



**IAFL Webinar
Thursday 16th July 2020**

**A Practitioner's guide to recovery of wrongfully
retained children**

Supporting Documents



Coordinated by: [Jason Naimi](#) (Nevada, USA)

Panel: [Caroline Harnois](#) (Canada); [Carolina Marín Pedreño](#) (England)

Contents

Page 1: Jason Naimi

Page 48: Caroline Harnois

Page 68: Carolina Marín Pedreño

CHECKLIST FOR WRONGFUL REMOVAL

1. Was the child wrongfully removed?
 - a. Where was the child's habitual residence at the time of removal?
 - i. Habitual Residence is determined by looking back in time, and determining the place, at the moment of removal, where the child had been physically present for a sufficient amount of time to show a settled purpose, focusing on the child's circumstances. *Feder v. Feder*, 63 F.3d 217 (3d Cir. 1995). Where the child was in school, a home had been purchased, and the parents were working, that test was easily met. *Id.*
 - ii. The Court specifically adopted a "child-centric view" of what habitual residence means to him or her. *Id.*
 - b. Did the parent who had the child in the other contracting state have a right of custody under the law of the State of the children's habitual residence; and
 - i. The Hague Convention, Article 3, provides three potential sources of custody rights:
 1. Operation of law;
 2. Judicial or administrative decision; or
 3. An agreement having legal effect under the law of that State.
 - c. If so, did the removing parent's actions violate those rights?
 - i. The standard of proof (for whether the removal of the child was "wrongful" under Article 3 of the Hague Convention) is "preponderance of the evidence" that (1) the child has been removed from his or her "habitual residence," and (2) the child's removal was in breach of the parent's rights of custody under the law of the child's habitual residence. See, e.g., 42 U.S.C. § 11603(e)(1); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*") (citing 42 U.S.C. § 1160 (b)(4)). The same test applies to wrongful retention (i.e., the situation in which a parent had a legitimate right to custody of the child for some period of time, but failed to return the child as required by whatever custodial arrangement was in issue).
 - d. If the child has been removed, or retained, from his or her State of Habitual Residence, in violation of a right of custody of the left-behind parent, Article 1 of the Hague Convention requires the child's return to the contracting state where questions concerning the parties' competing claims to custody can be addressed. This is not for the US court to determine.
2. Do you have jurisdiction for a Hague Petition?
 - a. A Hague Petition must be filed within one (1) year of removal or retention of the minor child from his or her habitual residence.
 - b. The habitual residence of the minor child must be a signatory of the Hague Convention. *Ogawa v. Ogawa* (2009).
 - c. The child must be under 16 years of age.
 - d. Even if you have jurisdiction to file a Hague Petition, the "abductor" has the right to claim the following defenses:
 - i. Filing parent either did not exercise custody rights or consented to the removal/retention;

- ii. Grave risk of physical/psychological harm if the child is returned to the other parent; or
 - iii. Child objects and has attained an appropriate age and degree of maturity.
- 3. Checklist for filing a Hague Petition in the Federal United States District Court (District of Nevada) seeking the return of a child that has been brought here from another country that is the child's actual State of Habitual Residence:
 - a. Initial Filings to Open the Case:
 - i. *Civil Cover Sheet*, form from Court
 - ii. Filing Fee
 - iii. *Summons in a Civil Case*, form from Court
 - iv. *Declaration Under UCCJA, NRS 125A* (Nevada)
 - v. *Certificate of Interested Parties*
 - vi. *Notice of Stay of Custody Proceedings*
 - vii. *Verified Complaint and Petition for Return of Minor Child*
 - 1. Provide exhibits giving rise to rights of custody with certified translated documents of the law, Court Order, or parties' agreement(s)
 - b. Filings for the Return of Child:
 - i. *Ex Parte Emergency Motion for Immediate Return of Child and Scheduling of an Expedited Hearing*
 - ii. *Detailed Declaration from client in Support of Ex Parte Motion*
 - iii. *Petition for Warrant in Lieu of Writ of Habeas Corpus*
 - iv. *Notice of Hearing*
 - c. Proposed Orders to be submitted to the Court alongside Motion practice:
 - i. *Order Directing Return of Minor Child*
 - 1. In my experience, using the minor child's school location as the pickup destination helps to eliminate third parties.
 - ii. *Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus*
 - iii. *Warrant in Lieu of Writ of Habeas Corpus*
 - d. In my experience, all documents must be served by personal service.

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 **JANE/JOHN DOE,**

Petitioner,

CASE NO:

10 vs.

11 **JANE/JOHN DOE,**

12 Respondent.

13
14 **DECLARATION UNDER UNIFORM CHILD CUSTODY**
JURISDICTION ACT (NRS 125A.385)

15 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)

16 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

17 **1.** There is 1 minor child of the parties subject to this proceeding. The name, place
18 of birth, birth date and sex of each child, the present address, periods of residence
19 and places where each child has lived within the last five (5) years, and the name(s),
20 present address and relationship to the child of each person with whom the child has
21 lived during that time are:

22 **A. Child's Name:** **Child's Name**

23 Place of Birth: _____

24 Birth Date: _____

25 Sex: _____

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27 Period of Residence: From _____ to Present

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Address: _____

Person Child Lived With: JANE/JOHN DOE

Relationship: Father/Mother/Other

Period of Residence: From _____ to _____

Address: unknown

Person Child Lived With: JANE/JOHN DOE

Relationship: Father/Mother/Other

Period of Residence: From _____ to _____

Address: _____

Person Child Lived With: JANE/JOHN DOE and JANE/JOHN DOE

Relationship: Mother and Father

2. I **have** / **have not** participated as a party, witness, or in any other capacity in any other litigation or custody proceeding in this or any other state concerning custody of a child involved in this proceeding.

If you checked “**have**” above, please supply the following information about the other proceeding(s):

- a. Name of each child involved;
- b. Your role in other proceeding(s);
- c. Court, state, and case number of other proceeding(s);
- d. Date of court order or judgment in other proceeding(s);

3. I **do** / **do not** know of any proceeding that could affect the current proceeding including proceedings for enforcement and proceedings related to domestic violence, protective orders, termination of parental rights, and adoptions pending in a court of this or any other state concerning a child involved in this proceeding other than that set out in item 1 above.

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If you checked “do” above, please supply the following information about the other proceeding(s):

- a. Name of each child involved;
- b. Your role in other proceeding(s);
- c. Court, state, and case number of other proceeding(s);
- d. Date of court order or judgment in other proceeding(s);

4. I do / do not know of any person not a party to this proceeding who has physical custody or claims to have custody or visitation rights with respect to any child subject to this proceeding.

If you checked “do” above, please supply the following information and check appropriate lines:

- a. Name and address of person(s);
_____ Person named has physical custody of (*name of child*) _____
_____ Person named has physical custody of (*name of child*) _____
_____ Person named has physical custody of (*name of child*) _____

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VERIFICATION BY ATTORNEY

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Francesca Resch, Esq., first being duly sworn, deposes and says:

That I am an attorney licensed to practice law in the State of Nevada, and the United States District Court -- District of Nevada, I am a partner of NAIMI & CERCEO and am one of the Nevada attorneys representing MS. TORRES GARCIA, the Petitioner in this action; pursuant to NRS 15.010 this verification is being made on behalf of Petitioner because he is absent from the State of Nevada, County of Clark; I have read the above Petition and know the contents thereof as true, except as to the matters that are stated therein on my information and belief, and as to those matters, I believe them to be true. I declare under penalties of perjury under the laws of the State of Nevada that the foregoing is true and correct.

FRANCESCA RESCH, ESQ.

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20__.

NOTARY PUBLIC in and for said
County and State

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

8 **JANE DOE,**

9 Petitioner,

CASE NO:

10 vs.

11 **JOHN DOE,**

12 Respondent.

13 **PETITIONER'S CERTIFICATE AS TO INTERESTED PARTIES**

14 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)
15 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

16 Pursuant to Fed. R. Civ. P. 7.1-1, the undersigned, counsel of record for
17 Petitioner, **JANE DOE**, certifies that there are no additional parties known to **her** that
18 have an interest in the outcome of this case.

19 This representation is made to enable judges of the court to evaluate possible
20 recusal.

21 **DATED** this _____ day of _____, 20__.

22 Respectfully Submitted By:

23 NAIMI & CERCEO

24
25 _____
26 Robert Cerceo, Esq.
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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9
10 **JANE/JOHN DOE,**

Petitioner,

CASE NO:

11
12 vs.

13 **JANE/JOHN DOE,**

Respondent.

14
15 **NOTICE OF STAY OF CUSTODY PROCEEDINGS**

16 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)

17 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

18
19 Pursuant to Article 16 of The Convention on the Civil Aspects of International
20 Child Abduction, done at the Hague on 25 October 1980 [Convention], you are
21 hereby notified that a Verified Complaint and Petition for Return of Child was filed
22 on the appropriate court in Clark County, Nevada, on or **_____**, 20__.

23 Pursuant to Article 16 of the Convention, all actions before the Eighth Judicial
24 District Court of Nevada concerning the merits of the rights of custody of the parties
25 are, as a matter of International Law, stayed pending the determination of the
26 aforesaid Federal action.

27 The complete text of Article 16 is as follows:
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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.

DATED this ____ day of _____, 20__.

Respectfully Submitted By:
NAIMI & CERCEO

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7 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

8 **JANE/JOHN DOE,**

9 Petitioner,

CASE NO:

10 vs.

11 **JANE/JOHN DOE,**

12 Respondent.

13 **PETITIONER’S VERIFIED COMPLAINT AND PETITION FOR RETURN**
OF THE CHILD

14 The Convention on the Civil Aspects of International Child Abduction, done
15 at the Hague on 25 Oct 1980 Article 7(b)
16 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

17 Petitioner, **JANE/JOHN DOE**, respectfully shows this Court as follows:

18 **I. INTRODUCTION**

19 1. This action is brought by **JANE/JOHN DOE** (“Mother/Father” or
20 “Petitioner”), a citizen of **Country**, to secure the return of her **[age]** year old
21 **daughter/son, name of child(ren)** (hereinafter “minor child(ren)”), who is, without
22 Petitioner’s consent or acquiescence, wrongfully and illegally retained in the United
23 States after the child’s **Mother/Father, JANE/JOHN DOE** (“Mother/Father” or
24 “Respondent”), took the minor child out of the State of **Country**, Country of
25 **Country**, also without **Mother/Father**’s knowledge, consent, or acquiescence, and
26 never returned back to **Country**.

1 2. This Petition is filed pursuant to the Convention of the Civil Aspects of
2 International Child Abduction (the “Hague Convention” or the “Convention”)¹ and
3 the International Child Abduction Remedies Act (“ICARA”).² A copy of the Hague
4 Convention is attached hereto as **Exhibit 1**. The Hague Convention came into effect
5 in the United States of America on July 1, 1988, and has been ratified between,
6 among other Contracting States, the United States of America and **Country**.

