Order for Issuance of Warrant In Lieu of Writ of Habeas Corpus** may be prepared and filed early in the proceeding. Such a Writ, once signed by a judge, permits the proper authorities to take the child[ren] into custody to be presented to the court for the Hague Convention hearing. The document may be modeled after the following:

ORDER FOR ISSUANCE OF WARRANT IN LIEU OF WRIT OF HABEAS CORPUS

The Convention on the Civil Aspects of International Child[ren] Abduction, done at the Hague on 25 Oct 1980 and International Child Abduction Remedies Act, 42 U.S.C. 11601 et. seq.

Upon the reading and filing of the PETITION FOR RETURN OF THE CHILD PURSUANT TO THE CONVENTION and the International Child Abduction Remedies Act and Petitioner's PETITION FOR A WARRANT IN LIEU OF WRIT OF HABEAS CORPUS, it appears that (NAME OF CHILD[REN]) are persons under sixteen (16) years of age, are illegally held in custody, confinement or restraint by (NAME OF ABDUCTING PARENT) (and her family) at (specific location of child[ren]) and from which it appears that a Warrant should issue in lieu of Writ of Habeas Corpus.

ORDERED, that a Warrant of Arrest issues out of and under the Seal of the [name of court] directed to any peace officer within the State of [name of state where the are being held] commanding the peace officer to take into protective custody (NAME OF CHILD[REN]) and release (NAME OF CHILD[REN]) to the Petitioner or his/her agent; and it is further

ORDERED, that this case shall be heard at a hearing scheduled on the __ day of ,__ at __ o'clock in the fore/afternoon of that day at _____, or as soon thereafter as counsel may be heard; and it is further

ORDERED, that the peace officer serve a copy of the following listed documents on [NAME OF ABDUCTOR] and execute and deliver to Petitioner the appropriate proof of service thereof:

(1) Warrant In Lieu of Writ Habeas Corpus; and

(2) Notice of Petition Under Hague Convention; and

(3) Petition For Return of Child[ren] To Petitioner.

ORDERED, that Petitioner or his agent shall not remove (NAME OF CHILD[REN]) from the (name of the state) pending further order of this Court, and it is further,

ORDERED, that this Order gives any peace officer within the (name of state] the authority to search [name of place Petitioner believes the child[ren] are being held), or any other place where (NAME OF CHILD[REN]) are reasonably believed to be present, for the purpose of determining whether (NAME OF CHILD[REN]) are present.

J. S. C.

Notice of Petition Under the Hague Convention

The next likely document to be drafted is the **Notice of Petition**. This document provides the abducting parent with the following: the case caption naming the Petitioner and Respondent; the existence of the Hague Convention[64] and ICARA[65]; the date, place and time of the hearing; notice that Respondent's personal appearance is required at the Hague hearing; and the attorney's address and telephone number.[66] The following is a good model:

[64] *See generally*, Hague Convention, *supra* note 1.

[65] *See generally,* ICARA, *supra* note 12.

[66] The Notice of Petition can be copied almost directly from a previous Notice. They do not change very much from case to case.

NOTICE OF PETITION UNDER HAGUE CONVENTION
The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980 and International Child Abduction Remedies Act, 42 U. S. C. 11601 et. seq.

NOTICE is hereby given to _____, that a PETITION FOR RETURN OF CHILD[REN] (Copy attached) has been filed with the _____ Court of the State of _____, County of ___.

A hearing on this matter will be held at _____ at the Courthouse located at on the __ day of __, 199_, or as soon thereafter as counsel may beard.

YOU ARE ORDERED TO APPEAR PERSONALLY AT THE HEARING.

Dated:

Attorney, Esq.

TO: Respondent

Petition for the Return of the Child[ren] to Petitioner

Finally, the attorney must prepare, file and serve the **Petition for Return of the Child[ren] to Petitioner**.[67] This document is generally broken down into sections.[68]

The Preamble informs the court that the Petitioner is moving under the Hague Convention and that the text of the Hague Convention and ICARA are annexed with the papers. The objectives of the Hague Convention, which are to secure a prompt return of the abducted child[ren][69] and to ensure that the rights of the Petitioner in one

[67] The Petition for Return can be copied from a previous Petition. The form need not change from Petition to Petition.

[68] Such sections include: Preamble; Jurisdiction; Status of Petitioner and Child[ren]; Removal and/or Retention of Child[ren] By Respondent; Custody Proceedings in [Name of country from which child[ren] were abducted]; Relief Requested; Notice of Hearing; Attorneys' Fees and Costs (Convention Article 26 and/or 42 U.S.C. 11607).

[69] Hague Convention, *supra* note 1, Article 1(a); E. Perez-Vera, Hague Conference on

Contracting State are respected by other Contracting States,[70] should also be clearly stated. The most important thing for a lawyer to keep in mind when drafting papers for a Hague Convention case is that, more often than not, the primary purpose of the papers is to educate both the bench and the bar on the Hague Convention.[71]

Under the heading Jurisdiction, the attorney should simply state that ICARA gives the U.S. courts jurisdiction over the case.[72]

The third heading is the Status of Petitioner and Child. Here the attorney sets forth the elements of the cause of action. The Hague Convention applies to cases where a child under the age of sixteen (16) years [73] has been removed from his or her state of habitual residence,[74] in breach of right of custody of Petitioner [75] which the

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Private International Law, Convention on the Civil Aspects of International Child Abduction: Convention and Recommendation Adopted by the Fourteenth Session and Explanatory Report 23, ¶II B (provisional ed. April 1981) (available on BBS electronic bulletin board maintained by the Office of William M. Hilton. The access number is (408) 246-0387) [hereinafter Perez-Vera Report].

[70] Hague Convention, *supra* note 1, Article 1(b); *see also* Id. at ¶II B 16.

[71] *See*, Hague Convention, *supra* note 1, Article 19 (Such an education will involve, among other things, informing the presiding justice and your opposing counsel that the Hague Convention is only to determine what Contracting State has jurisdiction over any and all custody issues. This will become most important when your opposition begins to defend against the Hague Petition. If the judge allows issues of custody to be tried, the purpose of the Hague Convention is defeated. Remember, first and foremost, the Hague is a jurisdictional Convention!)

[72] ICARA, *supra* note 12, 22 U.S.C. 9003(a), §4 ("JURISDICTION OF THE COURTS.- The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.").

[73] Hague Convention, *supra* note 1, Article 4.

[74] Hague Convention, *supra* note 1, Article 1.

[75] Hague Convention, *supra* note 1, Articles 3 and 5.

Petitioner had been exercising[76] at the time of the wrongful removal or retention.[77] The attorney should annex a copy of the original [Request for Return] form with the Petition.

The section entitled Removal and/or Retention of Child[ren] by Respondent sets forth, generally, the approximate date of the alleged abduction and states that the abduction was wrongful under Article 3 of the Hague Convention.[78] This section of the **Petition** may be written very generally by merely stating the existence of a right of custody, but the issue will become more complicated at the Hague hearing where opposing counsel may defend against the **Petition** by alleging that the Petitioner never had any right of custody.[79] This will be covered in more depth under the heading "Defenses to the Hague Convention."

Finally, this section should state as specifically as possible where the Petitioner believes the child[ren] are being held in the United States and that the child[ren]'s habitual residence is the foreign jurisdiction.

Custody Proceedings in [name of country] should reference (and annex) any papers regarding proceedings in the State of habitual residence, including orders or

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[76] Hague Convention, *supra* note 1, Article 3.

[77] Hague Convention, *supra* note 1, Article 1.

[78] Hague Convention, *supra* note 1, Article 3 (This is the client's cause of action. A removal or retention is considered wrongful where: "(a) it is in breach of rights of custody attributed to a person, ..., 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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.").

[79] Hague Convention, *supra* note 1, Article 3 ("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." Such rights include: orders of protection and/or restraint issued by the State of habitual residence; orders of custody either temporary or permanent; equal rights of custody attributable to both parents as a matter of law; and rights of visitation.).

decrees issued by the courts of that state.[80] Here the attorney should cite Article 16[81] which gives the court entertaining the Hague Petition the authority to stay other proceedings regarding the same parties and the same child[ren]. This may also be done by an Order to Show Cause filed in the same Court and served upon the Respondent.

Provisional Remedies refers to requests such as the **Warrant in Lieu of Habeas Corpus** which is based upon the belief that the abducting parent will again remove and secrete the child[ren].

The section called Relief Requested can be drafted like any court order. For instance the attorney may choose to respectfully request the following: (a) an order directing a prompt return; (b) the issuance of a warrant; (c) the direction of notice; (d) an order staying other proceedings; (e) an order directing Respondent to pay Petitioner's costs and fees; and (f) any other and further relief . . . .

The attorney should, under the heading Notice of Hearing, state the law under which notice is being given. For example, "pursuant to 42 U.S.C. 11603(c)[82] the Respondent shall be given notice according to" and then state the appropriate law.

The Hague Convention makes a provision for attorney fees.[83] The attorney may want to ask for fees under the heading Attorney's Fees and Costs [Including

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[80] Again, note that the *ex parte* orders are no more determinative than any United States order. See note 6.

[81] Hague Convention, *supra* note 1, Article 16 ("After receiving notice of the wrongful removal or retention of a child under Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which the child has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.").

[82] ICARA, *supra* note 8, 42 U.S.C. 11603(c), §4 ("NOTICE.-Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.).

Transportation Expenses] Pursuant to Convention Article 26 and/or 22 U.S.C. 9007) and submit a bill for fees incurred to date in the case.[84] If this strategy is taken, a request should also be made for the court to reserve judgment over any further fees.

The above documents can be verified by the client via fax, therefore, the papers may be drafted, filed and served without the client having to be present in the United States.[85]

Choosing a Forum- FEDERAL OR STATE COURT

Any court of competent jurisdiction can entertain a Hague Convention case. Usually cases are brought in state court because most attorneys who practice family law are more familiar with state courts, however, ICARA gives both federal and state courts jurisdiction over Hague Convention cases.[86] Therefore, the attorney should carefully consider where the **Petition** should be brought. Since the Federal courts do not normally hear custody cases, a federal judge may be better able to look solely at the legal issue of jurisdiction, as required by the Convention, without becoming clouded by the custody issues. "Local law regarding ultimate issues of custody are inappropriate and irrelevant."[87] However, the practitioner may still feel more comfortable in the state courts in which he or she normally practices.

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[83] Hague Convention, *supra* note 1, Article 26.

[84] When an Order for Return is granted, the court is required to order the person who removed or retained the child[ren] to pay the necessary expenses incurred by and on behalf of the petitioner "including court costs, legal fees, foster home or other care during the course of the proceedings in the action and transportation costs related to the return of the child unless the respondent establishes that such order would be clearly inappropriate" 22 U.S.C. §9007(b)(3).

[85] For those clients who are unable to read english, remember to alter the verification to say, "The above referenced papers have been read to me. . . .").

[86] ICARA, *supra* note 9, 22 U.S.C. 9003(a) & (b).

[87] Keane v. Courtwright No. 91-DR-40-066 (Family Court for the 5th Judicial Circuit

If an attorney chooses to bring the action in state court, he or she should consider different local or state courts that handle family cases. For instance, a local court or judge may be perceived to display bias toward a local abducting parent. In that case it may be wiser to bring the action in federal court. Although a case could be brought in either the Federal or the State Courts, there have been various methods used to try to remove the case from a particular court. A case brought in the State Court may be removed to the Federal Court under the Federal Removal Statute.[88] Further, a case could be denied a hearing in the Federal Court under the *Younger Abstention Doctrine*.[89]

Serving the Respondent

ICARA provides that notice of a **Petition** under the Hague Convention must be effectuated according to "the applicable law governing notice in interstate child custody proceedings."[90] In the United States, the relevant federal law is the Parental Kidnapping Prevention Act [PKPA][91] which dictates that the Uniform Child Custody Jurisdiction Act [UCCJA] [92] governs the issue of notice.[93] The UCCJA requires that "reasonable notice and an opportunity to be heard" be provided to the Respondent.[94] This does not specifically require personal service, but in a Hague Convention case, the

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of S.C. April 16, 1991).

[88] In Matter of Makmoud 1997 WL 43254 (ED NY Dearie,J 1997)
[89] Grieve v. Tamerin 269 F3d 149, (2nd Cir. 10/17/20010
[90] ICARA, *supra* note 12, 42 U.S.C. 11603(c), §4.

[91] Parental Kidnapping Prevention Act, 28 U.S.C.A. 1738A [hereafter PKPA].

[92] Uniform Child Custody Jurisdiction Act [hereinafter UCCJA].

[93] PKPA, *supra* note 37, 28 U.S.C.A. 1738A [?].

[94] Domestic Relations Law §75-e (McKinney's Consolidated Laws of New York).

Notice of Petition and the **Petition for Return** should ideally be personally served in order to forestall any notice challenge. Of course this is not always possible, especially if the Respondent's whereabouts are unknown.

Often times the Respondent is staying with family in the United States and the Petitioner has a good idea of where to begin looking for the Respondent and the child[ren]. In a case like this, service may be simple. Additionally, frequently the abducting party has availed him or herself of the local courts and obtained an *ex parte* order which has been served upon the client. When appearing at any scheduled hearing, with or without your own stay, it is easy to serve the **Petition** on the Respondent or the Respondent's attorney.

Defenses and Exceptions Under the Hague Convention and Rebutting Those Defenses

Articles 12,[95] 13[96] and 20[97] of the Hague Convention provide the defenses available to the Respondent in a Hague case. Such defenses include alleging that: the Petitioner had no right of custody or access at the time of the removal or retention[98]; the Petitioner was not exercising his or her right of custody[99]; the Petitioner acquiesced to the removal or retention[100]; there is grave risk that a return would expose the child[ren] to harm or an intolerable situation[101]; the child[ren] is of appropriate age and degree of

[95] Hague Convention, *supra* note 1, Article 12.

[96] Hague Convention, *supra* note 1, Article 13.

[97] Hague Convention, *supra* note 1, Article 20.

[98] Hague Convention, *supra* note 1, Article 3.

[99] Hague Convention, *supra* note 1, Article 3.

[100] Hague Convention, *supra* note 1, Article 13(a).

[101] Hague Convention, *supra* note 13(b). Friedrich v. Friedrich 78 F3d. 1060, (6th Cir,

maturity and objects to the return[102]; the child[ren] is settled in the new environment[103]; and/or a return would not be permitted by "the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."[104]

These exceptions however, in light of Article 19, are narrowed to prohibit the making of custody decisions at this level.[105] Article 19, therefore, should be kept in mind to rebut issues and testimony that border on issues of custody and parental fitness.

A Return Would Place the Child[ren] in Grave Risk of Danger

Article 13 allows an authority to refuse to return a wrongfully abducted child if there is a grave risk that the child[ren] would be placed in an intolerable situation or exposed to physical or psychological harm by being returned to the State of habitual residence.[106] Read along with Article 19[107], the 13(b) exception has been interpreted to mean protecting the child[ren] from harm that may occur in the State,[108] not at the hands of the Petitioner.[109]

1996), Blondin v. Duboois, 238 F3d. 153, (2nd Cir, 2001)

[102] Hague Convention, *supra* note 1, Article 13.

[103] Hague Convention, *supra* note 1, Article 12.

[104] Hague Convention, *supra* note 1, Article 20.

[105] Hague Convention, *supra* note 1, Article 19 ("A decision under this Convention concerning the return of that child shall not be taken to be a determination on the merits of any custody issue.").

[106] Hague Convention, *supra* note 1, Article 13(b).

[107] Hague Convention, *supra* note 1, Article 19.

[108] An example today, in 2015, would be the "grave risk" of returning a child to Iraq (although Iraq is not a signatory, it is an example of a situation that itself poses a "grave risk" of harm).