7 3. The objects of the Hague Convention are:

8 Article 1(a): to secure the prompt return of children wrongfully removed to or
9 retained in any Contracting States; and

10 Article 1(b): To ensure that right of custody and of access under the law of one
11 Contracting State are effectively respected in other Contracting States.³

12 4. The Hague Convention authorizes a federal district court to determine the
13 merits of a claim for the wrongful removal or retention of a child; it does not,
14 however, permit the district court to consider the merits of any underlying custody
15 dispute.

16 II. JURISDICTION AND VENUE

17 5. This Court has jurisdiction over this case pursuant to 42 U.S.C. §11603(a)
18 (jurisdiction under the Hague Convention) and 28 U.S.C. §1331 (federal question
19 jurisdiction). Venue is proper pursuant to 42 U.S.C. §11603 and 28 U.S.C. 139(b)
20 because, upon information and belief, the child and Respondent are residing at 5921
21 West Bartlett Ave., Las Vegas, NV 89108, USA.

22 III. STATEMENT OF FACTS

23 6. **Insert facts surrounding parties’ relationship – married or not – and**
24 **background.** Petitioner and Respondent became the parents of the minor child who
25

26 ¹ Oct. 25, 1980, T.I.A.S. No. 11, 670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg.
10494 (1986).

27 ² 42 U.S.C. §§11601 – 11610 (2011).

28 ³ *Id.*

1 was born on **D.O.B.** A copy of the minor child's birth certificate is attached hereto as
2 **Exhibit 2.**

3 7. **Insert facts regarding custodial rights. For example:** Pursuant to the Family
4 Code for the **State of _____**, parents are deemed to have shared custody until an
5 Order is put in place by a Judge. Neither parent is allowed to remove the child from
6 the State the child is residing in, let alone the Country, without the other parent's
7 permission or permission of the Court. A copy of the the **Civil Code (or custody**
8 **agreement/order)** with an English translation attached hereto as **Exhibit 3.**

9 8. **Insert facts regarding wrongful removal. For example:** Sometime after the
10 parties' separation, without **Mother/Father** knowledge, consent, or acquiescence,
11 Respondent removed the minor child from the State of _____, Country of _____,
12 to travel to the United States of America. Petitioner sought after **his/her daughter/son,**
13 until late 20____ wherein Respondent contacted **Mother/Father** to inform her he/she
14 was residing in Las Vegas, Nevada, USA with the minor child.

15 9. When Respondent contacted Petitioner, **he/she** told Petitioner to forget about
16 **his/her son/daughter,** and instead of providing a return date, **he/she** proposed that
17 Petitioner sign over all of **his/her** parental rights to the minor child.

18 10. Petitioner indicated that **he/she** did not consent to Respondent retaining the
19 child in the United States, and requested that Respondent send the minor child back
20 to **Country.** Petitioner's requests were ignored.

21 10. Respondent applied for a Visa to the United States in an attempt to travel to
22 Las Vegas and retrieve **his/her daughter/son.** **Mother/Father's** application was
23 denied.

24 11. On **date,** Petitioner filed a Hague Convention Request For Return of the Child
25 matter with the Ministry of Justice in **City, State, Country.** A copy of the Request for
26 Return of Child is attached hereto as **Exhibit 4.**

1 12. It has now been [redacted] months/years since Petitioner has seen his/her
2 daughter/son.

3 **IV. WRONGFUL RETENTION OF CHILD BY RESPONDENT; CLAIM**
4 **FOR RELIEF UNDER THE HAGUE CONVENTION**

5 13. As set forth above, as of the date of the filing of this Petition, Respondent has
6 wrongfully retained the minor child within the meaning of Article 3 of the
7 Convention and continues to wrongfully retain the child in the state of Nevada,
8 United States, in violation of Article 3 despite the Petitioner's efforts to have the child
9 returned to Country.

10 14. Petitioner never gave his/her consent for Respondent and the minor child to
11 visit family in the United States.

12 15. Respondent's retention of the child is wrongful within the meaning of Article
13 3 of the Convention because:

- 14 a) It is in violation of Petitioner's rights of custody as established by the
15 Family Code for the State of [redacted], which awards both parents
16 custody rights, and is attached hereto respectfully as **Exhibit 3**.
17 Specifically, Respondent's retention of the Child is in violation of
18 Petitioner's right as a joint physical custodian to determine the Child's
19 place of residence. *See* Hague Convention, Art. 5(a) (defining "rights of
20 custody" under Article 3 to include "in particular, the right to determine
21 the child's place of residence");
- 22 b) At the time of the Child's removal from State, Country, Petitioner did
23 not consent to the child's removal from his/her homestate; and
- 24 c) The Child is a habitual resident of Country within the meaning of Article
25 3 of the Convention immediately before Respondent wrongfully
26 removed him/her to the United States.
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1 16. Respondent is presently wrongfully retaining the Child in the State of Nevada,
2 County of Clark.

3 17. Upon information and belief, Respondent is keeping the Child at the residence
4 located at Address, City, State, Zip.

5 18. The Child is now age (#) years old. The Hague Convention applies to children
6 under sixteen (16) years of age and thus applies to this Child.

7 19. This Petition is filed less than one year from the Petitioner's discovery of the
8 whereabouts of the Child. Petitioner has not consented or acquiesced to Respondent's
9 wrongful retention of the Child.

10 **V. PROVISIONAL REMEDIES**

11 **(42 U.S.C. §11604 & Hague Convention, Article 16)**

12 20. Petitioner requests that this Court issue a warrant seeking immediate physical
13 custody of the Child, directing any United States Marshal or other law enforcement
14 officer to bring the Child before this Court. Petitioner also asks that this Court
15 schedule an expedited hearing on the merits of this Petition.

16 **VI. NOTICE OF HEARING**

17 **(42 U.S.C. §1603(c))**

18 21. Pursuant to 42 U.S.C. §11603(c), Respondent shall be given notice of these
19 proceedings in accordance with the laws governing notice in interstate child custody
20 proceedings.

21 **VII. RELIEF REQUESTED**

22 **WHEREFORE**, Petitioner, JANE/JOHN DOE, prays for the following relief:

- 23 (a) The scheduling of an expedited hearing on the merits of the Verified
24 Complaint; an order that respondent show cause at this hearing why the
25 Child should not be returned to Mexico, and why such other relief requested
26 in the Verified Complaint should not be granted; and, pursuant to Federal
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- Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced and consolidated with the hearing on the Verified Complaint;
- (b) A final judgment in Petitioner’s favor establishing that the Child shall be returned to **City** in the State of _____, Country of _____, where an appropriate custody determination can be made by a **Country** court under **State** law;
 - (c) An Order for the pickup of the minor child to occur at **School name**, located at **Address, City, State, Zip**;
 - (d) An Order requiring that Respondent pay Petitioner’s expenses and costs, including transportation costs, under 42 U.S.C. §11607, such expenses and costs to be resolved via post-judgment motion; and
 - (e) For any such further relief as may be just and appropriate under the circumstances of this case.

DATED this _____ day of _____, 20__.

Respectfully Submitted By:
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Attorneys for Petitioner

VERIFICATION

1 I am one of the attorneys for Plaintiff/Petitioner, JANE/JOHN DOE. I make
2 this verification on behalf of Petitioner because Petitioner is absent from this country.
3 The above document is true based on the above identified attorneys' investigation to
4 date and communications between NAIMI & CERCEO and JANE/JOHN DOE,
5 except as to the matters that are stated in it on information and belief and as to those
6 matters I believe it to be true. I declare under penalty of perjury under the laws of the
7 State of Nevada that the forgoing is true and correction.
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9 This ____ day of _____, 20____.

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14 ATTORNEY NAME, ESQ.
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6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 **JANE/JOHN DOE,**

Petitioner,

CASE NO:

10 vs.

11 **JANE/JOHN DOE,**

12 Respondent.

13
14 **PETITIONER’S EX PARTE EMERGENCY MOTION FOR IMMEDIATE**
15 **RETURN OF THE MINOR CHILD AND SCHEDULING OF AN**
16 **EXPEDITED HEARING FOR AN ORDER OF RETURN AND IMMEDIATE**
17 **PICK UP OF MINOR CHILD UNDER THE HAGUE CONVENTION**

18 The Convention on the Civil Aspects of International Child Abduction, done at the
19 Hague on 25 Oct 1980 Article 7(b)
20 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

21 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Petitioner
22 **JANE/JOHN DOE** (“Mother/Father”), hereby moves this Court for an ex parte order
23 directing Respondent, **JANE/JOHN DOE** (“Mother/Father”), to return the minor
24 child, **(INITIALS OF MINOR CHILD’S NAME)**, born **(D.O.B.)**, to **Mother/Father**
25 in **City, State, Country**. **Mother/Father** also moves for the setting of an expedited
26 hearing in this matter for an Order of Return to finalize the time, manner, date, and
27 other transportation arrangements for immediate pick up of **(INITIALS OF MINOR**
28 **CHILD’S NAME)** for his/her return to **Country** with **Mother/Father**.

Mother/Father respectfully requests that this Court:

- (1) shorten or otherwise waive the time requirements that apply to motions;
- (2) grant an immediate hearing on this *Motion*;

1 (3) to schedule an expedite hearing to set to finalize the time, manner, date,
2 and other transportation arrangements of (INITIALS OF MINOR CHILD's NAME)
3 return to Country and incorporate them in an order of return;

4 (4) For an Order for immediate return and pick up of the minor child using all
5 necessary force to recover the child from the child's school, School Name, located at
6 Address City, State Zip;

7 (5) grant a hearing requiring Mother/Father to show cause why the relief set
8 forth in Mother/Father Motion should not be summarily granted by this Court;

9 (6) to Order that Father pay the entirety of Mother/Father's legal costs,
10 Mother/Father's and the child's travel expenses, and any other costs pursuant to 42
11 U.S.C. § 11607, and

12 (7) for any such further relief as may be just and appropriate under the
13 circumstances of this case.

14 This Motion is based upon the papers and pleadings on file herein, and the
15 attached Declaration of Attorney.

16
17 **DATED** this _____ day of _____, 20__.

18
19 Respectfully Submitted By:

20 NAIMI & CERCEO

21
22 _____
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Attorneys for Petitioner

1 **I. POINTS AND AUTHORITIES**

2 **A. INTRODUCTION**

3 This is a Convention on Civil Aspects of International Child Abduction
4 (“Hague Convention”) matter where Father took the parties’ minor child, L.M.G.T.,
5 from the State of Michoacán in the Country of Mexico (“Michoacán”) to the United
6 States of America (“United States”) without Mother’s knowledge, consent, or
7 acquiescence, and illegally remained in the United States with the minor child whilst
8 depriving Mother of her custody and parental rights. The facts have already been
9 before this Court, background of the case are as follows.

10 **B. WHO THEY ARE**

11 **Child** – L.M.G.T. was born on July 4, 2006 in Morelia, a small town in the
12 State of Michoacán, Country of Mexico.¹ L.M.G.T. is now twelve (12) years old and
13 attends school in Las Vegas under the Deferred Action for Childhood Arrivals
14 (“DACA”) program. The child is currently enrolled in J.D. Smith Middle School,
15 located at 1301 E. Tonopah Ave., North Las Vegas, NV 89030. When the parties
16 separated in May, 2015, L.M.G.T. was a sweet, caring, and happy young girl. Mother
17 has not had sufficient contact with L.M.G.T. since Father illegally removed her from
18 Michoacán in late 2017.