[109] *see* Gsponer v. Johnstone, 12 FamLR 7 (Family Court of Australia),

The burden on the Respondent is to prove by clear and convincing evidence[110] that there is a grave risk that the child[ren] will be subject to harm if returned. The burden of proof on the Petitioner is only a preponderance of the evidence. Therefore, it is clear that the Convention is drafted to encourage return of abducted children.

The Child[ren] Objects to the Return

There is an additional provision of Article 13 (unlettered) which allows for the judicial or administrative authority to consider the child[ren]'s wishes. This, however, depends upon the child[ren]'s age and degree of maturity.[111] In the case of Sheikh v. Cahill[112], the New York Supreme Court ruled that the child, who was nine (9) years old, had not obtained an age and degree of maturity to warrant the court to make the child's views dispositive. The court found that the *in camera* interview revealed that the child preferred to stay in the United States because of being wooed by his father during his summer vacation visitation. The court further found that the child's reaction to his summer vacation was expected given his age and degree of maturity.

The Child[ren] is Settled in the New Environment (One Year Elapsed)

Article 12 states that even if proceedings had been commenced after the expiration of one year the court **shall** order the return of the child **unless it is**

Zimmerman v. Zimmerman, (Dallas County, Texas, 255th Judicial District). In this case, the court ordered the return of the child to England and found that the Respondent did not meet the burden of proof(clear and convincing evidence) to show that the child would be subject to grave risk of harm if returned to the State of habitual residence (England). If "grave risk" was determined to be the return of the child[ren] to the petitioner, then the case would become a custody case.

110 ICARA, *supra* note 6, 42 U.S.C. 11603(e)(2), §4.

111 Hague Convention, *supra* note 1, Article 13.

112 Sheikh v. Cahill, 546 N.Y.S.2d. 517, 522(Sup.1989).

demonstrated that the child is now settled in its new environment.[113] This exception provides a defense to an abducting parent in a case where the proceedings were not started within one year after the abduction. The judge would then have to determine whether or not the child is settled in his or her new environment. However, if the time elapsed is less than one year, even if the child is settled in this new environment, the court must order the return of the child to the state of Habitual Residence, unless the child comes under one of the other exceptions of the Convention.

A Return Conflicts with the Fundamental Freedoms of the Requested State[114]

Another exception, provided under Article 20, allows for the court to refuse to order the return of the child[ren] "if this would not be permitted by the fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms."[115] This article functions as a safety valve for a member country to not return a child[ren] to a country where the rights of freedom have been abridged. In addition it might dovetail with Article 13(b) with regard to a return in the event of a grave risk of danger to that country. Yugoslavia, which was signatory, could have this problem if the Treaty still applies to its various new states.

The Burden of Proof

The Respondent's burden of proof, in defending against the **Petition for Return**, is to prove either by clear and convincing evidence[116] that the Article 13(b)[117] or Article

[113] Hague Convention, *supra* note 1, Article 12.

[114] Hague Convention, *supra* note 1, Article 20.

[115] Hague Convention, *supra* note 1, Article 20.

[116] ICARA, *supra* note 6, 22 U.S.C. 9003(e)(2), §4.

20[118] exceptions apply or by a preponderance of the evidence[119] that any other Article 12[120] or the other Article 13[121] exceptions apply. The Petitioner's burden of proof is always preponderance of the evidence.[122]

Awaiting the Decision

Under the provisions of Article 11 of the Hague Convention,[123] the judge must act expeditiously. If a decision has not been made within six (6) weeks of the date of the commencement of the action, the Petitioner or the United States Central Authority has the right to request a statement from the authority regarding the reason for the delay.[124]

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[117] Hague Convention, *supra* note 1, Article 13(b) (Even if a removal or retention has been determined to have been wrongful, an authority may deny a return if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.").

[118] Hague Convention, *supra* note 1, Article 20 ("The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.").

[119] ICARA, *supra* note 9, 42 U.S.C. 11603(e)(2), §4.

[120] Hague Convention, *supra* note 1, Article 12 (The Hague Convention provides that an authority may refuse to return a child[ren] who has been wrongfully removed or retained if: the Petitioner waited longer than one (1) year after the wrongful removal or retention to file the **Petition**; the Respondent can demonstrate that the child[ren] is settled in the new environment; or where the authority has reason to believe the child[ren] has been taken to another State.).

[121] Hague Convention, *supra* note 1, Article 13 (excluding 13(b)) (Even if a removal or retention is been determined to have been wrongful, an authority may deny a return if: the Petitioner was not exercising his or her right of custody at the time of the removal; or, depending on the degree of maturity and age of the child[ren], the child[ren] objects to being returned.).

[122] *see supra* note 111.

[123] Hague Convention, *supra* note 1, Article 11.

[124] *Id*.

Payment of Costs and Fees

Of major interest to attorneys handling cases under the Hague Convention is Section 22 U.S.C. §9007, which provides for the award of cost and fees under the Convention and ICARA.[125] The Act, in paragraph 2, provides that petitioner may be required to bear the cost of legal counsel or advisors, court costs incurred in connection with their petitions and travel costs for the return of the child involved and any accompanying persons unless a return is ordered or the case is covered by Federal or State legal assistance programs. It should be noted that many countries across the world provide funding for counsel in bringing a case for return of the child in their countries. The United States opted against this part of the Convention. Paragraph 3 states that any court ordering the return of a child pursuant to an action brought under this Act "**must order the respondent to pay necessary expenses incurred by or on behalf of petitioner, including court costs, legal fees, foster home, or other care during the course of the proceeding and transportation costs relating to the return of the child, unless the respondent establishes that such order would be clearly inappropriate."[126]** This inquiry, therefore, is not into the Respondent's ability to pay but into the inappropriateness of requiring the Respondent to pay. It is very clear that when a petition is brought under the Hague Convention and a successful return is accomplished, than the judge must award counsel fees to the successful party. This may be very helpful in being able to get an attorney to represent a client. In addition, Courts have ruled that the Foreign Attorney who assisted in the case may also be compensated under the Federal Statute. [127]

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[125] 22 U.S.C. § 9007(b)

[126] 22 U.S.C. §9007(b)(3).

[127] See Distler v. Distler, 26 Fed Supp. 2d 723 (D.C. NJ 1998

Order for Return and the Problems of Return

Once a Request for Return of the child[ren] to the state of that child's habitual residence has been granted, the question then becomes which parent the child[ren] is to return with. In some cases the court orders that the abducting parent return to the state of habitual residence with the child[ren] in order for a custody proceeding to take place there. In other instances, the court turns the child[ren] over to the parent who petitioned for the return. The outcome depends upon the facts and circumstances of each case.

It is important to remember that this is a civil treaty. Its purpose is to ensure the return of a child[ren] to his or her habitual residence in an orderly, expeditious manner. Criminal actions should not be enforced against the abducting parent once that parent has returned to the country of habitual residence with the child[ren].[128]

Criminal actions can have a detrimental effect on the child[ren], especially when the child[ren] is present to witness the arrest of one of its parents. This is not and was not the intention of this treaty.

Conclusion

It is a good idea to collect as much of the case law around the country and around the world as possible. To be able to argue issues of terminology and theories

[128] There was one particular instance where the court ordered that the abducting mother return to Germany with the children. The parents had agreed that no criminal action was to be brought against her, however, once the mother arrived at the airport the police retained her for the initial abduction of the children. Therefore, it is a better idea for the nonabducting spouse to be responsible for the return of the child[ren]. Thonemann v. Thonemann, Supreme Court of the State of New York, Rockland County, Index No. 3438-93, 1993.

under the terms of this Convention, the law is now developing in this country Each new case which is undertaken brings to the forefront a new decision which further construes and helps to write the law in the United States.

Learning and developing arguments which can be used to further reduce child abduction throughout the world is a good by-product of the Convention. Educating judges across the country that just because a party has abducted a child to their courtroom does not give that judge a right to hear the merits of a case thereby allowing an abducting parent to pick their forum is our task. It is important that this convention be given full opportunity to make the world a little bit smaller and protect children by reducing abductions throughout the world.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
FOURTEENTH SESSION FINAL ACT

Excerpts containing the text of the

1980 Hague Convention
on the Civil Aspects of
International Child Abduction

Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela; and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer,convened at the Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments--

A. The following draft Conventions--

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions--

CHAPTER I -- SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are--

(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.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention--

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II -- CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other object's of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures--

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel. and advisers;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III -- RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain--

(a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the grounds on which the applicant's claim for return of the child is based;

(d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by--

(e) an authenticated copy of any relevant decision or agreement;

(f) a certificate or an affidavit emanating from a Central Authority, or

other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

(g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

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

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV -- RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or, securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the

exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V -- GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention. Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses

incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise or rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units--

(a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

(b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise, the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI -- FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time Of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands. This Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting state has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter, the Convention shall enter into force--

1. For each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2. For any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies. The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following--

1. The signatures and ratifications, acceptances and approvals referred to in Article 37;

2. the accessions referred to in Article 38;

3. the date on which the Convention enters into force in accordance with Article 43;

4. the extensions referred to in Article 39;

5. the declarations referred to in Articles 38 and 40;

6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7. the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Public Law 100-300
100th Congress
[H.R. 3971, 29 Apr 1988]

42 USC 11601 et seq

An Act

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC 1. SHORT TITLE.

This Act may be cited as the "International Child Abduction Remedies Act".

SEC. 2. FINDINGS AND DECLARATIONS [42 USC 11601]

(a) Findings. -- The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and

retention of children and will deter such wrongful removals and retentions.

(b) DECLARATIONS. -- The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes-

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

SEC. 3. DEFINITIONS. [42 USC 11602]

For the purposes of this Act--

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 453 of the Social Security Act (42 U.S.C. 653);

(4) the term "Petitioner" means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this Act, which seeks relief under the

Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 7(a).

SEC. 4. JUDICIAL REMEDIES. [42 USC 11603]

(a) JURISDICTION OF THE COURTS. -- The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) PETITIONS. -- Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) NOTICE. -- Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) DETERMINATION OF CASE. -- The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) BURDENS OF PROOF. --

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence-

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing-

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) APPLICATION OF THE CONVENTION. -- For purposes of any action brought under this Act--

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) FULL FAITH AND CREDIT. -- Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) REMEDIES UNDER THE CONVENTION NOT EXCLUSIVE. -- The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

SEC. 5. PROVISIONAL REMEDIES. [42 USC 11604]

(a) AUTHORITY OF COURTS. -- In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 4(b) of this Act may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition.

(b) LIMITATION ON AUTHORITY. -- No court exercising jurisdiction of an action brought under section 4(b) may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

SEC. 6. ADMISSIBILITY OF DOCUMENTS. [42 USC 11605]

With respect to any application to the United States Central Authority, or any petition to a court under section 4, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

SEC. 7. UNITED STATES CENTRAL AUTHORITY. [42 USC 11606]

(a) DESIGNATION. -- The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) FUNCTIONS. -- The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this Act.

(c) REGULATORY AUTHORITY. -- The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this Act.

(d) OBTAINING INFORMATION FROM PARENT LOCATOR SERVICE. -- The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

SEC. 8. COSTS AND FEES. [42 USC 11607]

(a) ADMINISTRATIVE COSTS. -- No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) COSTS INCURRED IN CIVIL ACTIONS. --

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 4 shall be borne by the petitioner unless they are covered by payments from Federal State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 4 shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

SEC. 9. COLLECTION, MAINTENANCE, AND DISSEMINATION OF INFORMATION. [42 USC 11608]

(a) IN GENERAL. -- In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority--

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this Act.

(b) REQUESTS FOR INFORMATION. -- Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) RESPONSIBILITY OF GOVERNMENT ENTITIES. -- Whenever any department, agency, or instrumental of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which --

(1) would adversely affect the national security interests of the United States or the law enforcement interests of United States or of any State; or

(2) would be prohibited by section 9 of title 13, United States enforcement Code;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) INFORMATION AVAILABLE FROM PARENT LOCATOR SERVICE. -- To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) RECORDKEEPING. -- The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

SEC. 10. INTERAGENCY COORDINATING GROUP. [42 USC 11609]

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter l of chapter 57 of title 5, United States Code, for employees of agencies.

SEC. 11. AGREEMENT FOR USE OF PARENT LOCATOR SERVICE IN DETERMINING WHEREABOUTS OF PARENT OR CHILD.

Section 463 of the Social Security Act (42 U,S.C. 663) is amended --

(1) by striking "under this section" in subsection (b) and inserting "under subsection (a)";

(2) by striking "under this section" where it first appears in subsection (c) and

inserting "under subsection (a), (b), or (e)"; and

(3) by adding at the end the following new subsection:

"(e) The Secretary shall enter into an agreement with the Central Authority designated by the President in accordance with section 7 of the International Child Abduction Remedies Act, under which the services of the Parent Locator Service established under section 453 shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an applicant to such Central Authority within the meaning of section 3(1) of that Act. The Parent Locator Service shall charge no fees for services requested pursuant to this subsection."

SEC. 12. AUTHORIZATION OF APPROPRIATIONS. [42 USC 11610]

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this Act.

Approved April 29, 1988.

LEGISLATIVE HISTORY-H.R. 3971:
HOUSE REPORTS: No. 100-525 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol, 134 (1988):
Mar. 28, considered and passed House.
Apr. 12, considered and passed Senate, amended.
Apr. 25, House concurred in Senate amendment.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW FOURTEENTH SESSION FINAL ACT

Excerpts containing the text of the

1980 Hague Convention
on the Civil Aspects of
International Child Abduction

Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela; and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer,convened at the Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments—

A. The following draft Conventions—

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

(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.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention—

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other object's of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;
(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
(d) to exchange, where desirable, information relating to the social background of the child;
(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel. and advisers;
(h) to provide such administrative arrangements as may be necessary and

appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

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

The application may be accompanied or supplemented by—

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

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the

Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
(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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign

decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

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

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or, securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention. Central

Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise or rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

(a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
(b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise, the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time Of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands. This Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention

applies.

Article 41

Where a Contracting state has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter, the Convention shall enter into force—

1. For each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
2. For any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies. The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

1. The signatures and ratifications, acceptances and approvals referred to in Article 37;
2. the accessions referred to in Article 38;
3. the date on which the Convention enters into force in accordance with Article 43;
4. the extensions referred to in Article 39;
5. the declarations referred to in Articles 38 and 40;
6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7. the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Public Law 100-300
100th Congress
[H.R. 3971, 29 Apr 1988]

42 USC 11601 et seq

An Act
INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC 1. SHORT TITLE.

This Act may be cited as the "International Child Abduction Remedies Act".

SEC. 2. FINDINGS AND DECLARATIONS [42 USC 11601]

(a) Findings.—The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.
(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) DECLARATIONS.—The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.
(2) The provisions of this Act are in addition to and not in lieu of the

provisions of the Convention.

(3) In enacting this Act the Congress recognizes-

(A) the international character of the Convention; and
(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

SEC. 3. DEFINITIONS. [42 USC 11602]

For the purposes of this Act—

(1) the term “applicant” means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;
(2) the term “Convention” means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;
(3) the term “Parent Locator Service” means the service established by the Secretary of Health and Human Services under section 453 of the Social Security Act (42 U.S.C. 653);
(4) the term “Petitioner” means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention;
(5) the term “person” includes any individual, institution, or other legal entity or other legal entity or body;
(6) the term “respondent” means any person against whose interests a petition is filed in court, in accordance with this Act, which seeks relief under the Convention;
(7) the term “rights of access” means visitation rights;
(8) the term “State” means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and
(9) the term “United States Central Authority” means the agency of the Federal Government designated by the President under section 7(a).