19 **Father** – **Name** is well known in Mexico. He is armed and dangerous. His
20 tendency to be violent, drunk and/or high, and short tempered, which is what caused
21 the parties’ separation. Father threatened Mother that if he finds out she is seeking
22 the return of L.M.G.T., he will make her disappear and try to kill Mother. Mother is
23 afraid for her life. However, Mother is more concerned that the child is residing with
24 Father’s fellow drug dealing family in Las Vegas, Nevada. Such a living situation is
25 unsafe and unstable for the teenage girl.

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¹ See Minor Child’s Birth Certificate attached to Petitioner’s Verified Complaint and Petition as Exhibit 2.

1 **Mother** – **Name** is self-employed, making barely enough to support herself
2 since the parties' separation. During her relationship with Father, she was able to
3 rely upon his income from the drug money. However, upon their separation, she was
4 barely able to make ends meet, forcing her to fend for herself, and allowing Father to
5 get away with keeping L.M.G.T. in his possession. When Mother learned L.M.G.T.
6 was in the United States, she immediately applied for a visa to see her daughter and
7 bring her back to Michoacán. Mother's application was denied.

8 **C. QUICK FACTS**

9 The parties are both residents of Michoacán, Mexico, and have one (1) minor
10 child, to wit: L.M.G.T., born July 4, 2006. The parties were cohabitating at the time
11 of their daughter's birth, and continued to do so until May, 2015.

12 Without Mother's consent, Father brought the child to the United States
13 sometime in late 2017. Mother was not aware what country or state the minor child
14 was in until late 2018 when Father contacted her, pressuring her to revoke her
15 parental rights, and threatening her that she will never see her daughter again. Mother
16 has tried to communicate with Father, his extended Family, Mexican authorities, and
17 United States authority in hopes of getting Father to return to Michoacán with their
18 daughter. However, Father has refused to return.

19 Father has remained in the United States illegally with the child and has only
20 allowed sporadic calls between Mother and the minor child for short periods of time.
21 Father is constantly filling the child's head with negative ideas regarding Mother to
22 further alienate the child from Mother.

23 In Michoacán, Mother filed a custody motion and a criminal offense report on
24 January 18, 2017 based on the Father's abduction of the minor child. Mother also
25 filed a Hague Convention Request for Return of the Child in February, 2018. The
26 Mexican courts have placed a hold on their cases pending the results of this matter.

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1 It has been years since Mother has last seen her daughter. Father has acted
2 beyond the scope of his parental rights by bringing the child to and retaining her in
3 the United States, he has prohibited Mother from exercising her custody rights, and
4 has stayed in the United States illegally with the intent of abducting the minor child.
5 Mother misses her daughter dearly, and wishes to reunite with her son as soon as
6 possible.

7 II. GOVERNING LAW AND ARGUMENT

8 A. Mother is Entitled to *Ex Parte* Emergency Relief.

9 Consistent with Federal Rule 65 and the exigent circumstances that typically
10 exist in Hague Convention cases, Article 2 of the Hague Convention provides:
11 “Contracting States shall take all appropriate measures to secure within their
12 territories the implementation of the objects of the convention. For this purpose they
13 shall use the most expeditious procedures available.” October 25, 1980, T.I.A.S. No.
14 11,670 at 1, 22514 U.N.T.S. at 98. The “objects” of the Hague Convention are
15 expressed in Article 1: the prompt return of an abducted child and the protection of
16 the rights of custody. Federal Rule 65 allows this Court to expeditiously promote the
17 Hague Convention’s objectives.

18 Father has clearly exceeded the scope of his parental rights by illegally
19 remaining in the United States illegally, and wrongfully retaining the minor child.
20 Mother has made several attempts to convince Father to return to Michoacán with
21 their child, but Father has wholeheartedly refused. Father intends on remaining in the
22 United States permanently, and has no intention of abiding by the Michoacán laws
23 and judgments which clearly grant custody rights to both parents.

24 B. Mother is Entitled to a Return and Immediate Pick Up Order of the 25 Minor Child Pursuant to the Hague Convention.

26 The Hague Convention addresses the increasing problem of international child
27 abduction in the context of international law while respecting rights of custody and
28 visitation under national law. According to its preamble, the convention aims “... to

1 protect children internationally from the harmful effects of their wrongful removal
2 or retention and to establish procedures to ensure their prompt return to the State of
3 their habitual residence.” Hague Convention, Preamble, T.I.A.S. No. 11, 670 at 4.
4 The twin objectives of the Hague Convention are: (1) To secure the prompt return of
5 children wrongfully removed [] or retained; and (2) To ensure that rights of custody
6 and of access under the law of one Contracting State are effectively respected in the
7 other Contracting States. *Id.*, Art. 1; see also *In re Prevot*, 59 F.3d 556, 558 (6th Cir.
8 1995).

9 **i. L.M.G.T. has been wrongfully removed and retained.**

10 This Court is to determine only whether the removal or retention of a child was
11 “wrongful” under the law of the child’s “habitual residence,” and, if so, to order the
12 return of a child to the place of “habitual residence” for the court there to decide the
13 merits of the custody dispute, unless the alleged abductor can establish one of a few
14 defenses. *See, e.g., Ohlander v. Larson*, 114 F.3d 1531, 1534, 1541 (10th Cir. 1997),
15 *cert. denied*, 522 U.S. 1052 118 S. Ct. 702 (1998); *Friedrich v. Friedrich*, 78 F.3d
16 1060, 1067 (6th Cir. 1996) (“Friedrich II”). Article 3 of the Hague Convention spells
17 out the parameters for determining whether a child has been wrongfully removed or
18 retained. The removal or retentions of a child is wrongful where: (1) It is in breach
19 of rights of custody attributed to a person . . . under the law of the State in which the
20 child was habitually resident immediately before the removal or retention; and, (2)
21 At the time of removal or retention those rights were actually exercised, either jointly
22 or alone, or would have been so exercised but for the removal or retention.²

23 **1. Father’s act of remaining in the United States is a breach of**
24 **Mother’s right of custody under the law of L.M.G.T.’s habitual**
25 **residence of Michoacán, Mexico.**

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28 ² *See* Hague Convention of October 25, 2980 on the Civil Aspects of International Child
Abduction, Chapter 1, Article 1.

1 The question to be asked in a Hague proceeding is whether the parent’s act of
2 removing or retaining the child is in breach of the other parent’s rights of custody
3 under the law of the State of the child’s habitual residence. That question entails a
4 threefold analysis: (1) where was the child’s habitual residence? (2) Did the parent
5 who had the child in the other contracting state have a right of custody under the law
6 of the State of the child’s habitual residence? and (3) if so, did the removing parent’s
7 action violate those rights? If the child has been removed or retained from his or her
8 habitual residence in violation of the right of custody of the left-behind parent, the
9 child is to be returned to the other country forthwith. *See Vaile v. Eighth Jud. Dist.*
10 *Ct.*, 118 Nev. 262, 44 P.3d 506 (2002); *cert. denied sub. nom. Vaile v. Porsboll*, 538
11 U.S. 906, 123 S. Ct. 1483, 155 L. Ed. 2d 225 (2003).

12 Habitual Residence: The problem most often faced in these types of cases is in
13 the form of a trial period, or “visit” to the other country, or a posturing for a “trial
14 period” by the “taking” parent. In *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995),
15 the court said that habitual residence is determined by looking back in time, and
16 determining the place, at the moment of removal, where the child had been physically
17 present for a sufficient amount of time to show a settled purpose, focusing on the
18 child’s circumstances. Where the child was in school, a home had been purchased,
19 and the parents were working, were all considerations.

20 In the current case, it is quite clear that L.M.G.T.’s habitual residence is
21 Michoacán, Mexico. The child was born in Michoacán. Both Mother and Father
22 resided in Michoacán throughout the child’s youth, and were residing there when
23 they separated. Both Mother and Father are Mexican citizens and residents of
24 Michoacán. Neither parent has United States citizenship. Mother was denied a visa
25 to the United States. Upon information and belief, Father does not have a United
26 States visa.

27 Without Mother’s consent, Father brought the child to the United states. It was
28 only after Father and L.M.G.T. were there that Father contacted Mother. Without

1 Mother's knowledge or consent, Father decided to illegally stay in the United States
2 and keep L.M.G.T. with him. This does not change the fact that L.M.G.T. was born
3 in Mexico, speaks Spanish with *very* little English, her Mother, who has custody
4 rights, still resides in Michoacán, and L.M.G.T.'s citizenship is Mexico. Clearly, the
5 habitual residence of L.M.G.T. is Michoacán, Mexico.

6 Right to Custody: The next review is the right of custody for the parents. The
7 Hague Convention, Article 3, provides three potential sources of custody rights: (1)
8 operation of law; (2) judicial or administrative decision; or (3) an agreement having
9 legal effect under the law of that State. Hague Convention, Art. 3, T.I.A.S. No. 11,670
10 at 5.

11 Here, the Family Code for the State of Michoacán grants custody rights to both
12 parents until an Order is obtained stating differently. Neither parent has obtained an
13 Order relating to custody. This Family Code is a valid source of custody rights and
14 the Hague Convention encompasses the custody orders therein. As such, since Father
15 has illegally removed L.M.G.T. from her habitual residence, and retained her in the
16 United States of America without Mother's consent, Father has violated the Family
17 Code for the State of Michoacán and indecorously disrupted Mother's custody rights.

18 Retention and Violation of Custody Rights: Article 1 of the Hague Convention
19 requires the child's return to the contracting state where questions concerning the
20 parties' competing claims to custody can be addressed. The standard of proof (for
21 whether the removal of the child was "wrongful" under Article 3 of the Hague
22 Convention) is "preponderance of the evidence" that (1) the child has been removed
23 from his or her "habitual residence," and (2) the child's removal was in breach of the
24 parent's rights of custody under the law of the child's habitual residence. See, e.g.,
25 42 U.S.C § 11603(e)(1); Friedrich I, 983 F.2d at 1400. The same test applies to
26 wrongful retention (i.e., the situation in which a parent had a legitimate right to
27 custody of the child for some period of time, but failed to return the child as required
28 by whatever custodial arrangement was in issue).

1 This case involves Father's wrongful retention of L.M.G.T., who has been
2 removed from her habitual residence of Michoacán, Mexico, as discussed above, and
3 Father's wrongful retention of L.M.G.T. This is a breach of the Family Code for the
4 State of Michoacán, which grants Mother custody rights. Father's retention of
5 L.M.G.T. meets all the above elements of being "wrongful" and is proven beyond a
6 preponderance of the evidence standard. L.M.G.T. should be returned to Mother, as
7 the Michoacán, Mexico courts have jurisdiction over the child and all related custody
8 matters.

9 **2. At the time Father retained the child, Mother was actively**
10 **seeking to exercise her custody rights, and would have done so,**
11 **but for the unlawful retention.**

12 After the parties' separation, Mother was left destitute. Father used this as a
13 tool to keep L.M.G.T. away from Mother, as she could not afford to care for her.
14 However, once Mother was able to care for herself and the child, she actively began
15 searching for L.M.G.T. It was not until Father contacted Mother at the end of 2017
16 asking Mother to rescind her parental rights and give up hope to seeing her daughter,
17 that she learned he absconded with the child to the United States of America. Mother
18 also learned that Father has been actively alienating L.M.G.T. from her Mother by
19 speaking negatively about Mother in her absence. It was not until the end of 2018
20 that Mother learned that the child was physically located in Las Vegas, Nevada. The
21 pending action then followed.

22 After considering the above, it is clear that Father's unwillingness to
23 communicate with Mother regarding L.M.G.T., or provide her with their
24 whereabouts was infringed upon Mother's parental rights. Furthermore, the unlawful
25 transportation of L.M.G.T. to the United States of America was beyond the scope of
26 Father's parental rights. As such, Mother is entitled to an Order which returns the
27 minor child to Michoacán, Mexico and orders an immediate pick up by Mother
28 pursuant to the Hague Convention.

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ii. This Court should order the return and immediate pick up of L.M.G.T. to ensure that custody and access under the Contracting State of Michoacan, Country of Mexico, are effectively respected in the United States.

For the Hague Convention to apply, both countries must be signatories [...]. Under Article 19 of the Hague Convention, analysis is not a determination of custody rights, "... a United States district court has [the] authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim." See, e.g., *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("Friedrich I") (citing 42 U.S.C. § 1160 (b)(4)). This Court is to determine only whether the removal or retention of a child was "wrongful" under the law of the child's "habitual residence," and, if so, to order the return of the child to the place of "habitual residence" for the Serbian court to decide the merits of the custody dispute, unless the alleged abductor can establish one of a few defenses. See, e.g., *Ohlander v. Larson*, 114 F.3d 1531, 1534, 1541 (10th Cir. 1997), cert. denied, 522 U.S. 1052 118 S. Ct. 702 (1998); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II").

Here, both Mexico and the United States of America are signatories of the Hague Convention. As such, this Court should order the return and immediate pick up of L.M.G.T. to ensure that custody and access under the Contracting State of Michoacán, Mexico are effectively respected in the Contracting State of the United States of America. However, the USA Court only has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. This Court should only determine that Father's retention of the child was wrongful in accordance with the Family Code for the State of Michoacán. This Court should order the pickup from the child's middle school, J.D. Smith Middle School, and return the child to Michoacán, Mexico, where a custody case is already pending.

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III. CONCLUSION

Based on the above, Petitioner, NAME, respectfully request this Court grant the following relief (COPY AND PASTE REQUESTED RELIEF FROM ABOVE):

1. For this Court to shorten or otherwise waive the time requirements that apply to motions;
2. For this Court to schedule an expedite hearing to set to finalize the time, manner, date, and other transportation arrangements of L.M.G.T.’s return to Michoacán, Mexico and incorporate them in an order of return;
3. For a scheduling of an immediate hearing on the merits of the *Motion*;
4. For an Order for immediate return and pick up of the minor child using all necessary force to recover the child from the child’s school, J.D. Smith Middle School, located at 1301 E. Tonopah Ave., North Las Vegas, NV 89030;
5. For a hearing requiring Father to show cause why the relief set forth in Mother’s *Motion* should not be summarily granted by this Court;
6. For an Order requiring that Father pay the entirety of Mother’s travel expenses and costs pursuant to 42 U.S.C. § 11607; and
7. For any such further relief as may be just and appropriate under the circumstances of this case.

DATED this _____ day of _____, 20__.

Respectfully Submitted By:
NAIMI & CERCEO

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Francesca Resch, Esq.
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Attorneys for Petitioner

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DECLARATION OF ATTORNEY

1. I, FRANCESCA RESCH, ESQ., declare that I am an attorney with NAIMI & CERCEO representing Petitioner, NAME.

2. Currently, the Court has not scheduled a hearing in the above referenced matter.

3. This *Motion* is to brought for the purposes of having this Court issue a order for return and to set an expedited hearing in this matter. This request is made in good faith and not to delay adjudication of the issues or for any improper purpose.

I declare under penalty of perjury that under the laws of the State of Nevada (NRS 53.045 and 28 U.S.C. § 1746), that the foregoing is true and correct to the best of my knowledge.

EXECUTED this _____ day of _____, 20__.

FRANCESCA RESCH, ESQ.

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 **JANE/JOHN DOE,**

10 Petitioner,

CASE NO:

11 vs.

12 **JANE/JOHN DOE,**

13 Respondent.

14 **PETITION FOR WARRANT IN LIEU OF A WRIT OF HABEAS CORPUS**

15 The Convention on the Civil Aspects of International Child Abduction, done at the
Hague on 25 Oct 1980
16 International Child Abduction Remedies Act, 42 U.S.C., 11604 NRS 125A.120

17 **I. ALLEGATIONS OF PETITIONER**

18 Petitioner is a person as defined by 42 U.S.C. §11602(5) who has a right of
19 custody of **Child's Name** ("minor child"), born on **DOB**, for whom this petition has
20 been filed. Such right of custody has been breached within the meaning of Article 3
21 of The Convention on the Civil Aspects of International Child Abduction, done at
22 the Hague on 25 Oct 1980 ("Convention").

23 The minor child is being illegally held in custody, confinement, or restraint by
24 Respondent, **JANE/JOHN DOE**, at **Address, City**, NV 89108, USA.

25 **Insert facts, for example:** Towards the end of 2018, Respondent informed
26 Petitioner that he was staying in Las Vegas with the minor child, and that if Petitioner
27 tried to seek the return of the minor child, he would make her "disappear." Father
28

1 intends on illegally staying in the United States and wrongfully retaining the child
2 with him within the meaning of Article 3 of the Convention and since has failed to
3 return the child to the Petitioner.

4 Petitioner has, in multiple instances and to no avail, pleaded for the return of
5 the minor child.

6 Since Respondent is and has been in Las Vegas, it is possible that he will
7 attempt to flee from the authorities and hide in order to avoid being found.

8 Petitioner believes that the child will be removed from the jurisdiction of the
9 court unless a warrant is issued. It is therefore necessary for the child to be taken into
10 immediate custody by the court to prevent any harm coming to the child and to
11 prevent Respondent from fleeing Las Vegas and further court orders.

12 **II. OTHER APPLICATIONS**

13 A complaint and petition for the return of the child has been filed
14 contemporaneously with this Petition for Warrant in Lieu of Writ of Habeas Corpus.
15 No other applications for a writ of habeas corpus or a warrant in lieu of writ has been
16 made by Petitioner or on behalf of the child in regard to the said restraint or injury.

17 **III. RELIEF REQUESTED**

18 The petitioner prays that a Warrant in Lieu of Writ of Habeas Corpus be issued,
19 directing any police officer or U.S. Marshall in the State of Nevada, or any federal
20 officer, to bring the Respondents and the child immediately before this Court, to use
21 all force to remove the child, and place the child at the Clark County, Nevada Child
22 Haven located at 601 N. Pecos Rd. Las Vegas, NV 89101.

23
24 **DATED** this _____ day of _____, 20__.

25 Respectfully Submitted By:

26 NAIMI & CERCEO
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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 **JANE/JOHN DOE,**

10 Petitioner,

CASE NO:

11 vs.

12 **JANE/JOHN DOE,**

13 Respondent.

14 **NOTICE OF HEARING**

15 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)

16 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

17 TO: **JANE/JOHN DOE,** Respondent.

18 **YOU AND EACH OF YOU** please take notice that a Petition for Return of
19 Child has been filed with the United States District Court. A hearing is scheduled at
20 the Lloyd D. George United States Courthouse, United States District Court, 333 Las
21 Vegas Blvd. South, Las Vegas, Nevada, before the Honorable Judge _____,
22 on the day of _____, 2019, at the hour of ___ o'clock __.m.

23 You are ordered to appear personally with **Minor Child's name** at the aforesaid
24 hearing. Failure to appear personally, with or without **Minor Child's name** may result
25 in a decision adverse to you.

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ORDER

JANE/JOHN DOE A is hereby **Ordered To Appear** with **Minor Child's name** at the above time and place.

DATED this _____ day of _____, 2019.

UNITED STATES DISTRICT JUDGE

Respectfully Submitted By:
NAIMI & CERCEO

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Notice of Petition Under Hague Convention pursuant to NRCP 11 was made on the _____ day of

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_____, 20__, by Hand Delivery of a true copy of the same, to the following address:

NAME
Address
City, State, Zip, USA

An employee of Naimi & Cerceo

1 Robert Cerceo, Esq.
Nevada Bar No. 5247
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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9
10 **JANE/JOHN DOE,**

Petitioner,

CASE NO:

11
12 vs.

13 **JANE/JOHN DOE,**

14 Respondent.

15 **ORDER DIRECTING RETURN OF MINOR CHILD**

16 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)

17 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

18
19 **ORDER FOR RETURN OF CHILD**

20 The court orders, pursuant to the provisions of the Convention on the Civil
21 Aspects of International Child Abduction, done at the Hague on 25 Oct 1980 and/or
22 the International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq., that the
23 minor, **Name of Child**, born **DOB**, be returned in the company of her **mother/father**
24 to **Country**, and that said return be reported to the appropriate Central Authority.

25 By virtue of this order, **JANE/JOHN DOE**, has the sole and exclusive right to
26 the physical and legal custody of the child during the period of time required to return
27 the above-named minor to **Country**, the country of the minor's habitual residence,
28 pending further order of that court. This order is not a determination of the merits of

1 any custody issues within the meaning of Article 19 of the Convention, and pursuant
2 to Article 16 of the Convention no judicial or administrative authorities in the United
3 States should decide on the merits of any rights of custody.

4 The order of this court is made under the authority of 42 U.S.C. § 11603(a),
5 conferring original and concurrent jurisdiction on state and federal district courts of
6 the United States.

7 **THEREFORE, TO ANY PEACE OFFICER IN THE STATE OF**
8 **NEVADA, OR TO ANY FEDERAL OFFICER:**

9 You are hereby commanded to enforce the instant order allowing JANE/JOHN
10 DOE, using all necessary force, including entry into the premises where the
11 child is located, to remove the above-named minor from the United States of
12 America, and to allow JANE/JOHN DOE to accompany her to Country, giving
13 said JANE/JOHN DOE the right, without interference, to have said child in his
14 lawful custody for the purposes described herein. If JANE/JOHN DOE is not
15 initially present to receive the child, the child will be delivered to the Clark
16 County Child Haven located at 601 N. Pecos Rd., Las Vegas, Nevada 89101
17 until JANE/JOHN DOE can retrieve the child or can make appropriate
18 arrangements for the child to fly back to Country, at which time the child shall
19 be escorted to the respective airport terminal.

20 This order is effective the date below written, and shall continue in force and
21 effect until modified or canceled by a court of competent jurisdiction in Country.