SEC. 4. JUDICIAL REMEDIES. [42 USC 11603]

(a) JURISDICTION OF THE COURTS.—The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.
(b) PETITIONS.—Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in

the place where the child is located at the time the petition is filed.

(c) NOTICE.—Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) DETERMINATION OF CASE.—The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) BURDENS OF PROOF.—

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence-

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing-

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) APPLICATION OF THE CONVENTION.—For purposes of any action brought under this Act—

(1) the term “authorities”, as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;
(2) the terms “wrongful removal or retention” and “wrongfully removed or retained”, as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and
(3) the term “commencement of proceedings”, as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) FULL FAITH AND CREDIT.—Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) REMEDIES UNDER THE CONVENTION NOT EXCLUSIVE.—The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

SEC. 5. PROVISIONAL REMEDIES. [42 USC 11604]

(a) AUTHORITY OF COURTS.—In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 4(b) of this Act may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition.
(b) LIMITATION ON AUTHORITY.—No court exercising jurisdiction of an action brought under section 4(b) may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

SEC. 6. ADMISSIBILITY OF DOCUMENTS. [42 USC 11605]

With respect to any application to the United States Central Authority, or any petition to a court under section 4, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

SEC. 7. UNITED STATES CENTRAL AUTHORITY. [42 USC 11606]

(a) DESIGNATION.—The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.
(b) FUNCTIONS.—The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this Act.
(c) REGULATORY AUTHORITY.—The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this Act.
(d) OBTAINING INFORMATION FROM PARENT LOCATOR SERVICE.—The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

SEC. 8. COSTS AND FEES. [42 USC 11607]

(a) ADMINISTRATIVE COSTS.—No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) COSTS INCURRED IN CIVIL ACTIONS.—

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as

provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 4 shall be borne by the petitioner unless they are covered by payments from Federal State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 4 shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

SEC. 9. COLLECTION, MAINTENANCE, AND DISSEMINATION OF INFORMATION. [42 USC 11608]

(a) IN GENERAL.—In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this Act.

(b) REQUESTS FOR INFORMATION.—Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) RESPONSIBILITY OF GOVERNMENT ENTITIES.—Whenever any department, agency, or instrumental of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of United States or of any State; or

(2) would be prohibited by section 9 of title 13, United States enforcement Code;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) INFORMATION AVAILABLE FROM PARENT LOCATOR SERVICE.—To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection © can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection © of this section.

(e) RECORDKEEPING.—The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

SEC. 10. INTERAGENCY COORDINATING GROUP. [42 USC 11609]

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter l of chapter 57 of title 5, United States Code, for employees of agencies.

SEC. 11. AGREEMENT FOR USE OF PARENT LOCATOR SERVICE IN DETERMINING WHEREABOUTS OF PARENT OR CHILD.

Section 463 of the Social Security Act (42 U,S.C. 663) is amended—

(1) by striking “under this section” in subsection (b) and inserting “under subsection (a)”;

(2) by striking “under this section” where it first appears in subsection © and inserting “under subsection (a), (b), or (e)”; and

(3) by adding at the end the following new subsection:

“(e) The Secretary shall enter into an agreement with the Central Authority designated by the President in accordance with section 7 of the International Child Abduction Remedies Act, under which the services of the Parent Locator Service established under section 453 shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an

applicant to such Central Authority within the meaning of section 3(1) of that Act. The Parent Locator Service shall charge no fees for services requested pursuant to this subsection."

SEC. 12. AUTHORIZATION OF APPROPRIATIONS. [42 USC 11610]

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this Act.

Approved April 29, 1988.

LEGISLATIVE HISTORY-H.R. 3971:

HOUSE REPORTS: No. 100-525 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol, 134 (1988):

Mar. 28, considered and passed House.
Apr. 12, considered and passed Senate, amended.
Apr. 25, House concurred in Senate amendment.

Curriculum Vitae of.
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EDUCATION

Ithaca College (B.S., *cum laude*, 1968)
St. John's University (J.D., 1972)
Certified Public Accountant (NY 1973)
New York University (LL.M., Taxation, 1976)

COURT ADMISSION

1973 -- Admitted to Bar, New York and U.S. Tax Court
1974 -- U.S. District Courts, Southern and Eastern Districts of New York
-- U.S. Court of Appeals, Second Circuit
1976 -- U.S. Supreme Court and District of Columbia
1979 -- New Jersey and Florida

PUBLISHED ARTICLES

The Hague Convention - Understanding & Litigating Under the Treaty
The Hague Convention - Educating the State Court Judge
Distribution of Military Benefits - The Need for Reform
Distribution of Military Benefits - Congressional Reform
Interjurisdictional Enforcement of Matrimonial Orders - A Proposal
Is Surrogacy Against Public Policy: The Answer is Yes.
Seton Hall Law Review, 1988
Divorce Law in China - Domestic Relations Tax Reform Act, 1984
How to try a Hague Case.

EXPERTISE

Expert Witness on various court cases throughout the nation on Interstate and International Child Abduction Cases

Liaison to International Child Abduction Project sponsored by the ABA Center on Children and the Law - Department of Justice OJJDP, (1993-96)

Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAN), funded by the Dept. of Justice OJJDP in conjunction with ABA Center on Children and the Law and the National

Center for Missing and Exploited Children (NCMEC)

Consultant to the United States State Department, Bureau of Consular Affairs, Children□s Issues Department and National Center for Missing and Exploited Children (MCMEC) on International Child Abductions

Certificate of Appreciation from the United States Department of State- March 1996

Participant in Hague Convention Meetings on Implementation of Treaty, Hague, Netherlands, 1993, 1996, 1999

Member of United States delegation to the Hague-1996

EXPERTISE -- (continued...)

Expert Witness before U.S. House of Representatives; House Ways and Means Committee, Child Support Amendments, 1984, 1988, Social Security Amendments, 1989

Expert Witness before Senate and Assembly Judiciary Committee of New York on Hearings of Surrogate Parent Bill, 1986

Expert Witness before U.S. Senate, Committee on Armed Services, Uniform Services Former Spouses Protection Act, 1982

Speaker/Lecturer on Interstate and/or International Child Custody, at various Institutes, including:

- Second World Congress on the Rights of Children (1997)
- American Bar Association's annual winter and spring meetings
- International Academy of Matrimonial Lawyers (1997; 1992)
- American Family Conciliation Courts National Conferences
- American Association of Trial Lawyers
- Hispanic Bar Association
- New Jersey Continuing Legal Education Institute
- COURT TV
- American Academy of Matrimonial Lawyers 2002
-

I have been continuously active in the practice of law for the past thirty (30) years, and for the last twenty-six (26) years have devoted my practice, almost entirely, to that of matrimonial and family law. I am a Fellow of the American Academy of Matrimonial Lawyers and the previous chair of the National Legislation Committee. I have chaired many committees in that organization. I am a Fellow of the International Academy of Matrimonial Lawyers and Former Secretary of the American Chapter of that organization. I am a member of the National Panel of Marital Arbitrators of the American Arbitration Association. I am also a member of the Executive Committee of the Family Law Section

of the New York Bar Association. In addition, I was a member of the Executive Council of the American Bar Association's Family Law Section, and a member of various matrimonial law committees both in New York State and American Bar Associations. I chaired the Federal Kidnapping Committee of the Academy of Matrimonial Lawyers and I was liaison to ABA Parental Abduction Project. I was the Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAN), funded by the Dept. of Justice OJJDP in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children. I have been an expert witness before the United States Senate Armed Services Committee on issues relating to military pension, the House Ways and Means Committee on issues relating to child support, and before the New York State and New Jersey State Assembly's Judiciary Committees on the subject of surrogate parenting and have advised the U.S. State Department on various occasions including speaking in the North American Symposium on International Child Abduction. My experience in the matrimonial field is extensive and varied and includes the handling of all types of matrimonial actions and proceedings in the trial and appellate courts of the State of New York and elsewhere including over three hundred (300) cases under the Hague Convention. I have been a Lecturer at Various Institutes on Interstate and International Child Custody, including American Family Conciliation Courts National Conferences, American Bar Association's annual winter and spring meetings, American Academy of Matrimonial Lawyers, International Academy of Matrimonial Lawyers, American Association of Trial Lawyers, Hispanic Bar Association, New Jersey Continuing Legal Education Institute, COURT TV, and various other bar associations. My firm has handled many international custody actions and many interstate custody actions involving the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.

AMERICAN BAR ASSOCIATION - Member (1972-present)

Family Law Section --

Council Member (1996-99; 1985-91)
International Law and Procedures (1991-present)
Chairman/Member, Federal Legislation & Procedures (1989-present)
Vice Chair/Member, Federal Task Force on Legislation (1992-present)
Parliamentarian (1995-96)
Liaison to International Child Abduction Project (1993-96)
Co-Chairman, Bankruptcy Committee, (1992-94)
Advisory Committee (1991-94)
Chairman, By-Laws Committee (1990-91; 1982-84)
Law and the Fifty States (1985-94)
Chairman/Member, Scope & Correlations Committee (1987-90)
Ad hoc Committee on Surrogacy (1987-88)
Editorial Board, Family Law Quarterly (1987)
Chairman, Research Committee Member (1986)
Member, Annual Meeting Coordination Committee (1985-86)
Chairman, Policy & Procedures Handbook Committee (1982-86)
Membership Chairman (1983-85)

Chairman, Interstate/Federal Support Laws & Procedures Committee (1981-85)
Vice Chairman Divorce Laws and Procedures Committee (1980-82)
Alimony, Support and Maintenance Committee (1977-80)

Young Lawyers Division

Member, Liaison with Other Professions and Organizations (1981-82)
Member, Child Advocacy and Protection Committee (1980-82)
Delegate (1974-81)

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS - New York Chapter

Fellow (1984-present)
Chairman/Member, Kidnapping Committee (1994-6), (1996-present)
Chairman, Meeting Committee (1986-1998)
Member, Legislation Committee (1991-1998)
Parliamentarian (1995-96; 1991-92)
Member, National Budget and Finance Committee (1994-95)
Co-Chairman, National Legislation Committee (1990-91)
Chairman, Committee on Surrogate Parenting (1986)
Board of Managers, New York Chapter (1986-90) (1993-1996) (1999-2002)
Specialization Committee (1985)
Secretary, New York Chapter (1999-present)

INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS - Member (1988-present)

Board of Managers, American Chapter (1996-present)
Secretary, American Chapter (1994-95)
Board of Governors, International (2004- present)

NEW YORK STATE BAR ASSOCIATION - Member (1972-present)

Chairman, International Custody Committee (1995-1998)
Executive Committee (1979-2000)
Program Chairman, Annual Meeting (1985-91)
Co-chairman, Committee on Surrogate Parenting (1986-87)
Program Chairman, Young Lawyers Section (1985)
Chairman, Long Range Planning, Family Law Section (1979-85)
Liaison, Executive Committee, Young Lawyers Section (1979-82)

Association of the Bar of the City of New York - 1973

Member, Committee on Matrimonial Law (1991-1996)
Liaison to Committee on Matrimonial Law (1985)

New Jersey Bar Association - 1979
Co-chairman, Specialization Committee Member (1983-84)
Legislation Committee (1984)

Westchester County Bar Association - 1973
Bergen County Bar - 1979
Essex County Bar Association - 1979
District of Columbia Bar Association
Florida Bar Association
American Association of Attorneys-CPA's - 1973
American Arbitration Association - 1973
National Panel of Marital Arbitrators (1978-present)
Commercial Panel Arbitrators (1975)
Employment

Law Offices of Robert D. Arenstein (New York & New Jersey) (1984 to present)
Arenstein & Huston, P.C., President (1980-84)
Self-Employed (1975-80)
Shapiro, Weiden & Mortman, P.C. (1974-75)
Hofheimer, Gartlir, Gottlieb & Gross (1973-74)

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Habitual Residence & Cross Border Comparison

Laura Dale, Houston, Texas
Ashley Tomlinson, Houston Texas

HABITUAL RESIDENCE:
A COMPARATIVE ANALYSIS OF HABITUAL RESIDENCE STANDARDS UNDER THE HAGUE CONVENTION

LAURA D. DALE & ASHLEY V. TOMLINSON
LAURA DALE & ASSOCIATES, P.C.
HOUSTON, TEXAS

HABITUAL RESIDENCE

WHAT DOES IT MEAN?

2

"HABITUAL RESIDENCE:" A DISPOSITIVE ELEMENT

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.

3

WHAT IS HABITUAL RESIDENCE?

- The Convention does not define habitual residence.
- Signatory States have adopted different definitions and interpretations of habitual residence.
- The United States circuit courts have adopted different tests for determining habitual residence.

4

CIRCUIT SPLIT

1. **Parental Intent** – These courts prioritize the subjective intentions of the parents' regarding the child's habitual residence over objective evidence of the child's acclimatization to a new country.
2. **Child's Perspective** – These courts give emphasis to the child's perspective by looking at objective facts of acclimatization to a new country.
3. **Balanced/Totality of the Circumstances** – These court reject any presumption that one factor should be given any greater weight in the habitual residence analysis; instead, they assign all relevant factors the appropriate weight based on the totality of the circumstances in each case.

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PARENTAL INTENT MODEL

A MAJORITY VIEW

6

PARENTAL INTENT

Two variants of the Parental Intent Model:

1. *Mozes* – followed by the First, Second, Fourth, Ninth and Eleventh Circuits
   (*Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001))

2. *Berezowsky* – followed by the Fifth Circuit
   (*Berezowsky v. Ojeda*, 765 F.3d 456 (5th Cir. 2014))

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MOZES:

A (SOMEWHAT) FLEXIBLE PRESUMPTION
(1ST, 2ND, 4TH, 9TH AND 11TH)

TWO TIER TEST:

1. **Intent to Abandon** – There must be a settled intention or purpose to abandon the child's prior habitual residence as judged from the parents' perspective
2. **Acclimatization** – There must also be an "actual change in geography" and the passage of "an appreciable period of time…that is sufficient for acclimatization."

When the two elements conflict, the *Mozes* framework gives near dispositive weight to parental intent.

The practical result is a presumption that shared parental intent (or lack thereof) regarding a change of residence generally trumps evidence of acclimatization.

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The *Mozes* Parental Intent "Spectrum"

1. Category 1 – Settled Purpose:

Cases in which "the family as a unit has manifested a settled purpose to change habitual residence." Settled purpose can exist even when one parent had qualms about the move. This occurs when both parents and the child relocated together "under circumstances suggesting they intend to make their home in the new country." One parent's alleged reservations are rarely sufficient to negate a finding of shared and settled purpose to establish a habitual residence.

2. Category 2 – Ambiguous Duration:

Cases in which there was only consent for the child to stay in a new country for an ambiguous duration. The habitual residence is less clear in these cases and requires a much more fact-intensive inquiry. Even where there is a lack of perfect consensus between parents, courts can still infer shared parental intent from the circumstances of the child's stay.

3. Category 3 – Specific Period

Cases in which the child's relocation was clearly intended to be for a specific, limited period. One parent's unilateral decision to make the relocation indefinite will rarely result in a change of habitual residence.

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Parental Intent:
Where, When and How under *Mozes*
(1ST, 2ND, 4TH, 9TH AND 11TH)

"One need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad originally intended to be temporary. Nor need the intention be expressly declared, if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended."

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What role does acclimatization play in *Mozes*?

A child can acquire a new habitual residence without a parents consent, but:

- **"Slow to Infer"** – The courts are slow to infer habitual residence based on evidence of the child's acclimatization if there is uncertain or contrary evidence of parental intent.
- **Requires "Unequivocal" Evidence** – When parental intent is unclear, courts may find a change in habitual residence based on the child's acclimatization when "the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place." The child's life must have become "so firmly embedded in the new country as to make it habitually resident" despite parental intentions to the contrary.