22 DATED this _____ day of _____, 20__.

23
24 **UNITED STATES DISTRICT JUDGE**

25 Respectfully Submitted By:
26 NAIMI & CERCEO

27 _____
28 Francesca Resch, Esq.
Nevada Bar No. 13011
Attorneys for Petitioner

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7 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

8 **JANE/JOHN DOE,**

9 Petitioner,

CASE NO:

10 vs.

11 **JANE/JOHN DOE,**

12 Respondent.

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

14 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)
15 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

16 Upon filing and reading of the PETITION FOR RETURN OF CHILD
17 PURSUANT TO THE CONVENTION and the International Child Abduction
18 Remedies Act and Petitioner's PETITION FOR WARRANT IN LIEU OF A WRIT
19 OF HABEAS CORPUS, it appears that **Child's Name**, a person under the age of
20 sixteen (16) years, is illegally held in custody, confinement, or restraint by
21 **JANE/JOHN DOE** at **Address City, State Zip**, USA, County of Clark, and from
22 which it appears that a Warrant should issue in lieu of Writ of Habeas Corpus.

23 **IT IS ORDERED** that a Warrant of Arrest issue out of and under the Seal of
24 the U.S. District Court, District of Nevada, directed to the U.S. Marshal or any of
25 his/her deputies and any peace officer within the State of Nevada commanding him
26 to do any one or all of the following, indicated by the court's initial:

- 27 i. Take into protective custody **Child's Name** before the
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Honorable _____ in the
Federal Courthouse, at 333 Las Vegas Boulevard South, Las
Vegas, Nevada, or if court is not in session and no other Judge is
available, deliver **Child's Name** into the custody of Child Haven
located at 701 N. Pecos Rd. LV, NV 89101.

Court's Initial: _____

- ii. Serve a copy of all documents listed in Exhibit 1.1 attached hereto
on **JANE/JOHN DOE** and prepare the appropriate proof of
service thereof.

Court's Initial: _____

- iii. Take into protective custody and deliver **Child's Name** and
release **Child's Name** to Child Haven where **he/she** shall remain
in custody until a hearing is scheduled, said hearing to be done
promptly.

Court's Initial: _____

- iv. Take into protective custody **Child's Name**, and release **Child's
Name** to Petitioner, **JANE/JOHN DOE**. Petitioner is ordered to
immediately calendar a hearing in the courtroom at the Federal
Courthouse, at 333 Las Vegas Boulevard South, Las Vegas,
Nevada, pending further order of the court.

Court's Initial: _____

- v. Petitioner shall post a bond of _____ with the
court.

Court's Initial: _____

AUTHORITY TO SEARCH PREMISES

This order gives the U.S. Marshal or any of his/her deputies and any peace
officer within the State of Nevada the authority to use any and all force to enter and

1 search the premises located at 5921 West Bartlett Ave., Las Vegas, NV 89108, or
2 any other place where Child's Name is reasonably believed to be present, for the
3 purpose of determining whether Child's Name is present.

4 Court's Initial: _____

5 **ORDER**

6 The above is hereby ORDERED including all items set forth in the above
7 paragraphs that are initialed by the court.

8
9 **DATED** this _____ day of _____, 20__.

10
11 _____
12 **DISTRICT COURT JUDGE**

13 Respectfully Submitted By:
14 NAIMI & CERCEO

15
16 _____
17 Robert Cerceo, Esq.
18 Nevada Bar No. 5247
19 Francesca Resch, Esq.
20 Nevada Bar No. 13011
21 10000 W. Charleston Blvd., Suite 110
22 Las Vegas, Nevada 89135
23 Telephone: 702.901.4800
24 Facsimile: 702.463.0905
25 *Attorneys for Petitioner*

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EXHIBIT 1.1

DOCUMENTS FILED

Torres Garcia v. Guzman Galicia

1. *Civil Cover Sheet*
2. *Summons in a Civil Action*
3. *Form USM – 285*
4. *Declaration under Uniform Child Custody Jurisdiction Act (NRS 125A.385)*
5. *Petitioner’s Verified Complaint and Petition For Return of Child*
6. *Proposed Order Directing Return of Minor Child*
7. *Petitioner’s Ex Parte Motion for Immediate Return of the Minor Child and Scheduling Of An expedited Hearing for an Order of Return and Immediate Pick Up of Minor Child Under the Hague Convention*
8. *Proposed Order Granting Petitioner’s Ex Parte Emergency Motion For Immediate Return of the Minor Child and Scheduling of an Expedited Hearing for an Order of Return and Immediate Pick Up of Minor Child Under the Hague Convention*
9. *Petition for Warrant in Lieu of a Writ of Habeas Corpus*
10. *Proposed Warrant in Lieu of Writ of Habeas Corpus*
11. *Notice of Stay of Custody Proceedings*
12. *Notice of Hearing*
13. *Proposed Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus*

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Attorneys for Petitioner
6

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 **JANE/JOHN DOE,**

Petitioner,

CASE NO:

11 vs.

12 **JANE/JOHN DOE,**

13 Respondent.
14

15 **WARRANT IN LIEU OF WRIT OF HABEAS CORPUS**

16 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)

17 International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A
18

19 **THE PEOPLE OF THE STATE OF NEVADA TO:**

20 **The U.S. Marshal or any of his/her deputies and any PEACE OFFICER within**
21 **the State of Nevada**

22 **ORDER OF THE COURT**

23 It appearing to the Court, from the filing of a petition for a Warrant in Lieu of
24 Writ of Habeas Corpus, that **Child's Name**, a person under the age of sixteen (16)
25 years, is illegally held in custody, confinement, or restraint by **JANE/JOHN DOE** at
26 **Address, City**, NV 89108, USA, County of Clark, and there is reason to believe
27 **Child's Name** will be carried out of the jurisdiction;
28

1 **YOU ARE COMMANDED TO:**

2 i. Take into protective custody **Child's Name** before the Honorable
3 _____ at the Federal Courthouse, at 333 Las Vegas
4 Boulevard South, Las Vegas, Nevada, or if court is not in session and
5 no other Judge is available, deliver **Child's Name** into the custody of
6 Child Haven, located at 601 N. Pecos Road (at Bonanza), Las Vegas,
7 Nevada 89110.

8 Court's Initial: _____

9 ii. Take into protective custody and deliver **Child's Name** and release
10 **Child's Name** to Child Haven, located at 601 N. Pecos Rd. Las Vegas,
11 Nevada 89101, where he shall remain in custody until a hearing is
12 scheduled, said hearing to be done promptly.

13 Court's Initial: _____

14 iii. Take into protective custody **Child's Name**, and release **Child's Name**
15 to Petitioner, **JANE/JOHN DOE**. Petitioner is ordered to immediately
16 calendar a hearing at the Federal Courthouse, at 333 Las Vegas
17 Boulevard South, Las Vegas, Nevada, pending further order of the court.

18 Court's Initial: _____

19 iv. Serve a copy of the documents listed in Exhibit 1.1 attached hereto on
20 **JANE/JOHN DOE** and prepare the appropriate proof of service thereof.

21 Court's Initial: _____

22 **AUTHORITY TO SEARCH PREMISES**

23 This Order gives the U.S. Marshal or any of his/her deputies and any peace
24 officer within the State of Nevada the authority to use any and all force to enter and
25 search the premises at 5921 West Bartlett Ave., Las Vegas, NV 89108, USA, or
26 any other place where **Child's Name** is reasonably believed to be present, for the
27 purpose of determining whether **Child's Name** is present.

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ISSUANCE BY CLERK

_____ Federal Clerk, United States District Court,
District of Nevada.

DATED this _____ day of _____, 20__.

By Deputy

Respectfully Submitted By:
NAIMI & CERCEO

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Nevada Bar No. 5247
Francesca Resch, Esq.
Nevada Bar No. 13011
10000 W. Charleston Blvd., Suite 110
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Telephone: 702.901.4800
Facsimile: 702.463.0905
Attorneys for Petitioner

EXHIBIT 1.1

DOCUMENTS FILED

Torres Garcia v. Guzman Galicia

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7. *Petitioner’s Ex Parte Motion for Immediate Return of the Minor Child and Scheduling Of An expedited Hearing for an Order of Return and Immediate Pick Up of Minor Child Under the Hague Convention*
8. *Proposed Order Granting Petitioner’s Ex Parte Emergency Motion For Immediate Return of the Minor Child and Scheduling of an Expedited Hearing for an Order of Return and Immediate Pick Up of Minor Child Under the Hague Convention*
9. *Petition for Warrant in Lieu of a Writ of Habeas Corpus*
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3 efile@naimicerceo.com
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5 Las Vegas, Nevada 89135
Telephone: 702.901.4800
6 Facsimile: 702.463.0905
Attorneys for Petitioner

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

7 **JANE/JOHN DOE,**

8
9 Petitioner,

CASE NO:

10 vs.

11 **JANE/JOHN DOE,**

12 Respondent.

13 **ORDER GRANTING PETITIONER'S EX PARTE EMERGENCY MOTION
FOR IMMEDIATE RETURN OF THE MINOR CHILD AND SCHEDULING
14 OF AN EXPEDITED HEARING FOR AN ORDER OF RETURN AND
IMMEDIATE PICK UP OF MINOR CHILD UNDER THE HAGUE
15 CONVENTION**

16 The Convention on the Civil Aspects of International Child Abduction, done
at the Hague on 25 Oct 1980 Article 7(b)
International Child Abduction Remedies Act, 42 U.S.C. 11604 NRS 125A

17
18 Petitioner, **JANE/JOHN DOE**, having filed Petitioner's ex parte emergency
19 motion for immediate return of the minor child and scheduling of an expedited
20 hearing for an order of return and immediate pick up of the minor child under the
21 Hague Convention, the Court having considered these pleadings in this case, and
22 pursuant to Federal Rule of Civil Procedure 65, the Motion is hereby GRANTED as
23 follows:

- 24 1. Petitioners request for this court to waive the time requirements that
25 apply to motions is GRANTED;
- 26 2. An expedite hearing on the merits of the of the *Motion* is hereby
27 scheduled to be held on _____, 20__ at _____ o'clock of this
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Court to set to finalize the time, manner, date, and other transportation arrangements of the minor child’s return to Country;

- 3. Respondent is hereby ordered to pay the entirety of Petitioner’s and the minor child’s travel expenses and costs pursuant to 42 U.S.C. § 11607; and
- 4. Respondent is hereby directed to show cause at the hearing scheduled in paragraph (2) above why the child should not be returned forthwith to Country, accompanied by Petitioner, and why the other relief requested in the Verified Petition should not be granted.

DATED this _____ day of _____, 20__.

DISTRICT COURT JUDGE

Respectfully Submitted By:
NAIMI & CERCEO

Robert Cerceo, Esq.
Nevada Bar No. 5247
Francesca Resch, Esq.
Nevada Bar No. 13011

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6 *Attorneys for Petitioner*

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 **JANE/JOHN DOE,**

10 Petitioner,

CASE NO:

11 vs.