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Why Parental Intent over Acclimatization?

Focus on acclimatization and the child's status quo doesn't sufficiently deter abduction:

- "The Convention is designed to prevent child abduction by reducing incentive of the would-be abductor to seek unilateral custody over a child in another country. The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try."
- Acclimatization is "so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there."
- Focus on acclimatization may "open children to harmful manipulation" by one parent seeking to foster attachments during what was supposed to be a temporary stay (e.g. "profess allegiance to the new sovereign."
- Children are "remarkably adaptable and form intense attachments quickly."

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A Flexible Presumption Under *Mozes*

Even though the *Mozes* framework creates a presumption that focuses on parental intent, it attempts to maintain some flexibility, although not much.

- Shared parental intent can be *inferred* and does not need to be explicit
- A court can find change of habitual residence if it is clear that the child's life has become firmly embedded in the new country.

***Mozes* warns against a rigid and inflexible parental intent test adopted by some foreign courts:**

- "[A] bright line rule…'where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence, save by agreement or acquiescence over time of the other parent' must be "carefully qualified."
- A rigid test may "lead to absurd results" that ignores reality.

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BEREZOWSKY:

A RIGID PARENTAL INTENT MODEL
(5TH CIRCUIT)

- **Parental intent requires an explicit agreement.**

  There must be a "meeting of the minds" evidenced by testimony that the parents "sat down together and explicitly agreed to a child's habitual residence."

  In contrast to *Mozes*, parental intent cannot be inferred from circumstances that developed over time and would allow a finding of parental intent despite the "lack of perfect consensus."

- **Acclimatization is given even less weight**

  Berezowsky explicitly rejects the authority of its sister circuits that allow a child to acquire habitual residence by becoming "sufficiently acclimated."

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CHILD-CENTRIC MODEL

A MINORITY VIEW

15

CHILD-CENTRIC MODEL

Two variants of the Child-Centric Model:

1. *Friedrich* – followed by the Sixth Circuit
   (*Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993)
2. *Feder* – followed by the Third and Eighth
   (*Feder v. Feder-Evans*, 63 F.3d 217 (3d Cir. 1995)

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FRIEDRICH:

PARENTAL INTENT IRRELEVANT
(6TH CIRCUIT)

"To determine habitual residence, the court must focus on the child, not the parents." *Friedrich*, 983 F.2d at 1401.

After *Mozes*, the Sixth Circuit reaffirmed its adherence to the purely child-centric model. In 2007, in *Roberts v. Tesson*, the Sixth Circuit held that:

- A court "should consider only the child's experience in determining habitual residence."
- The "subjective intent of the parents" is "not only inconsistent with the precedent" but also makes "seemingly easy cases hard and reaching results that are questionable at best."
- Any focus on parental intent would "run counter" to the goal of preventing a child from being "taken out of the family and social environment in which its life has developed."

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FEDER:

CHILDREN, THEN THE PARENTS
(3RD & 8TH CIRCUITS)

The child's perspective is the guiding framework:

"A child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective"

But parental intent is also relevant in determining whether the child has acclimated:

"A determination of whether any particular place satisfies this standard must focus on the child and consist of an analysis of the child's circumstances in that place and parents' present, shared intentions."

Feder, 63 F.3d at 224.

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ACCLIMATIZATION FACTORS FROM THE CHILD'S PERSPECTIVE (3RD, 6TH & 8TH)

The courts that adhere to the child-centric models have considered the following facts as evidence of a child's acclimatization:

- Passage of time
- Enrollment in school and other "academic activities"
- Personal possessions and pets acquired
- Fluency in the local language
- Formation of "meaningful relationships" with family members in that country
- Participation in social and group activities

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THE EFFECT OF PARENTAL INTENT ON ACCLIMATIZATION (3RD & 8TH)

The circuits that follow the more flexible child-centric model (3rd and 8th) have adopted the view that a child inevitably internalizes some of their parents' expectations and desires. The more the parents behave as if they are "settled," the more quickly the child will acclimate. Therefore, the acclimatization process must also look at the parents' shared intentions.

The courts have considered the following behavior as evidence of acclimatization and habitual residence:

- Selling the prior family home
- Purchasing a home in the new country
- Pursuit of personal interests and hobbies
- Pursuit of employment
- Securing benefits available only to residents
- Applying for residency or citizenship

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CHANGING THE BALANCE: WHEN PARENTAL INTENT OUTWEIGHS THE CHILD'S PERSPECTIVE

Under the *Feder* variant, the child's perspective and parental intent can both be weighed to determine whether the child has acclimated.

Even though *Feder* and its progeny favor the child's perspective, this fact-intensive model allows for a more flexible model under which courts can change the weight given to parental intent and the child's circumstances. The result is that the courts sometimes invert the presumption in favor of parental intent.

EXAMPLE: *Whiting v. Krassner*

The younger the child, the more weight that is given to parental intent. A young child lacks the capacity to form his or her own intentions on meaningful ties to an environment; therefore, by default parental intent is given nearly dispositive weight.

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SHOULD THERE BE ONE PRESUMPTION?

The flexible framework adopted by the Third and Eighth Circuits can, at times, overlap with *Mozes* and yield a very similar analysis.

The fact that these two models can sometimes seem indistinguishable has led some to observe that there is an inevitable convergence.

Given this convergence, does it make sense to have a presumption that favors parental intent or the child's perspective?

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TOTALITY OF THE CIRCUMSTANCES

A NEW MODEL FROM THE 7TH CIRCUIT

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REDMOND:

"THE DIFFERENCES ARE NOT AS GREAT AS THEY MAY SEEM…"

In *Redmond v. Redmond*, the Seventh Circuit observed that the two main models can be reconciled and that there should not be a presumption giving greater weight to either the child's perspective or the parents' intentions.

It is "unwise to set in stone the relative weights of the parental intent and the child's acclimatization."

Instead, habitual residence must remain "essentially fact-bound, practical and unencumbered with rules, formulas or presumptions."

Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013)

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HABITUAL RESIDENCE:
A Comparative Analysis of Habitual Residence Standards Under The Hague Convention

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I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction is designed to secure the prompt return of abducted children to their countries of habitual residence. But what is habitual residence? The drafters of the Convention deliberately chose to leave the term undefined as a matter of practicality. Yet, as a result, habitual residence has developed into a nebulous legal concept yielding inconsistencies, domestically and internationally.[1] The inconsistency has become increasingly problematic, especially given the primacy of habitual residence in Hague Convention cases.

Habitual residence is a threshold and often "outcome determinative" element in Hague Convention cases.[2] If a child has not been abducted from his or her habitual residence, the removal is not wrongful; therefore, a parent is not entitled to any relief under the Convention.[3] It then comes as no surprise that the United States circuit courts have struggled at length the concept of habitual residence. The circuits unanimously agree that, despite a definition, habitual residence requires consistent application. The circuit courts, however, have been unable to reach an agreement as to what the correct single inquiry or analytical framework should be. Likewise, there is a lack of consensus amongst the international community.

This paper explores the longstanding debate over habitual residence and attempts to extract some discernable pattern(s) between the circuit courts. We examine the theoretical foundations and practical implications of each such pattern with the hope that it may provide some guidance for practitioners.

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[1] *Redmond v. Redmond*, 724 F.3d, 745-46 (7th Cir. 2013); RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 188-194 (2013).

[2] *Mozes v. Mozes*, 239 F.3d 1067, 1071-73 (9th Cir. 2011).

[3] *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013).

II. THE DISCREPANCY AND ITS SOURCES

The international community and our circuit courts have been unable to agree on what conditions are necessary to create habitual residence. When a child has resided in one country its entire life, there is very rarely a dispute as to habitual residence. The difficulty arises when a family moves to one or more new countries during the child's life.

In exploring this issue, our courts have fallen into three "camps," each adopting a different focus in their habitual residence inquiry. These three groups will be discussed in more detail below, but can be generally described as follows:

(1) courts that prioritize the parental intent;
(2) courts that prioritize the child's perspective; and
(3) courts that have adopted a hybrid, totality of the circumstances test.

There are various factors that have spurred divergence amongst the courts and that have also made it difficult to overcome the lack of consensus.

a. *The Aims of The Hague Convention.*

Perhaps the most important reason for the spectrum of approaches taken by courts is that the Convention has multiple interrelated, yet distinct, objectives. These objectives can pull in different directions and be difficult to reconcile. On one hand, the Convention places at the head of its objectives the restoration of the child's status quo. This aim yields a more objective approach that focuses on the child's perspective. On the other hand, the Convention also aims to prevent one parent from unilaterally removing a child to a different country in search of a friendlier forum for a custody suit. This goal favors a subjective approach that focuses on the parents' intent. As explored at greater length below, it can be difficult at times to reconcile these two objectives in the context of a habitual residence inquiry.

b. Maintaining Flexibility

Courts must not only keep in mind the Convention's sometimes conflicting objectives, but also the inevitable myriad of fact patterns that come into play in a habitual residence inquiry. All circuit courts have stressed that a formulaic, "one-size-fits-all' habitual residence test is clearly inappropriate in light of the multitude of different fact patterns that can occur in a child abduction case. The determination has been described on multiple occasions as "highly fact-specific" and which "necessarily varies with the circumstances of each case."[4]

[4] *Whiting v. Krassner*, 391 F.3d (3d Cir. 2004).

c. Lack of Supreme Court Authority

The previous two factors have not only shaped our jurisprudence, but also that of our sister signatories. The result is a lack of consensus between treaty partners. The lack of international consensus and the inherent flexibility of the test, coupled with complicated fact patterns, make habitual residence cases unlikely candidates for certiorari to the United States Supreme Court. Many people (including some of the nation's most preeminent constitutional scholars) have asked our Supreme Court to resolve the circuit split on habitual residence. However, the Supreme Court will likely remain extremely reticent to decide a question that is still being considered by the Hague Conference. Moreover, the Supreme Court also favors "clean" cases that are straightforward and broadly applicable. Abduction cases often involve messy fact patterns that vary dramatically from case to case.

III. THE HABITUAL RESIDENCE MODELS

a. Parental Intent Model

Parental intent is the prevailing model in the United States. There currently exist two variants of this model, but both have in common an emphasis on the shared intent of the child's parents, instead of the child's perspective. Numerous parental intent courts have noted, "the difficult cases arise when the [parents] do not agree on where [habitual residence] has been fixed."[5] The two variants differ as to what constitutes share parental intent and how much weight parental intent should be given over the child's perspective. The first variant – the *Mozes* variant – places a strong emphasis on shared parental intent, but still allows for a finding of habitual based on the child's perspective. The *Berezowsky* variant, on the other hand, gives much greater weight to a rigid, narrow definition of shared parental intent.

1. The Mozes Varient – 1st, 2nd, 4th, 9th and 11th Circuits

The most common variant is *Mozes*, which originates from the Ninth Circuit's opinion in *Mozes v. Mozes*.[6] The *Mozes* variant starts it analysis with a two-tier test:

(1) Intent to Abandon – There must be a settled intention to abandon the child's prior habitual residence (as judged from the perspective of the "person or persons entitled to fix the place of the child's residence");
(2) Acclimatization – There must also be an "actual change in geography" and the passage of an appreciable period of time…that is sufficient for acclimatization."[7]

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[5] *Ruiz v. Tenorio*, 392. F3d. 1247, 1253 (11th Cir. 2004); *Mozes*, 239 F.3d at 1076.

[6] 239 F.3d 1067 (9th Cir. 2001). *See also Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005); *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Mozes v. Mozes*, 239 F.3d 1067, 1075 (9th Cir. 2001); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252-53 (11th Cir. 2004) (adopting the *Mozes* habitual residence framework).

When the two elements conflict, the *Mozes* variant gives near dispositive weight to the first tier – parental intent. In order to establish a new habitual residence, there must be shared parental intent *and* acclimatization. However, if there is evidence of a child's acclimatization, but no evidence of shared parental intent, the *Mozes* framework makes it extremely difficult to establish habitual residence.

In its lengthy analysis, the Ninth Circuit in *Mozes* established a spectrum of fact patterns that courts may encounter when considering the near-dispositive element of parental intent.

(1) On one side are those cases in which the court finds that "the family as a unit has manifested a settled purpose to change habitual residence."[8] There may be settled purposes even when one parent may have qualms about the move.[9] This occurs when both parents and the child relocated together "under circumstances suggesting they intend to make their home in the new country."[10] When a court finds a family made these coordinated efforts to abandon one residence in favor of another, one parent's alleged reservations are rarely sufficient to negate a finding of "shared and settled purpose."[11]
(2) On the other side of the spectrum are those cases in which the child's relocation was "clearly intended to be for a specific, delimited period."[12] In such cases, one parent's unilateral decision to make the move permanent will rarely result in a change of habitual residence.[13]
(3) In between are cases where there was only consent for the child to stay in a new country for "some period of ambiguous duration."[14] Even when there is a "lack of perfect consensus" between the parents, the circumstances of the child's stay are sometimes such that a court can infer shared parental intent to change the child's habitual residence.[15] Similarly, the circumstances of the child's stay may indicate that there is no "settled mutual intent from which abandonment can be

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[7] *Id*. at 1078.

[8] *Id.* at 1076.

[9] *Id*.

[10] *Id*. at 1077.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

inferred."[16] In such cases, the findings of the district court are entitled to great deference.[17]

The *Mozes* variant essentially "creates a presumption that shared parental intent (or lack thereof) regarding a change of residence generally trumps evidence of acclimatization."[18] If there is no shared parental intent, then *Mozes* warns that courts should "be slow to infer from [a child's acclimatization] that an earlier habitual residence has been abandoned."[19] As noted above, the emphasis on parental intent is driven by the fact that the "Convention is designed to prevent child abduction by reducing the incentive of would-be abductors" to engage in forum shopping.[20]

Yet, the spectrum of parental intent outlined in *Mozes* suggests that parental intent is a somewhat flexible concept. *Mozes* explicitly allows a finding of shared parental intent, despite a perfect consensus between the parents. Moreover, the *Mozes* variant does not require an unequivocal declaration of shared intent by the parents at the time of relocation, but allows courts to reach this inference from the totality of the circumstances: "One need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad originally intended to be temporary. Nor need the intention be expressly declared, if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended."[21] This is consistent with the commonly recurring observation by courts that the habitual residence test cannot be so rigid as to exclude parents from relief under the Convention.[22]

The *Mozes* variant may create a presumption that relies on parental intent; yet in keeping with the need for flexibility, *Mozes* does not foreclose the possibility that a child's acclimatization may by itself be sufficient to establish a new habitual residence. "A child's life may become so firmly embedded in the new country as to make it habitually residence even though there may be lingering parental intentions to the contrary."[23]

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[16] *Id*.

[17] *Id*.

[18] *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006)

[19] *Mozes*, 239 F.3d at 1078-79.

[20] *Id*. at 1079.

[21] *Id.* at 1075.

[22] *Id. at 1080-81*.

[23] *Id*. at 1078.

However, as stated above, *Mozes* warns that, without shared parental intent, courts should be slow to find that a child's contacts with a new country are sufficient to establish habitual residence. *Mozes* and its progeny adopt the view that "the greater the ease with which habitual residence can be shifted without the consent of both parents, the greater the incentive to try" and "[t]he question whether a child is in some sense 'settled' in its new environment is so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there."[24]

The Ninth Circuit concluded its analysis by cautioning that its parental intent framework should not become a rigid or bright line test. The courts that adhere to the *Mozes* variant have adopted the Ninth Circuits warning:

> Recognizing the importance of parental intent, some courts have gone of in the other direction, announcing a bright line rule that 'where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence of the children, save by agreement or acquiescence over time of the other parent…While this rule certainly furthers the policy of discouraging abductions, it has been criticized as needing to be 'carefully qualified if it is not to lead to absurd results. The point is well taken: Habitual residence is intended to be a description of a factual state of affairs, and a child *can* lose its habitual attachment to a place even without a parent's consent. Even if when there is no settled intent on the part of the parent to abandon the child's prior habitual residence if 'the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place.[25]

The second variant – the *Berezowsky* variant – seemingly ignores this admonition by adopting a narrow and rigid definition of parental intent and giving even less weight to acclimatization.

2. The Berezowsky Variant – 5th Circuit

In *Berezowsky v. Ojeda*, the Fifth Circuit reiterated that it had previously adopted the *Mozes* framework and emphasized that the "primary consideration in the habitual residence determination [is] shared parental intent."[26] This statement is not of itself particularly new or controversial; however, coupled with the court's rigid definition of shared parental intent and its refusal to even discuss the child's acclimatization,[27] the

[24] *Id*. at 1079.

[25] *Id*. at 1080-81.

[26] *Berezowsky v. Ojeda*, 765 F.3d 456 (5th 2014).

[27] *Id*. at 476 fn.10. ("Some courts have held that even absent a shared parental intent, a child may acquire a habitual residence by becoming sufficiently acclimated to a new environment. See, e.g.,

Fifth Circuit's approach constitutes a significant departure from *Mozes*. The result is a rigid and inflexible habitual residence test that would exclude many cases from the scope of the Convention.

As seen under the *Mozes* variant, numerous courts have emphasized that shared parental intent can be inferred from the totality of the circumstances, even when there is a "lack of perfect consensus" between the parents.[28] Yet, under the *Berezowsky* variant, shared parental intent cannot be inferred, but instead requires a "meeting of the minds."[29] The majority concluded in *Berezowsky* that there could have been no meeting of the minds because the parents had been estranged since before the child's birth. In her dissent in *Berezowsky*, Judge Haynes noted that the majority's insistence that "parents must testify that they sat down together and explicitly agreed to a child's habitual residence" marks a sharp departure from the long-established *Mozes* framework.[30]

Berezowsky also seems to suggest that acclimatization should be given even less weight than under the *Mozes* variant. In its opinion, the majority explicitly cited *Mozes* and its progeny as authority that allows a child to acquire habitual residence by becoming "sufficiently acclimated;" in response, the majority noted that the Fifth Circuit has "instead emphasized shared intentions."[31] The majority declined to even consider whether a three-year-old child had become sufficiently acclimated during his 13-month stay in Mexico, where he had also spent long periods of time prior to relocation.

Contrary to the *Mozes* variant, *Berezowsky* also seems to suggest that a district court's findings regarding habitual residence are not entitled to the deference normally afforded to a court's factual findings. To date, there has been no other court in any of the other circuits that has adopted the *Berezowsky* variant.

b. Child-Centric Model

Like the Parental Intent Model, there are two existing variants of the Child-Centric Model. These two variants share an emphasis on the child's perspective, instead of the parents' intentions. Yet, the weight given to the child's perspective varies. One variant considers only objective facts of the child's acclimatization and ignores entirely subjective parental intent; the other emphasizes the child's perspective, but parental intent remains relevant.

Gitter, 396 F.3d at 134; *Mozes*, 239 F.3d at 1081. The approach taken by our circuit has instead emphasized shared intentions. See Larbie, 690 F.3d at 311").

[28] *Mozes*, 239 F.3d at 1077.

[29] *Berezowsky*, 765 F.3d at 469.

[30] *Id*. at 477 fn.2.

[31] *Id*. at 467 fn. 10.

1. The Friedrich Variant – 6th Circuit

The Sixth Circuit stands alone in its interpretation of habitual residence. In one of the earliest examinations by an American circuit court of The Hague Convention, the Sixth Circuit held in *Friedrich v. Friedrich*, that "to determine habitual residence, the court must focus on the child, not the parents."[32] In exploring the mother's claims that she never intended for the child to habitually reside in Germany, the Sixth Circuit held that her intentions were *irrelevant*.[33]

Six years after the Ninth Circuit introduced the prevailing *Mozes* model, the Sixth Circuit reaffirmed its view of habitual residence in *Robert v. Tesson*.[34] In *Robert*, the Sixth Circuit reiterated that a court "should consider *only* the child's experience in determining habitual residence."[35] The court dismissed the "subjective intent of the parents" as "not only inconsistent with the precedent" but also making "seemingly easy cases hard and reaching results that are questionable at best."[36]

The *Roberts* court explained that it considered any focus on parental intent to "run counter" to the goal of preventing children from being "taken out of the family and social environment in which its life has developed."[37] In reaching this conclusion, the Sixth Circuit is able to give effect to both of the Convention's objectives of restoring the status quo and preventing abduction. However, the rigidity of the test ignores the import that parental intent may have in assessing the totality of the circumstances.

Two other courts have attempted to achieve this balance, by focusing on the child's perspective but still considering parental intent.

2. The Feder Variant – 3rd and 8th

Two years after *Friedrich*, the Third Circuit adopted a child-centric model under which objective evidence of the child's acclimatization is paramount. Under *Feder*, however, parental intent is still relevant. The Third Circuit explained that:

> A child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective…A

[32] 983 F.2d 1396, 1401 (6th Cir. 1993)

[33] *Id*.

[34] 507 F.3d 981 (6th Cir. 2007).

[35] *Id*.

[36] *Id*.

[37] *Id.*

> determination of whether any particular place satisfies this standard must focus on the child and consist of an analysis of the child's circumstances in that place and parents' present, shared intentions.[38]

The Eighth Circuit has since followed suit.[39] Together, these two courts have compiled an ever-growing list of objective factors that may help a court determine whether a child has acclimatized (e.g. enrollment in school, involvement in extracurricular activities, family relations, etc.). However, parental intent remains relevant in any habitual residence analysis. Moreover, under the *Feder* framework, there is an inverse correlation between the age of the children and the weight given to parental intent. The younger the child, the more weight is given to parental intent.[40] Because a young child lacks the capacity to form his or her own intentions or meaningful ties to an environment, parental intent is by default given nearly dispositive weight in deciding the issue of habitual residence.[41]

By allowing courts to adjust the weight given to different factors, the *Feder* variant gives courts the flexibility that is necessary in such fact-intensive cases. This flexibility can at times yields a framework that is nearly identical (or at least consistent with) the parental intent test under *Mozes*.[42] The flexible approaches embraced by the *Feder* and *Mozes* variants have led some scholars and jurists to note that there is a growing and inevitable convergence of the child-centric and parental intent models. The fact that these tests can sometimes seem indistinguishable has prompted one court to question the parental intent vs. child-centric paradigm. The Seventh Circuit seems to be moving toward a new hybrid test that is free of presumptions favoring one factor over the other.

c. Totality of the Circumstances Model

In *Redmond v. Redmond*, the Seventh Circuit surveyed the circuit split between the two schools – *Mozes*/parental intent and *Feder*/child-centric. The court concluded that the "differences are not as great as they may seem."[43] And the opinion may signal the

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[38] *Feder v. Feder-Evans*, 63 F.3d 217, 224 (3d Cir. 1995).

[39] *Silverman v. Silverman*, 338 F.3d 886, 898-99 (8th Cir. 2003); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010).

[40] *Whiting v. Krassner*, 391 F.3d 540, 548 (3d Cir. 2004).

[41] *Id*. (citing *Delvoye v. Lee*, 329 F.3d 332, 333 (3d Cir. 2003). The Sixth Circuit has acknowledged this caveat in the child-centric approach, but has declined to address whether it will incorporate this caveat to it otherwise purely child-based model. *Roberts v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

[42] In *Whiting v. Krassner*, the Third Circuit recognized that its sliding scale test could, in certain cases, be reconciled and consistent with *Mozes*. 540 F.3d at 548.

[43] *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013).

beginning of a new balanced model that doesn't start with the presumption that the parental intent should be given more weight than the child's, or vice versa.

As explained in *Redmond*, the Seventh Circuit never firmly committed to either camp. Instead, the Seventh Circuit "loosely" adopted the *Mozes* framework for its stated commitment to maintaining a flexible habitual residence test, not for its presumption favoring parental intent.[44] The court opined that the parental intent presumption in *Mozes* is, in fact, far from ideal. Shared parental intent may be the proper starting point in cases involving very young children for whom the concept of acclimatization has little meaning. On the other hand, the court observed, an emphasis on shared parental intent does not work when the parents are estranged essentially from the outset.[45] In other words, the Seventh Circuit concluded that it is "unwise to set in stone the relative weights of the parental intent and the child's acclimatization."[46] Instead, the habitual residence inquiry must remain "essentially fact-bound, practical, and unencumbered with rigid rules, formulas or presumptions."[47]

At first glance, a totality of the circumstances test seems a very rational approach because it is so fluid that it has the potential to deal effectively with every possible child abduction fact pattern. However, its greatest virtue is also is greatest vice. The lack of structure will provide little predictability for parties and it may become even more difficult to discern any consistent patterns. It may also facilitate result oriented opinions by judges left unbound by any clear precedent. The Seventh Circuit does seem to suggest, however, that it is possible to develop general guiding principles within this flexible framework that will provide sufficient guidance and binding precedent (e.g. parental intent is given greater weight when the child is young).

IV. A FOREIGN PERSPECTIVE

As discussed above, our courts are not the only ones that are struggling with the concept of habitual residence. There is an international debate that in many ways resembles and influences our own domestic debates over the proper habitual residence framework. In particular, the United Kingdom's jurisprudence has been of great significance in our habitual residence case law. Many of our seminal habitual residence cases – such as *Mozes*, *Redmond*, *Friedrich* to name a few – rely on two English opinions known as *Re Bates* and *Shah*.

In *Re Bates*, the English court expressed that courts should "resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each

[44] *Id*. at 746.

[45] *Id*.

[46] *Id*.

[47] *Id*.

case should continue to be assessed without resort to presumptions or presuppositions."[48] On the other hand, in *Shah*, another English court defined habitual residence as being "habitually and normally resident" in a location, coupled with a "settled purpose" to reside there.[49] It was this reference to "settled purpose" that gave rise to the shared parental intent standard adopted in *Mozes*.[50]

The United Kingdom Supreme Court, however, has since disavowed the "settled purpose" formulation. In 2014, the U.K. Supreme Court held in *Re LC* that "settled purpose" is "not readily applicable to a child, who usually has little choice about where he lives and no settled purpose, other than survival, than living there." [51] The rejection of "settled purpose" seems to signal a shift by the U.K. courts to a child-centric approach.

In fact, *Re LC* seems to establish a child-based model that far exceeds the scope of our domestic jurisprudence. First, the new U.K. habitual residence framework sets a low threshold for proving acclimatization. In his judgment in *Re LC*, Lord Wilson confirmed that courts need only look for "*some* integration on the part of the child in a social and family environment in the suggested state of habitual residence."[52] And perhaps the most novel, and radical, development is that *Re LC* encourages courts to give greater weight to the child's state of mind. Whereas our acclimatization case law still rests on "objective facts" (e.g. existence of social and familial ties), *Re LC* rejects the long-standing preference for objective proof over evidence of "state of mind."[53] The emphasis on the child's subjective state of mind may establish precedent for courts in the United Kingdom to give greater weight to children's preferences. This would be in keeping with other recent calls by the judiciary for children to "be heard far more frequently" in Convention cases.[54]

We have yet to see how *Re LC* will be applied by the lower courts and what it practical consequences will be.

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[48] *Re Bates* (1989), No. CA 122/89 (High Ct. of Justice, Fam. Div. Eng.).

[49] *Mozes*, 239 F.3d at 1073-74. Oddly, *Shah* is not an abduction case, but merely involved another law that used the same term. Therefore, reliance on *Shah*'s "settled intent" makes less sense in cases in which the issue is the habitual residence of minor children.

[50] *Id.*

[51] [2014] UKSC 1.

[52] *Id.*

[53] *Id.*

[54] [2011] EWCA Civ 272.

The Down Town Association
60 Pine Street
New York, NY 10005

UCCJEA or Hague Proceeding

Lawrence S. Katz, Miami, Florida

INT'L CHILD ABDUCTION

Returning Children Home &
Making the Abductor Pay
Through the UCCJEA

UCCJEA
N.Y. Dom. Rel. Law

- Adopted in almost all States
- Domesticate & Enforce Certified Foreign Custody Orders
- Proper Jurisdiction
- Proper Notice/Opportunity to be Heard
- Affirmative Defenses

Expedited Enforcement of Child Custody Determination

N.Y. Dom. Rel. Law §77-g

Fla. Fam. L. Form 12.941(d)

EMERGENCY VERIFIED MOTION FOR CHILD PICK-UP ORDER

Fla. Fam. L. Form 12.941(e)

- ORDER TO PICK-UP MINOR CHILDREN

N.Y. Dom. Rel. Law §76

- Initial Child Custody Jurisdiction
- 1. Except as otherwise provided in section seventy-six-c of this title, a court of this state has jurisdiction to make an initial child custody determination only if:
- (a) this state is the home state of the child on the date of commencement of the proceeding, or was the *home state within six months before the commencement*….

§75-d International Application

- (1) A court of this state shall treat a foreign country as if it were a state of the United States for purposes of applying this title and title two.
- (2) Except as otherwise provided in subsection
- (3), a child custody determination made in a foreign country under factual circumstances **in substantial conformity with the jurisdictional standards of this part** must be recognized and enforced under title three of this article.
- (3) A court of this state need not apply this article if the child custody law of a foreign country as written or applied violates fundamental principles of human rights.

§77-1 Recognition & Enforcement

A court of this state shall accord full faith and credit to an order issued by another state and consistent with this article which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified **by a court having jurisdiction to do so under title two of this article**, unless recognition and enforcement would violate subdivision 1-c of § 240 or §1.085 of family court act.

§ 77-g Expedited Enforcement

- (1) Verified Petition. Attach certified copies of all orders to be enforced & confirming registration. May attach copy of certified.
- (2) Petition must state:
- (a) Whether court that issued order i.d. j/d basis relied upon, and specify basis;
- (b) Whether order has been vacated, stayed or modified by court whose decision must be enforced, i.d. court, case no. & nature proceedings.

§77-g continued

- (c) Any proceeding has commenced that could affect it, including DV, abuse, TPR
- (d) Present address of child & respondent;
- (e) Relief in addition to immediate physical custody & attorney's fees, including law enforcement assistance & relief sought;
- (f) If child determination (order) registered and confirmed under 77 d of this title, the date and place of registration.

§77-g (3)

- Upon filing of the petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and child. The hearing must be held not more than 3 court days after filing of the petition, provided served not less than 24 hours prior to the hearing. The court may extend the date of the hearing briefly for good cause at the request of the petitioner.

§77-g (4)

- The order must state time & place of the hearing and advise respondent that the court will order that the petitioner may take immediate physical custody of the child & the payment of fees, costs, and expenses under §77-k, and may schedule a hearing to determined further relief unless the respondent appears and establishes that:

§77-g(4)

(a) Not registered & confirmed under §75-d of this article and that:

1. The issuing court did not have j/d
2. The order has been vacated, stayed or modified by a court having j/d to do so
3. The respondent was entitled to notice and not given per standards 75-g in those proceedings before issuing court

§77-g (4)(b)

or

The child custody determination for which enforcement is sought was registered and confirmed under. §77-c, but has been vacated, stayed, or modified by a court of a state having jurisdiction to sounder title two (§ 76-76-i)of this article.