12 **JANE/JOHN DOE,**

13 Respondent.

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that service of Petitioner's Ex Parte Motion for Immediate
16 Return of the minor child et. al., Petitioner's Declaration in Support of the Ex Parte
17 Motion for Return of the minor child, et. al., and the Order re: Ex Parte Motion for
18 Temporary Restraining Order, et. al. filed on **date**, was made on the **_____** day of
19 **Month year**, by mailing a true copy of the same, to the following address:

20 **JANE/JOHN DOE**
21 Address
Las Vegas, NV **Zip**, USA

22
23
24 _____
An employee of Naimi & Cerceo

CAROLINE HARNOIS
SUITE 4000
1 PLACE VILLE MARIE
MONTREAL, QUEBEC H3B 4M4
DIRECT LINE: 514 877-2972
CHARNOIS@LAVERY.CA

CHECKLIST FOR WRONGFUL REMOVAL OR RETENTION IN QUEBEC

Hague Convention in Quebec

- Hague Convention has been implemented in Quebec by the *Act respecting the civil aspects of international and interprovincial child abduction*, A-23.01
<http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/A-23.01>
- Despite its title, the Act is not in force between the Canadian provinces but only with the States designated as per Article 41 of the Act. The list of the designated States is available at: <https://www.justice.gouv.qc.ca/en/information-for-professionals/legal-professionals/abduction-of-a-child-by-a-parent/list-of-the-designated-states/>
- The Central Authority for Quebec:

Ministère de la Justice
Direction des orientations, des affaires législatives et de la refonte - Entraide internationale
enlevement.enfant@justice.gouv.qc.ca

Wrongful removal or retention

- Article 19 of the Hague Convention foresees that a return order is not a custody determination but rather an order that the child be returned to the jurisdiction which is most appropriate to determine the issue of his/her custody and access, namely the State of the child's habitual residence.
- This justifies the requirement in Article 12 that the return order be made "forthwith", and of Article 16 that a Court dealing with an abduction case is not permitted to decide on the merits of rights of custody until it has been decided that there exists a reason for not ordering return, or the application is not made within a reasonable time.
- The heart of the *Hague Convention's* prompt return mechanism is Article 3, which provides that the removal or retention of a child is wrongful (a) where it is in breach of custody rights under the law of the state in which the child was habitually resident immediately before the removal or retention and (b) where those rights were actually being exercised or would have been exercised but for the wrongful removal or retention. *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398

- Therefore the requirements to be met by a parent seeking a return order are strict. He/she must establish by preponderance of evidence that:
 - both countries are parties to the Hague Convention and that the Convention is in effect between them;
 - the abducted child is under 16 years old;
 - the child was habitually residing in the ‘requesting’ State at the time of the wrongful removal or retention;
 - the removal or retention of the child constitutes a breach of custody rights as determined by the law of that State, according to Article 3 of the Convention; and
 - the applicant was actually exercising those rights at the time of the wrongful removal or retention.
- The rights of custody mentioned at Article 3 may arise by operation of law, as a result of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State of habitual residence.
- In Quebec, Article 4 of the Act foresees that in addition to the cases foreseen in Article 3, the removal or the retention of a child is considered wrongful if it occurs when proceedings for determining or modifying the rights of custody have been introduced in Québec or in the designated State where the child was habitually resident and the removal or retention might prevent the execution of the decision to be rendered.
- The habitual residence is not defined in the Convention. However, the Supreme Court of Canada has ruled that habitual residence of the child must be determined according to the hybrid approach: *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398:
 - The hybrid approach “holds that instead of focusing primarily on either parental intention or the child’s acclimatization, the judge determining habitual residence must look to all relevant considerations arising from the facts of the case. The judge considers all relevant links and circumstances – the child’s links to and circumstances in country A; the circumstances of the child’s move from country A to country B; and the child’s links to and circumstances in country B. Considerations include the duration, regularity, conditions, and reasons for the child’s stay in a member state and the child’s nationality. No single factor dominates the analysis. The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children. But, there is no rule that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances. The hybrid approach is fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions”.

- When the parent seeking the return demonstrates that these conditions are met, the Court has the obligation to order the return of the child forthwith to his/her State of habitual residence, according to Article 12 of the Convention.
- However, the Convention provides for an exhaustive list of exceptions to the obligation to return the child. These exceptions must be interpreted in a restrictive fashion so that the Convention does not become a dead letter and for the non-return to remain the exception rather than the rule. Even where an exception has been established by the abducting parent who bears the burden of proof (by preponderance of evidence), the Courts retain discretion to order the return in any event.

Exceptions

- The exceptions to the obligation to return the child are the following:
 - the left-behind parent was not actually exercising the custody rights at the time of the removal or retention: Article 13(1)a);
 - the left-behind parent had consented to or subsequently acquiesced to the removal or retention: Article 13(1)a);
 - the child objects to being returned and has reached an age and a degree of maturity at which it is appropriate to take his views into account: Article 13(2);
 - there is a grave risk that the child's return would expose him/her to physical or psychological harm or otherwise place him/her in an intolerable situation: Article 13(1)b);
 - when more than one year has elapsed from the date of the wrongful removal or retention and the date of the commencement of judicial proceedings, and it is demonstrated that the child is now settled in his/her new environment: Article 12(2);
 - when the return would not be permitted by the fundamental principles of the requested States relating to the protection of human rights and fundamental freedoms: Article 20;

Process in Quebec

Request for Assistance of Central Authority

- A request for Assistance can be sent to the Central Authority for Quebec by the Central Authority of the State of habitual residence of the child or directly by the left-behind parent (see attached Form - in French or English);
- Request to the Central Authority is optional. Left-behind parent can also file an application directly with the Superior Court;
- In all Hague cases, the Attorney General of Quebec intervenes as an Impleaded party;

- When the assistance of the Central Authority is requested, it will provide a wide range of services including:
 - o Assistance in locating the child;
 - o Assistance in securing a voluntary return;
- At the request of the Attorney General, an *ex parte* order can be made to bring the children before the Director of Youth Protection (DYP) when the child is at risk or to prevent further harm (Articles 10 and 11 of the Act);

Application before the Superior Court

- The left-behind parent files an Application for the Immediate Return of the children before the Superior Court of Quebec (in French or English).
- The Application can include a request for Interim measures regarding interim access, deposit of passports, the appointment of a child attorney, etc.;
- A hearing on a Hague Application is scheduled by priority;
- Judgments ordering the return of a child under the 1980 Hague Convention are enforceable notwithstanding appeal;
- Mediation is possible at all stages;

Appeal

- Appeal from judgments on return applications are heard by the Court of Appeal of Quebec and the appeal declaration must be filed within 30 days of the judgment. They are also heard by priority and an application to suspend provisional execution can be filed.

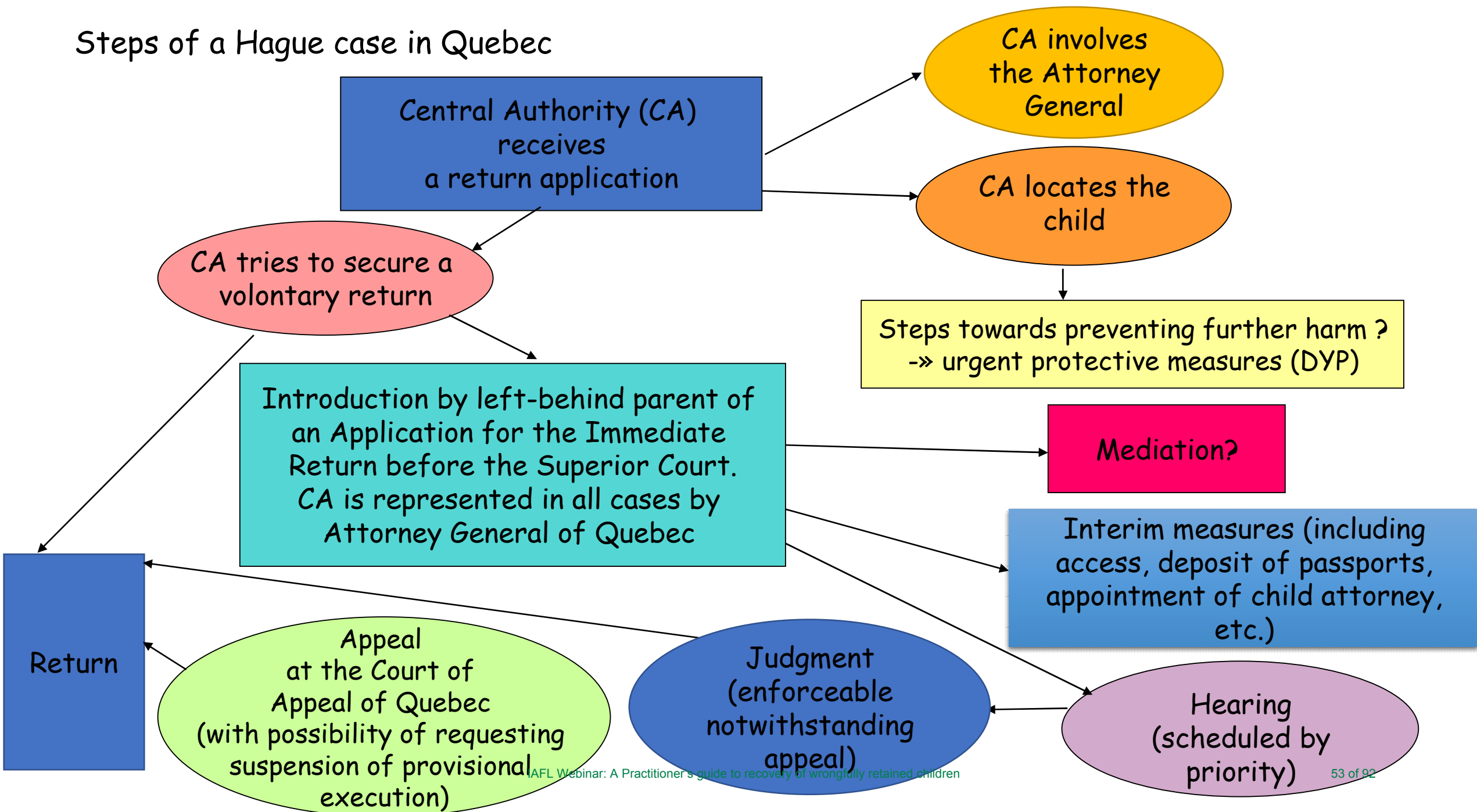
Determination under Article 15 of the Hague Convention

- Article 15 of the Hague Convention foresees that the Court of a Contracting State may, prior to making 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.
- Article 29 of the Act foresees that when a child habitually residing in Quebec is retained or removed abroad the determination under Article 15 of the Convention (or Article 29 of the Act) can be rendered by the Superior Court not only at the request of authorities of the State of habitual residence but also at the request of the left-behind parent.