§77-k Costs, Fees, & Expenses

1.The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be inappropriate. No fees, costs or expenses shall be assessed against a party who is fleeing an incident of domestic violence or mistreatment or abuse of a child or mistreatment or abuse of a child or sibling, unless the court is convinced by a preponderance of the evidence that such assessment would be clearly inappropriate.

Karan v. Karan
6 So.3rd 87, 91 (Fla. 3rd DCA 2009)

- The French court utilized a standard of *usual and permanent centre of interest*, The court held that:
- "….the record is clear that the children did not reside in Guadeloupe for six continuous months preceding the filing of the Husband's petition. Thus, the French trial court did not exercise its jurisdiction over the Husband's child custody proceeding in substantial conformity with the UCCJEA….the Florida trial court could have, and should have, exercised its jurisdiction over the child custody portion of the Wife's petition."

Dyce v. Christie
17 So.3rd 892 (Fla. 4th DCA 2009)

- Both Fla. Stat. 61.528 and 61.531 required the trial court to evaluate whether the father had proper notice and opportunity to be heard in the Jamaican proceedings. The father had notice of those proceedings and entered an appearance, having been represented by a Jamaican attorney until the attorney withdrew because of the father's failure to pay. That he failed to appear at the final hearing is not a failing of the Jamaican procedures but of the father.

Dyce v. Christie
17 So.3rd 892 (Fla. 4th DCA 2009)

- With respect to Fla. Stat. 61.506(3), the appellate court held: "We take that to mean that when the foreign law itself fails to recognize a fundamental public policy tenet, such as considering the best interests of the child, the courts may decline to recognize the judgment. However, whether the foreign court has properly applied its law is a question for the foreign jurisdiction. We do not think that public policy considerations require a Florida court to reevaluate the merits of every foreign custody decree to determine whether a child's best interest has been served by the foreign decree. "

Malik v. Malik
638 A.2d 1184 (Md. App. 1994)

- The Pakistani court's custody order is presumed to be correct. This presumption shifts to the opposing party the burden of proving by a preponderance of evidence that (1) the Pakistani court did not apply the 'best interests of the child standard or its equivalent, and (2) whether the procedural and substantive rights applied to the litigants before the Pakistani courts were such that confidence in the outcome was undermined.

Hosain v. Malik, 671 A.2d 988, 1005 (Md. Ct. Spec. App. 1996)

- A Pakistani custody order was entitled to comity even though the Pakistani court had applied a maternal preference, referred to as "Hazanit." Specifically, the *Hosain* court concluded that "given that Hazanit is only more doctrinaire in degree from the maternal preference and because the circuit court could have reasonably found it to be only a factor, we hold that the circuit court did not err in concluding that the principles of Pakistani law which were applied were not repugnant to Maryland law."

In re Custody of R
947 P.2d 745 (Wash. App. 1997)

- In this case, the Washington court in considering the public policy favoring the best interests of the child, when deciding to enforce a foreign custody decree, adopted the Maryland approach in Malik.
- As a result the Washington legislature amended the UCCJEA in 2001 and removed the "best interest of the child" language because it tended to create confusion between the jurisdictional issue and the substantive custody determination.

Tostada v. Tostada
151 P.3rd 1060 (Wash. App. 2007)

- Rejection of *In re R* and the Maryland law:
- The Court of Appeals, in reversing the lower court that based its decision on the 'children's best interests', held that the divorce decree and initial custody determination made by the Mexican court were valid and enforceable.

UCCJEA COMMENTS

- The official comments to the uniform act explain, "The UCCJEA eliminates the term 'best interests' in order to clearly distinguish between jurisdictional standards and the substantive standards relating to custody and visitation of children"

9 U.L.A. 652

Paillier v. Pence

144 Cal. App. 4th 461; 50 Cal. Rptr. 3rd 459 (Cal. App. 4th 2006)

- Facts: French court decree that awarded custody to the mother, father visitation and a *ne exeat* order that she could not move. The mother relocated to California. The trial court ordered that the child be returned by the mother voluntarily. She did not comply, a warrant was issued, the court ordered child returned to the father's custody for his return to France.

Paillier v. Pence

144 Cal. App. 4th 461; 50 Cal. Rptr. 3rd 459 (Cal. App. 4th 2006)

- The court of appeal reversed and remanded with directions to deny the order unless a French court either declined jurisdiction or issued a contrary order that was entitled to enforcement under the UCCJEA. The trial court had no jurisdiction to: change custody, **to apply the best interests test, and to enforce the move away order.**

Charara v. Yatim

937 N.E. 2d 490 (Mass. App. 2010)

- Facts: father obtained custody decree of children from Jaafarite Court in Lebanon. The mother returned to Massachusetts and filed for divorce.
- In the Jaafarite Court, it is only the father's fitness considered and he will be given custody of a son over the age of two absent circumstances that would render him unfit. Therefore, no deference was due to that custody order.

Charara v. Yatim

937 N.E. 2d 490 (Mass. App. 2010)

- The appellate court held that under the MCCJA that: " 'the substantial conformity test requires the satisfaction of three procedural components: whether the foreign court (1) had jurisdiction over the parties and the subject matter; (2) applied procedural and substantive law reasonably comparable to ours; and (3) based its order on the 'best interests of the child.'"

Chaar v. Chehab

78 Mass App. Ct. 501 (Mass. App. 2010)

- Father obtained a custody order in Lebanon after the mother left with the child.
- Held: "Under Massachusetts law, while removal of a child without court authorization or parental consent is a relevant consideration, the child is 'not chargeable with the misconduct of her mother…and ought not to be compelled to suffer for it. Her welfare is the paramount consideration' (citation omitted)….there is no indication that the Lebanese law governing custody disputes takes into consideration all of the relevant factors bearing on the child's best interests as that standard is understood under the laws of the Commonwealth."

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EDUCATION

J.D., University of Miami, 1968 Phi Alpha Delta
Law Fraternity

B.B.A., University of Miami 1965
Phi Epsilon Pi Fraternity, President

ADMISSIONS

Mr. Katz was admitted to the Florida Bar in 1968 and to the Florida Supreme Court, U.S. District Court, Southern District of Florida and the U.S. Court of Appeals, 5th Circuit; 1974, U.S. Supreme Court; 1980, U.S. District Court, Middle District of Florida; 1981, U.S. Court of Appeals, 11th Circuit; 1996, U.S Court of Appeals 3rd Circuit; and, 2014, U.S. Court of Appeals 9th Circuit.

ACTIVITIES AND LECTURES

Lecturer, "Records and the Abducted Child," Children's Records Law in Florida, 1999, 2000, 2001.

Lecturer, Twelfth Annual Nuts and Bolts of Divorce, DCBA Family Courts Committee (2005). “Economic Injunctions/Freeze Orders Domestic and Foreign.”

Lecturer, “Abduction Factors and Fla. Stat. §61.45 as it Concerns International Visitation and Child Custody,” First Family American Inn of Court (2006).

Lecturer, Family Law Update 19th Judicial Circuit in St. Lucie County, Florida (2007), “Int'l Child Abduction: Returning Kids Home & Making the Abductor Pay Through Hague or UCCJEA."

Lecturer, “Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction” sponsored by the University of Miami School of Law and the National Center for Missing and Exploited Children (NCMEC) (February 2008)

Participant, ICARA 15 Symposium. Office of Children’s Issues, U.S. Department of State, 2003.

Attended the Fifth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction held at the Hague, Netherlands 2006.

Member of Study Group of the Secretary of State Advisory Committee of Private International Law considering the 1996 Hague Protection of Children Convention, 2007.

Lecturer, “From Ferreting to Fetching: How to Find, Freeze and Retrieve Marital Assets

Hidden Abroad," ABA Section of Family Law, 2009 Spring CLE Conference.

Lecturer, "Moving from Kansas to Oz: Competing Paradigms and Practical Issues in International Child Custody Relocation Cases," Association of Family and Conciliation Courts (AFCC), 46th Annual Conference, May 2009.

Lecturer, "Transnational Families: Where International Law and Family Law Intersect," 2009 Florida College of Advanced Judicial Studies.

Lecturer, "Mediating International Child Abduction Cases and Other High Conflict Cross-Border Custody Disputes," ABA Section of International Law, 2009 Fall CLE Conference.

Lecturer, "Alternative to the Hague by Returning Kids Home and Making the Abductor Pay Through the UCCJEA", U.S. Chapter of the IAFL, 2011 Annual General Meeting.

Observer/attendee on behalf of IAFL (NGO) at the Sixth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforceability and Measures for the Protection of Children held at the Hague, Netherlands, June, 2011.

Lecturer, "Case Study: Application to Remove a Child From the Jurisdiction", IAFL, 2011 Annual General Meeting held at Harrogate, U.K., September 2011.

Lecturer, "1980 Hague Convention", Lunch and Learn Seminar Sponsored by Family Court Services, October 2011.

Observer/attendee on behalf of IAFL (NGO) at the Sixth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforceability and Measures for the Protection of Children held at the Hague, Netherlands, January, 2012.

Lecturer, "Representing the Abducting Parent", Japanese Symposium, IAFL, U.S. Chapter held at Minneapolis, MN, June 2012.

Lecturer, "Enforcement of Mediated Agreements", Japanese Symposium, IAFL, U.S. Chapter held at Minneapolis, MN, June 2012.

Lecturer, "International Enforcement of Mediated Agreements: Properly Structuring Your Agreements for Enforcement Success.", IAFL, U.S. Chapter Annual Meeting held at Minneapolis, MN, June 2012.

Lecturer, "Mediating Hague Abduction Cases." Phoenix Symposium, IAFL, U.S. Chapter Annual Meeting held at Carefree, AZ, February 2013.

Lecturer, "International Relocation", IAFL Hague Symposium, held at Colegio Puplico de Abogados de Capital Federal, Buenos Aires, Argentina, September 2013.

Lecturer, "Domestic Violence and the Article 13(b), Grave Risk Defense", IAFL Annual Meeting held at Buenos Aires, Argentina, September 2013.

Lecturer, "2007 Hague Maintenance Convention, 1996 Hague Jurisdictional Convention, the Cuban Adjustment Act and Asylum vs. Art. 13(b) grave risk", IAFL European Chapter Annual Meeting held at Bordeaux, France, March 2014.

Lecturer, “The Aftermath of *Lozano*: Defending Against the Well Settled Defense Under Art. 12”, IAFL, U.S. Chapter Annual Meeting held at New York City, NY, June 2014.

Lecturer, “Hague Abduction Convention and UCCJEA”, Florida Chapter of the AAML, The 37th Annual Institute, Tampa, FL, May 2015.

Lecturer, “Article 13(b) and Asylum in the U.S.”, IAFL Hague Symposium, held at Quebec City, Canada, June 2015.

PUBLICATION

Author, “When the? Involves an International Move, The Answer May Lie in Retaining U.S. Jurisdiction,” ABA Section Family Law, Family Advocate Spring 2006.

AWARDS AND RECOGNITIONS

International Academy of Family Lawyers, U.S. Chapter, June 2014, Bill Hilton Memorial Award for Exceptional Contributions to International Family Law.

Super Lawyers 2010 through 2015 (Top Attorneys in Florida). Florida Trend, the State’s Legal Leaders. Florida Legal Elite 2009-2015. Top Lawyers in Florida (2014-15). The First Family Law American Inns of Court Awards for Service (2008-10). Awards of Merit from the National Center for Missing and Exploited Children and the U.S Department of State Certificate of Appreciation for Extraordinary Assistance to Hague Convention Applicants. "AV" rated by Martindale Hubbell since 1976. Certificate of Recognition from ABA, Section of Family Law for Service as Chair of the International Law Committee. Listed in the Bar Register of Preeminent Lawyers. Supreme Court Certified Family Mediator. Listed in “Who’s Who in America, the World and Law”.

MEMBERSHIPS

Fellow, International Academy of Family Lawyers (IAFL), Board of Managers and Chairman of Committee on Hague Conventions (2010-2016): U.S. Chapter of the IAFL, Chairman of the Committee on Hague Conventions (2010-present) and member of the Admissions Committee (2010-present): First Family Law American Inn of Court, President (2009-10): American Bar Association: Family Law Section, International Law Committee, Chairman (2007-9) and Immediate Past Chairman (2009-2011), Domestic Violence Committee, Vice Chairman (2009-2011); International Law Section, Family Law Committee, member of Steering Committee; Florida Bar Association: former member; Continuing Legal Education, Children's Issues Committees, Legislation, Mental Health in Litigation, and Domestic Violence Committees; Mentor, International Child Abduction Attorney's Network (ICAAN) and the U.S. Department of State, Office of Children’s Issues Attorney Network; Member, International Society of Family Law; and, Member, Association of Family and Conciliation Courts.

REPORTED FAMILY CASES

In Re Cabrera, 323 F.Supp.2d 1303 (S.D. Fla. 2004) (return to Argentina the court found equitable tolling and held that a child should be returned rather than threatened with possible deportation).

In Re Arison-Dorsman, U.S. Dist. Lexis 9861, 32 Media L. Rep. 1699 (S.D. Fla. 2004) (return ordered to Israel: record should not be sealed).

Leslie v. Noble, 377 F.Supp. 2d 1232 (S.D. Fla. 2005) (held that father had rights of custody before, during and after paternity court proceedings in Belize).

Marcos v. Haecker, 915 So.2d 703 (Fla. 3rd DCA 2005) (international paternity case involving Spain, Mexico and Florida where a motion to quash service of process was affirmed on appeal).

Dallemagne v Dallemagne, 440 F. Supp. 2d 1283 (M.D. Fla. 2006) (return to France and provides an excellent analysis of burden of proof and defenses).

Angulo Garcia v. Fernandez Angarita, 440 F. Supp. 2d 1364 (S.D. Fla. 2006) (return to Colombia and held, in part, that consent to travel is invalid if procured by fraud).

Hanley v. Roy, 485 F.3rd 641 (11th Cir. 2007) (return to Ireland and held that district court made a "mockery" of Convention refusing to order the return of children to grandparents/guardians).

Dyce v. Christie, 17 So.3rd 892 (Fla. 4th DCA 2009) (expedited enforcement of final decree from Jamaica, child abduction, collateral attack of foreign judgment and due process of law).

Abdo v. Ichai, 34 So.3rd 13 (Fla. 4th DCA 2010) (PCA affirmed order permitting mother to relocate to France, retaining habitual residence in the United States and transferring jurisdiction to California).

Sarpel v. Eflanli, 65 So.3rd 1080 (Fla. 4th DCA 2011) (Temporary absence and the establishment of "home state" subject matter jurisdiction pursuant to the U.C.C.J.E.A. and anti-suit injunction preventing the former wife from attempting to modify the final judgment from Florida and "mirror orders" entered in Turkey).

Sahibzada v. Sahibzada, 2014 Ga. LEXIS 219 (S.Ct. Ga. 2014) (Supreme Court quoted from ABA article on relocation)

Carlwig v. Carlwig, 16 F. Supp. 3d 1075 (C.D. Ca. 2014) (Case of first impression on habitual residence by returning infant born in California to Sweden along with older brother where parties had shared intent to do so).

Carlwig v. Carlwig, U.S. App. LEXIS, 6353 (9th Cir. 2015) (Infant was not habitual residence of either U.S. or Sweden. Both children shall remain in Sweden).

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY, FLORIDA

Case No.: _____
Division: _____

_____,
Petitioner,

and

_____,
Respondent.

EMERGENCY VERIFIED MOTION FOR CHILD PICK-UP ORDER

I, *{full legal name}* _____, being sworn, certify that the following information is true:

1. This is a motion to enforce existing custody or time -sharing rights (as an operation of law or court-ordered) regarding the following minor child(ren):

Name	Sex	Birth Date	Race	Physical Description

2. Currently, the child(ren) subject to this motion is (are) in the physical possession of *{full legal name}* _____ _____ whose address or present physical location is: _____
This individual's relationship to the minor child(ren) is: _____ _____

3. I (☐) am (☐) am not married to the person named in paragraph 2.

4. **Status of minor child(ren).** I have a superior right to custody of or time-sharing with the minor child(ren) over the person named in paragraph 2 because:
[Choose **all** that apply]:
   a. ☐ **Custody or Time-Sharing has been established by a court.** A final judgment or order awarding custody of or time-sharing with the minor child(ren) was made on *{date}* _____ in *{name of court}* _____ *{case number}* _____.
   This order awarded custody of or specific time-sharing with the minor child(ren) to me.

This final judgment or order applies to the following minor child(ren): *{list name(s) of the child(ren) or write all}* _____

_____

A certified copy of said final judgment or order is attached, has not been modified, and is still in effect. [Choose if applies] (☐) This order is an out-of-state court order which is entitled to full faith and credit enforcement under the Uniform Child Custody Jurisdiction and Enforcement Act and/or the federal Parental Kidnaping Prevention Act.

b. ☐ **Custody or time-sharing is established as an operation of law.** I am the birth mother of the minor child(ren) who was (were) born out of wedlock and there is no final judgment or order awarding custody of or time-sharing with the following minor child(ren): *{list name(s) of the child(ren) or write all}* _____

_____

_____

☐ **Paternity has NOT been established.** A certified copy of the minor child(ren)'s birth certificate is attached and has not been amended.

☐ **Paternity has been established.** A certified copy of the final judgment of paternity, which shows no award of custody or time-sharingwas made, is attached. This order has not been changed and is still in effect.

c. ☐ Other: _____

_____

_____

_____

5. A completed Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d), is filed with this motion.

6. **Facts relating to the minor child(ren)'s current situation.**
[Choose **all** that apply]

a. ☐ The person named in paragraph 2 wrongfully removed or wrongfully detained the minor child(ren) on *{date}* _____ as follows: _____

_____

_____

_____

_____

☐ Please indicate here if you are attaching additional pages to continue these facts.

b. ☐ I believe that the minor child(ren) is (are) in immediate danger of harm or removal from this court's jurisdiction while with the person named in paragraph 2 based on the following:

_____

_____

_____

_____

c. ☐ The current location of the minor child(ren) is:

☐ unknown

☐ believed to be at the following address(es) with the following people *{list both the address and the people you believe will be there}*: _____

_____

_____

_____

7. Advance notice of this motion to the individual named in paragraph 2 should not be required because: _____

_____

_____

_____

_____

8. If needed, I can be contacted for notice of an emergency or expedited hearing at the following addresses/locations: _____

Name of Contact Person: _____

Address: _____

Telephone number(s) where I (or my designee) can be reached: *{give name of individual to call}*

_____

Name of Contact Person: _____

Address: _____

Telephone number(s) where I (or my designee) can be reached: *{give name of individual to call}*

_____

9. **Attorneys' Fees, Costs, and Suit Monies.**

☐ [Choose **if** applicable]

I have filed this motion because of wrongful acts of the person listed in paragraph two above. I request that this Court award reasonable attorney's fees, costs, and suit monies as applicable or authorized under Florida law, the UCCJEA, and other legal authorities.

WHEREFORE, I request an Emergency Order to Pick-Up Minor Child(ren), without advance notice, directing all sheriffs of the State of Florida or other authorized law enforcement officers in this state or any other state to pick up the previously named minor child(ren) and deliver them to my physical custody.

I understand that I am swearing or affirming under oath to the truthfulness of the claims made above and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

Dated: _____

_____
Signature of Party
Printed Name: _____
Address: _____
City, State, Zip: _____
Telephone Number: _____
Fax Number: _____

STATE OF FLORIDA
COUNTY OF _____
Sworn to or affirmed and signed before me on _____ by _____

_____
NOTARY PUBLIC or DEPUTY CLERK

_____
[Print, type, or stamp commissioned name of notary or clerk.]

☐ Personally known
☐ Produced identification
Type of identification produced _____

IF A NONLAWYER HELPED YOU FILL OUT THIS FORM, HE/SHE MUST FILL IN THE BLANKS BELOW: [fill in **all** blanks]
I, *{full legal name and trade name of nonlawyer}*_____,
a nonlawyer, located at *{street}* _____, *{city}* _____,
{state} _____, *{phone}* _____, helped *{name}* _____,
who is the [Choose only **one**] ☐ petitioner **or** ☐ respondent, fill out this form.

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY, FLORIDA

Case No.: _____
Division: _____

_____,
Petitioner,

and

_____,
Respondent.

ORDER TO PICK-UP MINOR CHILD(REN)

An Emergency Verified Motion for Child Pick-Up Order has been filed by (☐) Petitioner (☐) Respondent, alleging facts which under existing law are determined to be sufficient to authorize taking into custody the minor child(ren) named below. Based on this motion, this Court makes the following findings, notices, and conclusions:

JURISDICTION

This Court has jurisdiction over issues surrounding the minor child(ren) listed below based on the following:

[Choose **all** that apply]

a. ☐ This Court exercised and continues to exercise original jurisdiction over the minor children listed below under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), specifically, section 61.514, Florida Statutes.

b. ☐ A certified out-of-state custody decree has been presented to this Court with a request for full faith and credit recognition and enforcement under the Parental Kidnapping Prevention Act, 28 U.S.C. Section 1738A. This Court has jurisdiction to enforce this decree under the UCCJEA, specifically sections 61.501-61.542, Florida Statutes.

c. ☐ By operation of Florida law governing the custody of or time-sharing with child(ren) born out of wedlock, this Court has jurisdiction over the child(ren) listed below because this (these) child(ren) was (were) born in the State of Florida and no prior court action involving the minor child(ren) has addressed a putative father's rights to time-sharing or other parental rights. See sections 742.031 and 744.301, Florida Statutes.

d. ☐ Pursuant to the UCCJEA, specifically section 61.516, Florida Statutes, this Court has jurisdiction to modify a custody decree of another state and has consulted with the Court which took initial jurisdiction over the minor child(ren) to determine this authority.

e. ☐ Other: _____
_____

NOTICE OF HEARING

Because this Order to Pick-Up Minor Child(ren) has been issued without prior notice to the non-movant *{name}* _____, all

parties involved in this matter are informed that they are scheduled to appear and testify at a hearing regarding this matter on *{date}* _____, at {time} _____,at which time the Court will consider whether the Court should issue a further order in this case, and whether other things should be ordered, including who should pay the filing fees and costs. The hearing will be before The Honorable *{name}* _____ at *{room name/number, location, address, city}*_____, Florida. If a party does not appear, this order may be continued in force, extended, or dismissed, and/or additional orders may be issued, including the imposition of court costs.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact:

_____

{identify applicable court personnel by name, address, and telephone number}
at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

ORDER

This Court **ORDERS AND DIRECTS** any and all sheriffs of the State of Florida (or any other authorized law enforcement officer in this state or in any other state) to immediately take into custody the minor child(ren) identified below from anyone who has possession and:

1. ☐ **Place the minor child(ren) in the physical custody of** *{name}* _____ **who (☐) may (☐) may not remove the minor child(ren) from the jurisdiction of this Court.**

OR

☐ **Accompany the minor child(ren) to the undersigned judge, if the minor child(ren) is (are) picked up during court hours, for immediate hearing on the issue of custody or time-sharing.** It is the intention of this Court that the nonmoving party, minor child(ren), and movant appear immediately upon service of this order before the undersigned judge, if available, or duty judge to conduct a hearing as to which party is entitled to lawful custody of the minor child(ren) at issue. It is not the intention of the court to turn over the child(ren) to the movant on an ex parte basis. Neither party should be permitted to remove the child(ren) from the jurisdiction of this Court pending a hearing. If unable to accomplish the above, the sheriff/officer shall take the child(ren) into custody and place them with the Department of Children and Family Services of the State of Florida pending an expedited hearing herein.

OR

☐ **Place the minor child(ren) in the physical custody of** *{agency}* _____ **who shall contact the undersigned judge for an expedited hearing.** The sheriff/officer shall not delay the execution of this court order for any reason or permit the situation to arise where the nonmoving party is allowed to remove the child(ren) from the jurisdiction of this court.

2. **NEITHER PARTY OR ANYONE AT THEIR DIRECTION, EXCEPT PURSUANT TO THIS ORDER, MAY REMOVE THE CHILD(REN) FROM THE JURISDICTION OF THIS COURT PENDING FURTHER HEARING. SHOULD THE NONMOVING PARTY IN ANY WAY VIOLATE THE MANDATES OF THIS ORDER IN THE PRESENCE OF THE LAW ENFORCEMENT OFFICER, THIS OFFICER IS TO IMMEDIATELY ARREST AND INCARCERATE THE OFFENDING PARTY UNTIL SUCH TIME AS THE OFFENDING PARTY MAY BE BROUGHT BEFORE THIS COURT FOR FURTHER PROCEEDINGS.**

All sheriffs of the State for Florida are authorized and ORDERED to serve (and/or execute) and enforce this order in the daytime or in the nighttime and any day of the week, except as limited by this order above.

Except as limited by the above, if necessary, the sheriff/officer is authorized to take all reasonable, necessary, and appropriate measures to effectuate this order. The sheriff/officer shall not delay the execution of this order for any reason or permit the situation to arise where the child(ren) is (are) removed from the jurisdiction of this Court before execution of this order.

The minor child(ren) is (are) identified as follows:

Name	**Sex**	**Birth date**	**Race**	**Physical Description**

Current location/address of minor child(ren) or of party believed to have possession of the minor child(ren): _____

_____

_____

_____

DONE AND ORDERED on at _____, Florida *{date}* _____.

_____

CIRCUIT JUDGE

A copy of the {*name of document(s)}* _____ was [Choose only **one**] ☐ mailed ☐ faxed and mailed ☐ hand delivered to the parties listed below on {*date*}_____ by *{clerk of the court or designee}*_____.

Petitioner (or his or her attorney)
Respondent (or his or her attorney)

DRL §77-d

Form UCCJEA-16
Objection to the Registration of Out-of-State Child Custody or Visitation Order - UCCJEA
8/2002

.....

In the Matter Of The Registration Of An Out-of-State Custody Or Visitation Order Pursuant to the *Uniform Child Custody Jurisdiction and Enforcement Act*

Petitioner,

Docket No.
OBJECTION TO THE REGISTRATION OF OUT-OF-STATE CHILD CUSTODY OR VISITATION ORDER – UCCJEA

-against-

Respondent.

.....

I [specify name]: object to the registration of the custody or visitation order submitted to this Court for registration by the Petitioner that names the following child(ren):

Name(s) of Child(ren)	Date(s) of Birth

In support of this objection, I allege the following [check applicable box(es)]:

☐ The court that issued the order did not have jurisdiction, because [specify]:

☐ The custody or visitation order sought to be registered has been vacated, stayed or modified by a court having jurisdiction as follows [specify, including court and date, and attach certified copy of the order vacating, staying or modifying the order sought be registered]:

☐ I was entitled to notice before the custody or visitation order was made, but notice was not given according to the standards of Section75-g of the New York State Domestic Relations Law.

Date:

_____
Person Filing Objection (Print or Type Name)

_____
Address of Person Filing Objection[1]

_____
Signature of Attorney, if any

_____
Attorney's Name, if any (Print or Type)

_____

_____
Attorney's Address and Telephone Number

CERTIFICATE OF MAILING

I mailed this objection on [specify date]:_____.

_____ (Signature)

---

[1] Specify if address has been ordered to be kept confidential pursuant to Domestic Relations Law §§76-h, 254 or Family Court Act §154-b. If your health or safety or that of your child or children would be put at risk by disclosure of your address, you may apply for address confidentiality by submitting General Form GF-21, which is available at www.courts.state.ny.us (Family Court forms).

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

IN RE: THE MARRIAGE OF
[redacted]

CASE NO: [redacted]

Petitioner,

FAMILY DIVISION

and

[redacted]

Respondent.
_____/

ORDER FINDING INITIAL SUBJECT MATTER JURISDICTION

THIS CAUSE having come on to be heard before me on March 28, 2012, for a hearing to determine if this Court has initial subject matter jurisdiction to enter a child custody decree or declaration pursuant to the Uniform Child Custody Jurisdiction Act (hereinafter the "UCCJEA") The Court having heard testimony from the Petitioner and cross examination by the Respondent and brief argument from Petitioner's counsel and the Respondent, makes the following findings of fact and conclusions of law:

A. The Petitioner initially filed in this cause a *Petition for Support Unconnected with Dissolution of Marriage with Dependent and Minor Child* along with a UCCJEA affidavit wherein she acknowledged that there were prior proceedings relative to the child in New Zealand, which resulted in an order being entered on September 1, 2010, by the Honorable Judge Grace. The Petitioner subsequently filed a Petition for Dissolution of Marriage.

B. As a result of perusing the foregoing, the Court entered an order setting a hearing for December 13, 2011, and ordered that neither party should remove the child from this jurisdiction pending further order of the Court. On the day of the hearing, the

Honorable Scott Bernstein determined, in part, upon perusing the Notice of Related Case filed by the Petitioner that this matter should be set for hearing to determine if the Court had jurisdiction in this cause. Thereafter, the Court set this matter for hearing.

C. The parties met in Afghanistan while each was employed. They began a relationship and the Petitioner became pregnant in November 2007; thus, she returned home to Boulder, Colorado where she resided with her father. Respondent subsequently also left Afghanistan to reside with the Petitioner. Since the Respondent did not have residency status or a non-immigrant visa issued by the United States, he was required to depart and re-enter this country to comply with the date set forth on his form I-94 for departure.

D. The parties were married on July 13, 2008, in Boulder, Colorado. The child was born in that city on July 25, 2008. During that month the parties purchased a property located in Boulder, Colorado where they resided. That property was subsequently rented in July 2009.

E. The Respondent left Boulder, Colorado to return to work in Afghanistan in September 2008, and returned for the last time in February 2009. The Petitioner subsequently learned that her spouse had been terminated from his employment due to ethical misconduct by committing numerous acts of sexual harassment.

F. The parties and child went to New Zealand in June 2009. One month later the Petitioner discovered that her spouse was committing adultery with various women. The Petitioner was only permitted to remain in New Zealand for three months. The Respondent did not apply for a visa for her to remain thereafter. Notwithstanding the foregoing, in October 2009, he was granted the first ex-parte Order for Non-Removal of

[redacted]

the child from that country. The parties jointly had it discharged a few days later thereby permitting the Petitioner and child to return home in Boulder, Colorado.

G. In May 27, 2010, the Petitioner and child returned to New Zealand based upon the claim that the Respondent had a home they could return to and that they would attempt to reconcile. Upon their return she was presented with a tenant rental lease that refused to sign it. Within 24 hours, or on May 28, 2010, the Respondent sought and obtained his second ex-parte Order for Non-Removal from New Zealand of the child.

H. In June and July 2010, the Petitioner called the police to report acts of domestic violence committed by the Respondent upon her and in the presence of the child. Consequently, the parties separated on July 2, 2010, while the Respondent and child were in New Zealand for shortly over one month.

I. The parties attended marriage counseling pursuant to the Family Proceedings Act 1980 and Care of Children Act 2004. The Report of Counsellor from the Relationship Services in a report dated 29 July 2010, stated that the parties will not continue their marriage and resolved day to day issues that required the Petitioner to vacate the premises and reside in a hotel so the Respondent could visit with the child in the same house where they were staying for several days each week.