Checklist for filing a Hague Application before the Superior Court of Quebec seeking the return of a child to his State of Habitual Residence:

- a. Only one filing to the Superior Court to Open the Case and for the Return of the Child, namely: an *Introductory Application for the return of the Children to their State of Habitual Residence and for Safeguard order*.
- b. To be attached to the Application:
 - i. *Affidavit (in support of application)*
 - ii. *Notice of Presentation*
 - iii. *List of Exhibits which will include:*
 - *birth certificates;*
 - *copy of passports;*
 - *marriage certificate if applicable;*
 - *copy of the decree confirming that the State of habitual residence is a designated State as per Article 41 of the Act;*
 - *evidence as to the habitual residence;*
 - *evidence as to rights of custody, including judgment on custody where applicable, relevant sections of the law of the State of habitual residence on custody, certificate of jurisconsult on custody from licensed attorney from the State of habitual residence;*
 - *evidence regarding the costs;*
 - *any other relevant information including proof of citizenship, authorization to travel, etc;*
- c. The Application and documents must be filed in French or English;
- d. All documents must be served by personal service unless permission is granted by the Court to serve otherwise.

Steps of a Hague case in Quebec



C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO : 500-04-

SUPERIOR COURT
(Family Division)

XX, domiciled and residing at xxx.

Applicant

v.

YY currently residing at xxx;

Respondent

-and-

ATTORNEY GENERAL OF QUEBEC, xxx

Impleaded party

**INTRODUCTORY APPLICATION FOR THE IMMEDIATE RETURN OF MINOR CHILDREN TO
(country) AND FOR A SAFEGUARD ORDER**

*(Sections 18, 19 and 39 of the Act Respecting the Civil Aspects of International
and Interprovincial Child Abduction and Articles 49, 82, 409 and 660 of
the Code of Civil Procedure)*

IN SUPPORT OF THE INTRODUCTORY APPLICATION, APPLICANT SUBMITS THE FOLLOWING:

Background

1. The parties met each other in (...);
2. They were married on (...), in (...), as appears from a copy of their Marriage certificate communicated herewith as **Exhibit P-1**;
3. From the time of the marriage the parties resided (...), at which time they moved permanently to (...);

Two children were born issue of the marriage, namely:

- (...), male, born on (...) in (...), and presently (...) years old;
- (...), female, born on (...) in (...), and presently (...) years old;

(hereinafter referred to as the “**Children**”), as appears from a copy of their birth certificates communicated herewith *en liasse* as **Exhibit P-2**;

4. The Children have by birth dual Canadian and (...) citizenships, as appears from a copy of (...), communicated herewith *en liasse* as **Exhibit P-3**;
5. Applicant is an (...) citizen, as appears from a copy of his passport communicated herewith as **Exhibit P-4**;
6. Respondent is a (...) citizen, as appears from a copy of her passport, communicated herewith as **Exhibit P-5**;
7. On (...), the parties moved to (...) with the children permanently;
8. The parties ended their residence lease in Montreal and rented a house in (...), for an initial period of one (1) year, as appears from a copy of their lease contract communicated herewith as **Exhibit P-6**;
9. The parties moved all their belongings to (...), cancelled all their services in Montreal such as cellular phones contracts and completely established themselves in a 4,000 square foot house in (...), as appears from two (2) Facebook posts of Respondent dated (...) communicated herewith as **Exhibit P-7**;
10. The parties enrolled their children in (...) School, a private school in (...), where they started attending on (...) and the tuition for both children's school was paid in full for the entire year, as appears from the children's school records communicated herewith as **Exhibit P-8**;
11. (...) attended (...) School full time and was involved in the school (...) while also currently still holding a position in the school hockey team in (...);
12. (...) also attended (...) School two (2) days a week and was registered in (...) class;
13. The children have been followed by a pediatrician and other health professionals in (...) since they moved to (...) in (date);
14. The parties started working together in (...) with company (...) as appears from (...) communicated herewith as **Exhibit P-9** and as will be more fully demonstrated at the hearing on the merits of this application;
15. On (...), Respondent took the children to Montreal for a one week holidays during the children's spring break;
16. The parties had agreed that Respondent would return to (...) with the children on (...) as appears from the authorization to travel signed by Applicant as well as Respondent's email to Applicant dated (...) and Respondent's email to the children's school teachers dated (...), communicated herewith *en liasse* as **Exhibit P-9**;
17. However, Respondent and the children did not return to (...) on (...) and she has since then stated that she will not be returning the children as the parties had agreed;
18. The children have resided their entire life with both their parents;

19. Since their unlawful retention in the Province of Quebec, Respondent and the children have resided with Respondent's parents in (...) until on or around (...), when she moved to a condo also in (...), close to her parents' residence;
20. Since Respondent unlawfully retains the children in Montreal, her parents and herself have restricted Applicants' access to the children as appears from the email and text messages from Respondent and her mother to Applicant communicated herewith *en liasse* as **Exhibit P-11**;
21. More precisely, on or around (...), and as agreed with Respondent, Applicant drove to (...) to spend a long weekend at a local hotel with his children who he had not seen since their wrongful removal. He texted Respondent's mother to confirm the time of his arrival but she refused to let him have access to the children that night and asked him to pick them up the next day, which he was forced to accept, as appears from Exhibit P-11;
22. The same night, namely thirty (30) minutes prior to attempting to pick up the children, he received an email and a text message from Respondent informing him that, as requested by her attorneys, Applicant had to sign a document confirming that he agreed that the children's residence be in Montreal and that he had to give this document to her parents, failing which he would not be allowed to take the children, as appears from Exhibit P-11;
23. Applicant refused to sign said document and went to Respondent's parents' house to pick up the children who literally jumped of happiness to see their father. Nevertheless, not only Respondent's parents denied him access to the children but also called the police. The police had to intervene and allowed Applicant to have access to his children;
24. Respondent has also on several occasions, and particularly recently, restricted Applicant's Facetime access to the children;
25. Applicant has serious concerns about the safety of the children as Respondent is physically and verbally abusive and regularly exhibits hostile and irrational behaviour;
26. Respondent suffered from mental health issues and consulted a psychologist and a psychiatrist in (...) and was medicated, as appears from (...), communicated herewith as **Exhibit P-12**;
27. Respondent has repeatedly threatened to (...) during the marriage and had severe panic attacks. A few weeks before leaving (...) *describe incident*;
28. Since the unlawful retention of the children in the province of Quebec, Respondent has sent various text messages to Applicant sometimes asking him to pick her up and bring her "back home" to (...), as appears from Respondent's text messages to Applicant communicated herewith *en liasse* as **Exhibit P-13**;
29. Applicant requests this Honourable Court to intervene and order Respondent on an urgent basis not to expose the children to any adult conversation and not to denigrate Applicant nor try to diminish or let any third party diminish the relation and affection between the children and their father;

30. Applicant worries as Respondent's parents also suffer from mental health issues and do not provide a safe and secure environment to the children. Respondent's father was treated in psychiatry at (...) and Respondent's mother tried to commit suicide approximately (...) years ago at her house t (...) which required the intervention of the police force;
31. Applicant worries about the children being left alone with Respondent's parents which he knows happens as Respondent lives in the near proximity of her parents' house and they are her only support system in Montreal;

Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention")

32. It is clear from the foregoing that Respondent is wrongfully retaining the minor children and is preventing their return to their habitual place of residence in (...), within the meaning of the Hague Convention;
33. (...) is a signatory of Hague Convention, and has been a designated state since (...), the whole as it appears from a copy of Order in Council (no...), *Gazette Officielle du Québec*, vol. (...), (...), p. (...) communicated herewith as **Exhibit P-14**;
34. Furthermore, the retention (non-return) of the children must be considered wrongful within the meaning of article 3 of Hague Convention and article 3 *An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*, since Respondent breached Applicant's rights of custody and parental authority, conferred unto him by the laws of (...), namely Section (...) of the (...) which stipulates that "the parents are the joint natural guardians of their minor child[ren]", as appears from a copy of that provision of law of (...) as well as an affidavit from Mtre (...), lawyer in (...), communicated herewith *en liasse* as **Exhibit P-15**;
35. As such, Respondent was not entitled to unilaterally change the children's place of residence since that decision must be made by the parties together, or failing agreement, by the courts in (...);
36. Applicant never consented nor acquiesced to the children remaining in Quebec with Respondent;
37. Applicant was effectively exercising his custody rights at the time of the wrongful retention, having always lived with the children and Respondent;

Applicant's Requests

38. Considering the foregoing, Applicant is seeking the immediate return of the children to (...);
39. Applicant is asking that the police authorities of the jurisdiction of Montreal or within the province of Quebec take all necessary steps to return the children to him pursuant to a court order;

40. Applicant is asking that Respondent pay all expenses, disbursements and professional fees incurred by Applicant in connection with the present proceedings;
41. Pursuant to article 3076 and following of the *Civil Code of Québec*, Applicant is requesting the following safeguard orders:
- That all passports of the children be remitted to the undersigned attorneys;
 - That the children not be taken out of Quebec without the Court's authorization except to be returned to their State of habitual residence, namely (...);
 - That Applicant have full access to the children during his stay in Montreal for the duration of the proceedings, without interference of Respondent and/or her parents;
 - That Applicant have full access to the children through Facetime on a daily basis for the duration of the proceedings, without interference of Respondent and/or her parents;
 - That Respondent be ordered not to expose the children to any adult conversation and not to denigrate Applicant nor try to diminish or let any third party diminish the relation and affection between the children and their father;
 - That Respondent be ordered not to let the children alone in the presence of Respondent's parents, for the duration of the proceedings;
42. Given the urgency, Applicant is requesting that the delays for service, filing and presentation of the present application be reduced;
43. The present application is well-founded in fact and in law.

THEREFORE, MAY IT PLEASE THIS COURT TO:

As a safeguard order:

REDUCE the delays for service, filing and presentation of the present application;

ORDER that all passports of (...) be remitted to the undersigned attorneys;

ORDER that the children (...) not be removed from the Province of Quebec unless they are returned to (...), until the judgment on the present application is rendered;

GRANT Applicant full access the children (...) during his stay in Montreal for the duration of the proceedings;

GRANT Applicant daily Facetime access to the children (...) for the duration of the proceedings the whole without any interference from Respondent and/or her parents;

ORDER Respondent not to expose the children to any adult conversation and not to denigrate Applicant nor try to diminish or let any third party diminish the relation and affection between the children and their father;

ORDER Respondent not to let the children (...) alone in the presence of Respondent's parents, for the duration of the proceedings;

On the merits:

GRANT the present application;

ORDER the immediate return of the children (...) to (...);

ORDER that the children (...) be handed over to the custody of Applicant;

AUTHORIZE Applicant to obtain unilaterally from the Canadian authorities the authorization required for the return of the children (...) including, if applicable, their passport(s);

ORDER Respondent to reimburse Applicant for all expenses incurred by him in connection with the return of the children (...) to (...), including travel expenses, the costs of legal representation, and those of returning the child, and any costs incurred or payments made for locating the child, the whole in accordance with section 39 of the *Act respecting the civil aspects of international and interprovincial child abduction*;

ALLOW the undersigned attorneys to remit to Applicant, or any other person designated by Applicant, all passports of the children (...), as well as any documents required for her return;

ORDER Respondent not to interfere with the immediate return of (...) to their habitual place of residence in (...);

ORDER Respondent not to leave Montreal or the province of Quebec with the children (...), **except to return them** to their habitual residence in (...);

ORDER the police authorities of the judicial districts concerned to take all available measures to enforce the execution of the judgment to be rendered herein;

RENDER any other orders that the Court deems appropriate;

THE WHOLE, with costs.