J. Once again, the Petitioner was required to remain in New Zealand pursuant to an ex-parte order. Consequently, the Petitioner executed documents herself for an immigration visa under the Family Sponsor Category and was advised by letter on August 30, 2010, by New Zealand Immigration that her spouse was not an eligible sponsor since he had sponsored a successful applicant in March 2006, and could not do so again until the expiration of five years from that date. Thus, the Petitioner could not remain in New

[redacted]

Zealand.

K. The Petitioner had no source of income, support system or the ability to seek employment or remain in New Zealand, and the Respondent was providing her approximately NZD 100. Eventually she was evicted from her residence and had to borrow money from her family in Colorado to survive. Given her lack of immigration status she also had no access to New Zealand social service welfare. She did go to the Lower Hutt Women's Shelter and was able to obtain an attorney through legal aid.

L. On September 1, 2010, at a Care of Child Act hearing in the Lower Hutt Family Court, the ex-parte order was discharged; she and the child were granted leave to return to the United States that would be the child's habitual residence. Judge Grace found with respect to the Petitioner, in paragraph 28 of the order, that the "the reality of it is, and listening to your evidence, you appear to be, in my view, an honest and straight forward person who does not want to jeopardise your position with the Immigration Service and therefore find yourself in a 'catch 22' situation." He further stated in paragraphs 22 and 23 that the Petitioner was in a *no win situation* because she was not able to work due to her immigration status. Of significance is the finding that Judge Grace made in paragraph 30 with respect to the ex-parte order obtained by the Respondent: "The effect of that order preventing removal has really, in my view, the effect of holding Ms. Brown to *ransom* in a position where she does not have support of either her husband, or anybody else in New Zealand, because her husband is not able to provide that support."

M. The Respondent sought to domesticate the New Zealand court order in Boulder, Colorado. After returning from New Zealand the Petitioner left Colorado in

October 2010, after having received information that the Petitioner was dangerous and angry and being cognizant that in addition to him committing acts of domestic violence upon her in the presence of the child also served in the military as a sniper.

N. The Respondent sought an order from the Colorado Court permitting him to temporarily remove the child to New Zealand for a delineated period of time. That Court held a telephone conference on May 20, 2011. Judge Klein ordered the Respondent to "incorporate certain language into a written and notarized/acknowledged/certified statement assuring all parties involved that the minor child will in fact be returned to the U.S. at the conclusion of the parenting time as agreed by the parties." The Respondent submitted a Statement and Declaration that he signed on June 3, 2011, and his counsel signed on June 6, 2011. However, irrespective of the language in that document and advice of his counsel, he sent an accompanying letter to Judge Klein that he executed the Statement and Declaration under duress and did not agree with paragraph 2 of the document.

O. Notwithstanding the order of the Boulder County District Court after the Respondent returned with the child to New Zealand, he filed two ex-parte pleadings on July 28, 2011. The first was filed under the Domestic Violence Act and sought to keep the child in New Zealand under the custody of the state, which was denied by an order of the Court. Concurrently on the same day, the Respondent filed an ex-parte Breach of Parenting Order. He clearly violated his Declaration and the order of that Court. As a result of his actions, Judge Klein held an emergency telephone conference and directed the Respondent to return the child to the United States on a date certain.

P. The Petitioner had a Colorado driver's license, voter's registration, bank

accounts, and real property throughout the entire time that proceedings were held in New Zealand that resulted in the original order of Judge Grace and subsequent parenting order entered in December 2010, for which her counsel was given one day's notice. Since relocating to Florida in October 2010, she has had Florida bank accounts, a lease, motor vehicle, Florida voter's registration and driver's license. The child was treated by pediatricians originally in Colorado and presently in Florida.

Q. The Court finds that the child's home state was Colorado from birth until his relocation to Florida in September 2010. Although his birth was registered in New Zealand for travel/passport purposes, at all times he was a habitual residence of the United States and his home state was Colorado and now is Florida. He resided in each state for more than six months. He was only temporarily absent from his home state to travel and remain for brief periods of times in New Zealand as is permitted by the UCCJEA.

R. The Court finds that after hearing the testimony and observing the demeanor of the Petitioner, on both direct and cross examination by the Respondent that the Petitioner is credible and the exhibits that were introduced into evidence support her testimony.

S. The statutory provisions of the UCCJEA pertaining to Simultaneous Proceedings is set forth in Fla. Stat. §61.519(2) which provides: "Except as otherwise provided in s.61.517, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to s. 61.522. If the court determines that a child custody proceeding was previously commenced in a court in another state *having jurisdiction substantially in accordance with*

this part, the court shall stay the proceeding and communicate with the court of the state." (emphasis added) Fla. Stat. §61.511(2) entitled Communication between courts, provides in pertinent part that: "If the parties elect to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made." Therefore, this Court held the evidentiary hearing and gave both parties 10 days in which to provide a proposed order and relevant law so the Court could make a decision on jurisdiction.

T. This Court has taken judicial notice of the relevant sections of the statutory laws of New Zealand concerning personal and subject matter jurisdiction for custody and access rights of child as is set forth in the Care of Children Act 2004. Section 126(1) entitled personal jurisdiction that provides as follows: "The court has jurisdiction under this Act in any of the following cases: (b) if the child is the subject of the application or order is, when the application is made, present in New Zealand; or (c) if the child, a person against whom an order is sought, or the applicant is, when the application is made, domiciled or resident in New Zealand. The same language is found in section 4 of the Family Proceedings Act 1980 that gives Family Courts jurisdiction in proceedings under that Act.

U. In *Arjona v. Arjona,* 941 So.2d 451 (Fla. 3rd DCA 2006) the husband filed a divorce action in Mexico prior to the wife filing her divorce action in this circuit. He contended that the circuit court had to defer to the Mexican court. The Third District affirmed the holding by the circuit court that Florida was the children's home state and that the Mexican proceedings were not commenced substantially in conformity with the jurisdictional requirements of Fla. Stat. §61.514. The appellate court held, in part, that "The UCCJEA, however, gives jurisdictional priority to the child's home state. *Section*

61.514 of the UCCJEA provides that, except under limited exceptions, Florida has jurisdiction to make an initial child custody determination only if Florida is the child's home state." (emphasis supplied) *Id. at 455.* " We conclude that because Florida is the 'home state' of the children and Florida has not declined to exercise jurisdiction over the custody issues of the children, the proceedings in Mexico were not commenced in substantial conformity with the jurisdictional requirements of *section 61.514.* Thus, the communication requirement of *section 61.519* has no application in the instant case." *Id at 456. Arjona* was followed by the Utah Court of Appeals in *Meyeres v. Meyeres,* 196 P.3rd 604, 608 (Ct. App. Utah 2008).

In *Karam v. Karam,* 6 So. 3rd 87 (Fla. 3rd DCA 2009), the parties and children entered the United States via an investor's visa for the husband and respective derivative visas for the wife and children in 2005. Thereafter, the husband opened a store and the parties purchased a home. The wife obtained a social security card, health insurance for the children who attended school in Miami. Their home in Guadeloupe was listed for sale. The family spent summers in France and they continued to maintain bank accounts, vehicles and other businesses in Guadeloupe. The husband filed for a divorce in Guadeloupe and a month later the wife filed for a divorce in this circuit. "The French trial court entered an order finding that the 'children's residence is determined to be the father's residence,' and ordered that the children return to Guadeloupe to reside with the Husband." *Id at 89.*

The trial court in *Karam* dismissed the custody aspects of the wife's petition for dissolution of marriage and she then sought a petition for writ of certiorari from the Third District, which granted her the relief and quashed the aforementioned order. The

appellate court reviewed the applicable provisions of the UCCJEA relative to a foreign country being treated as a state, and the definition of home state. The French court utilized a standard of *usual and permanent centre of interest*, which was determined not to be synonymous with the UCCJEA. The appellate court held that:

> ....the record is clear that the children did not reside in Guadeloupe for six continuous months preceding the filing of the Husband's petition. Thus, the French trial court did not exercise its jurisdiction over the Husband's child custody proceeding in substantial conformity with the UCCJEA....the Florida trial court could have, and should have, exercised its jurisdiction over the child custody portion of the Wife's petition.

Id. at 91.

See also, Rosen v. Celebrezze, 883 N.E.2d 420 (Ohio 2008) and *Rosen v. Rosen,* 664 S.E. 2d 743 (W.Va. 2008), both decisions were from the respective state supreme courts and dealt with the same jurisdictional issues as in the instant case and the respective trial court's decision in West Virginia to decline to have direct verbal communications with the Ohio trial court prior to taking jurisdiction.

V. The child was merely present in New Zealand for one day prior to the Respondent seeking an ex-parte order on May 28, 2010, preventing the removal of the child from that country. Based upon the foregoing, the Court finds that the law of New Zealand with respect to personal and subject matter jurisdiction in child custody cases is not in substantial conformity with the UCCJEA and that at all times during the initial litigation resulting in Judge Grace's September 2010, order that the home state of the child was Colorado and the habitual residence was the United States. Therefore, this Court has subject matter jurisdiction pursuant to the UCCJEA to enter a child custody decree or determination and will not defer to the New Zealand court.

[redacted]

It is thereupon, ORDERED AND ADJUDGED as follows:

1. The State of Florida is the home state of the child and the United States is the habitual residence and was at the time the Petitioner filed the instant case.

2. New Zealand has not exercised jurisdiction in substantial conformity with the UCCJEA and therefore this Court will not defer jurisdiction for purposes of enforcement or modification of the order entered by Judge Grace on September 10, 2010.

DONE AND ORDERED in Chambers in Miami, Florida on this 18 day of ~~April,~~ May, 2012.

Circuit Court Judge

ANTONIO MARIN
CIRCUIT COURT JUDGE

Copies furnished to:

[redacted]

[redacted]

It is thereupon, ORDERED AND ADJUDGED as follows:

1. The State of Florida is the home state of the child and the United States is the habitual residence and was at the time the Petitioner filed the instant case.

2. New Zealand has not exercised jurisdiction in substantial conformity with the UCCJEA and therefore this Court will not defer jurisdiction for purposes of enforcement or modification of the order entered by Judge Grace on September 10, 2010.

DONE AND ORDERED in Chambers in Miami, Florida on this 18 day of ~~April,~~ May, to 2012.

Circuit Court Judge

ANTONIO MARIN
CIRCUIT COURT JUDGE

Copies furnished to:
Lawrence S. Katz, Esq.
[redacted]

The Down Town Association
60 Pine Street
New York, NY 10005

International Mediation

Nancy Zalusky Berg, Minneapolis, Minnesota

International Mediation Fact Pattern

James (James Stewart) is 35 years old, an Irish national and a chemical engineer employed by Multinational Corporation (MC) whose principle place of business is in Singapore. He has been climbing the corporate ladder since completing college which has entailed multiple moves and frequent international travel.

Katy (Kathy Maddox) is 45 years old, a US citizen and an international family lawyer with offices in Washington D.C and London.

Marriage; James and Kathy met in a London coffee shop in 2007 when James helped figure out the proper change for her coffee. James was working at the London office of MC at the time and Kathy was attending an IAML conference. They bumped into each other at the same coffee shop two more times during the conference and decided it was destiny. Both had sacrificed a romantic life to build their careers and were now longing to settle down and start a family. Kathy was particularly afraid her time to have children was rapidly passing. She had had her eggs frozen 10 years earlier and was eager to get started. James loved the idea of a wife with a successful career who would not be dependent upon him. Blinded by love, they each ignored the warning signs during their brief engagement. They married just 6 months after that fateful day in the London coffee shop in Washington D.C. where Kathy's large extended family resided. James was disconnected to his remaining family after the tragic and untimely death of his father. They agreed to settle in London where Kathy had small vanity satellite office (one secretary and one not terribly bright young lawyer) thinking that she would build her international presence there. Kathy had not told James she opened the London office solely for the prestige of having such an office and largely funded it from her personal inheritance. She was not qualified to practice in London and rarely had any business there.

Immediately after the marriage April 22, 2008 Kathy began preparing to become a parent. She identified the most family friendly neighborhood in London, Wandsworth. She located and obstetrician and potential nanny. She began looking at schools. She had her frozen eggs shipped over from Washington D.C. deciding the best time for conception and delivery in accordance with their vacation holiday plans and the availability of the nanny she had selected. James was very busy with his work and loved returning to their beautifully decorated home to find Kathy had prepared a sumptuous meal for him, ready whatever time he arrived.

James and Kathy rarely discussed money and never discussed how their financial situation would be impacted by children. James made very good money and just assumed Kathy did as well. James, however, managed their bills seeking contribution from Kathy on an equal basis. Kathy was able to contribute though unbeknownst to James on occasion had to supplement her income with funds from an inheritance.

After two miscarriages, Kathy successfully gave birth to a boy, Adrian, in April 2009 and then a girl, Alison, in June 2011. After each birth she suffered post-partum depression but managed with the help her medications and the lovely nanny they had hired, Fabiana, from Buenos Aires.

Fabiana was a, frankly, stunning 24 year old woman who hoped to have a career in the theatre. James, in particular, appreciated her ability to step in and manage the household when Kathy was out of sorts. Eventually the age difference and Kathy's struggles with depression wore on James and interacting with Fabiana became more critical to his contentment with married life.

After the birth of their children Kathy discovered she had lost her drive to succeed in the London legal community and went into her office less and less. She longed for the support she imagined she would have from her family in D.C. She had nearly depleted her inheritance and worried that James would hate her for her failure to have income comparable to his. She began buying things and returning them in order to get cash. She took cash advances on their credit cards to contribute the share James expected from her for the household expenses.

Adding to their struggles was the discovery that Adrian had severe learning disabilities and did not qualify for the wonderful school Kathy had selected. Alison was a distant and avoidant child who did not enjoy her mother's touch. Parenthood was not all it had been cracked up to be for Kathy. James took little interest in the children except if the activity involved Fabiana. James and Kathy argued more often over money and parenting issues. Finally one night after a particularly disastrous dinner in which Adrian knocked over the milk and Alison refused to eat the lovely bœuf bourguignon Kathy had spent the day preparing James told her he had never really loved her and the marriage was over.

Divorce proceedings commenced thereafter. James retained the renowned international family lawyer, Anne-Marie Hutchinson, who immediately suggested they try to mediate their disputes. Kathy meanwhile determined she could not remain in London and would take the children back to Washington D.C. where she had family and friends and the remnants of a legal career. Without telling James or Fabiana, whom she no longer trusted, her plans she packed up the children and returned to her mother's home in Washington D.C and retained Cheryl Hepfer, past-president of the IAML to represent her in the divorce.

Angered and surprised that Kathy would take such a step the question of mediating what had now become an international child custody dispute James advised Anne-Marie that mediation would not likely occur and filed a petition for the return of the children under The Hague Convention on the Civil Aspects of International Child Abduction with the United States Central Authority.

Fearing the proceedings were rapidly spinning out of control and concerned that unless immediate action was taken there would be little hope of a future not racked with conflict for the children Anne-Marie contacts Cheryl on her cell phone over the weekend. Cheryl and Anne-Marie had developed a close working relationship through the IAML. Anne-Marie knew that her weekend call would not be unwelcomed.

Cheryl and Anne-Marie agreed that they would immediately encourage their clients to consider mediation of their disputes; at least the child related ones, as quickly as possible. Given the difference in time the mediation would have to occur at 9 am in Washington D.C. and 2 pm London via Skype. They agreed there would be a mediator present at each site, preferably one male and one female, and each from the IAML list of certified international mediators. James selected Lisa Lustigman from Withers in part because of her familiarity with Americans and Kathy chose Betty Sandler from Virginia whom she had known since she first became a lawyer.

The lawyers composed a fact sheet for the mediators who then reviewed the fact sheet along with The Hague petition. Two days before the scheduled mediation the mediators spoke and agreed on an agenda.