Montreal, (...), 2020

LAVERY, DE BILLY
Limited Liability Partnership
Lawyers for Applicant

AFFIDAVIT

I, the undersigned, **XX**, domiciled and residing at (...) being duly sworn, do solemnly declare and affirm the following:

1. That I am the Applicant herein;
2. That the minor children are not the object of a decision of a court, nor a pending case before a court nor of any agreement with a director of youth protection;
3. All the facts alleged in the *Introductory application for the immediate return of minor children to (...) and for a safeguard order* are true and correct and should be deemed as if recited at length herein;

AND I HAVE SIGNED

XX

SOLEMNLY AFFIRMED BEFORE ME
at _____, this XX, 2020

Commissioner of Oath/lawyer/notary
for the district of XXX.

NOTICE OF PRESENTATION

**TO: Mrs. XX
Address**

Respondent

**AND: ATTORNEY GENERAL OF QUEBEC
Address**

Impleaded party

TAKE NOTICE THAT the *Introductive application for the immediate return of minor children to (...) and for a safeguard order* will be presented before one of the Honourable judges sitting in the practice division of the Montreal Courthouse located at Notre-Dame East, (Quebec) on XX, 2020, at 9:00 a.m. in room 2.17 or so soon thereafter as Counsel may be heard.

TAKE FURTHER NOTICE THAT if you are in default to present yourself at the above-mentioned date, the Applicant may obtain a judgment by default, without any further notice. It is important that you act within the above mentioned delays, either through an attorney to represent your interests, or by proceeding yourself within the formalities of the law.

DO GOVERN YOURSELF ACCORDINGLY.

Montreal, XX, 2020

LAVERY, DE BILLY
Limited Liability Partnership
Lawyers for Applicant

CANADA

SUPERIOR COURT
(Family Division)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO : 500-04

XX

Applicant

v.

XX

Respondent

-and-

ATTORNEY GENERAL OF QUEBEC

Impleaded party

LIST OF EXHIBITS

EXHIBIT P-1: ADD DESCRIPTION

EXHIBIT P-2:

EXHIBIT P-3:

EXHIBIT P-4:

EXHIBIT P-5:

EXHIBIT P-6:

EXHIBIT P-7: ;

TO BE COMPLETED

These exhibits are available on request.

Montreal, (...), 2020

LAVERY, DE BILLY
Limited Liability Partnership
Lawyers for Applicant

LDB:14864785v1

Request for Return of the child

Hague Convention on the Civil Aspects of International Child Abduction

Addressed to

REQUESTED AUTHORITY

CONCERNS THE FOLLOWING CHILD OR CHILDREN

Surname and first name(s)	who will attain the age of 16 on	Y	M	D
Surname and first name(s)	who will attain the age of 16 on	Y	M	D

Note: The following particulars should be completed insofar as possible.
If the provided spaces are insufficient, you may attach supplementary sheets.

1. IDENTITY OF THE CHILD OR CHILDREN

Surname and first name(s)		Date of birth (If known)			Y	M	D
Place of birth (If known)				Nationality			
Habitual residence before removal or retention							
Social insurance number				Passport (Country, No.) (If any)			
Height	Weight		Colour of hair		Colour of eyes		
Description							<input type="checkbox"/> Photography attached

Surname and first name(s)		Date of birth (If known)			Y	M	D
Place of birth (If known)				Nationality			
Habitual residence before removal or retention							
Social insurance number				Passport (Country, No.) (If any)			
Height	Weight		Colour of hair		Colour of eyes		
Description							<input type="checkbox"/> Photography attached

2. IDENTITY OF PARENTS

MOTHER	Surname and first name(s)		Date of birth			Y	M	D
	Place of birth		Nationality					
	Occupation		Telephone number		Regional Code			
	Habitual address							
	Social insurance number				Passport (Country, No.) (If any)			
	Country of habitual residence				Province (If any)			
FATHER	Surname and first name(s)		Date of birth			Y	M	D
	Place of birth		Nationality					
	Occupation		Telephone number		Regional Code			
	Habitual address							
	Social insurance number				Passport (Country, No.) (If any)			
	Country of habitual residence				Province (If any)			
Date of marriage of parents (If any)			Y	M	D	Place of marriage		

3. REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercised either alone or jointly, custody rights before the removal or retention)

Surname and first name(s) or name of institution	
Nationality (If individual applicant)	
Occupation (If individual applicant)	
Address	
Telephone number	Regional Code
Passport (Country, No.) (If any)	
Country of habitual residence	Province (If any)
Relation to the child <input type="checkbox"/> Mother <input type="checkbox"/> Father <input type="checkbox"/> Other Specify :	
Name and address of legal adviser (If any)	

4. INFORMATION CONCERNING THE PERSON ALLEGED TO HAVE REMOVED OR RETAINED THE CHILD

Surname and first name(s)		Date of birth (If known)			Y	M	D
Place of birth (If known)		Nationality (If known)					
Last known address in Québec							
Occupation							
Name and address of employer							
Social insurance number			Passport (Country, No.) (If any)				
Height	Weight	Colour of hair	Colour of eyes				
Description						<input type="checkbox"/> Photography attached	
Place where child is thought to be							
All information available which might be of help in locating to the whereabouts of the child (Ex.: names of persons, facts, etc.)							

5. TIME, PLACE, DATE AND CIRCUMSTANCES OF WRONGFUL REMOVAL OR RETENTION

--

6. FACTUAL OR LEGAL GROUNDS ESTABLISHING BREACH OF APPLICANT'S CUSTODY RIGHTS

<input type="checkbox"/> Court decision	<input type="checkbox"/> Operation of law	<input type="checkbox"/> Agreement
Comments		

IAFL Webinar: A Practitioner's guide to recovery of wrongfully retained children 65 of 92

7. CIVIL PROCEEDINGS IN PROGRESS

--

8. CHILD IS TO BE RETURNED TO

Surname and first name(s)		Date of birth			Y	M	D
Address							
Telephone number		Regional Code		FAX number		Regional Code	
Proposed arrangements for return of child							

9. OTHER REMARKS

<p>N.B. Any allegation stating that the security of the abducted child is endangered must be supported by an affidavit.</p>

10. LIST OF DOCUMENTS ATTACHED

--

Signed at		Date			Y	M	D
Signature and / or stamp of the requesting Central Authority or applicant							

Authorization to act

Hague Convention on the Civil Aspects of International Child Abduction (Article 28)

I, the undersigned _____, authorize the requested Central Authority to act on my behalf or to designate a representative to do so.

I also authorize the Central Authority for Québec to release, for the purposes of this Hague Convention, the personal information provided in connection with this application.

Place _____ date _____

Signature

**The enforcement of Hague Return Orders:
perspectives from England and Wales**



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Carolina Marín Pedreño is a Spanish *Abogada* who cross-qualified as a Solicitor in England and Wales in 2006. She is a Partner at Dawson Cornwell Solicitors in London. Current President of the City of Westminster and Holborn Law Society and Vice President of IAFL Executive Committee among others elected positions and memberships.

Carolina is known as a “*go-to practitioner for cross-border work involving both public and private children cases*”. She specialises in international cases particularly child abduction, registration and enforcement of foreign contact orders, leave to remove, residence, contact and public law cases. She has represented parents in all instances in the UK and in the European Court of Justice in Luxemburg and in the European Court of Human Rights in Strasbourg.

Carolina is a frequent lecturer and author on family law and has been interviewed by the press on many occasions. She has been appointed as expert in the European Projects VOICE (research on children’s voice in child abduction cases) and AMICABLE (enforcement of mediation agreements on Child Abduction and relocation cases). She has been invited by the Spanish Judicial Council to participate in the training of the Spanish Judiciary in international family law.

Structure

- I: Introduction – *page 4*
- II: Return Orders – *page 5*
- III: A word on undertakings – *page 6*
- IV: Appeals – *page 7*
- V: Enforcement proceedings: When a respondent refuses to return – *page 7*
- VI: Contempt of Court – *page 11*
- VII: When non-enforcement becomes a breach of human rights – *page 12*
- VIII: Tips for successful applicants – *page 13*

I: Introduction

The Courts of England and Wales are seeing an ever-increasing number of Hague and non-Hague abduction applications. Centralised in the High Court in London, roughly a dozen specialist High Court judges determine abduction applications on a daily basis concerning children from all over the world.

Proceedings under the Hague Convention in particular are commonplace. However, enforcement proceedings remain far less routine. Failing to comply with a return order remains the exception, rather than the rule. That notwithstanding, the Courts of England and Wales hold a specialist arsenal of tools, deployed in exceptional circumstances, to ensure that children who should return home, are returned home.

II: Return Orders

Hague applications in England and Wales are determined following proceedings in the High Court, and are concluded by way of either:

- i. Judicial determination, returning the child;
- ii. Judicial determination, refusing to return the child;
- iii. By agreement between the parties, returning the child;
- iv. By agreement between the parties, permitting the applicant to withdraw their application and thereby allowing the child to remain in England and Wales.

When proceedings are concluded by way of agreement, a court order allowing for the child's future is almost always necessary.

Mediation is strongly encouraged and indeed a recent change in practice has seen specialist mediators in court during Hague proceedings at the first directions hearing. Parties who come to an agreement by way of negotiation or mediation should be strongly advised to convert the terms of their agreement into a binding court order.

Hague final orders in England and Wales are often detailed and complex, and can run to many pages with schedules and appendices. More often than not, they contain detailed provisions for the child's return. The main provision of this nature is generally drafted as:

*"The child/ren, [insert name/s] shall be summarily returned to [insert state] **forthwith and by no later than 23.59pm on [insert date]**, pursuant to article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980."*

It is best practice to ensure some time for the child's return. Returns should take place speedily but allow sufficient time for the arrangements for return to be put in place. Depending on the time of year and factors within the case, judges may permit children to be returned at the conclusion of a school term or half-term, or at any other suitable juncture.

In the event that the child's and/or respondent's passports have previously been seized by Police acting under the direction of the High Court Tipstaff, an order will be made permitting the release of the passports to the respondent at the point of departure. This role will usually

be carried out by the applicant's solicitor, and it will be incumbent upon the respondent to rapidly identify flights for their return following the final hearing.

A Port Alert may have been put in place within the proceedings. This is a measure made by way of Court order, which places a 'marker' against a child's or respondent's name. If a passport, ID or document with a marked name is scanned by authorities at a port of exit within the UK, the Police will be notified and the documents will be seized. They will therefore be prevented from travelling. Port alerts are invaluable tools during the currency of abduction proceedings, particularly where the risk of re-abduction is high. Within Hague proceedings, the final return order must make provision for the Port Alert to be discharged to prevent any hiccups at the airport.

In the event that the respondent confirms that they do not seek to return with the child following the making of a return order, the Court will look to ensure that the child is placed in the care of the applicant or a third party in good time for the return to take place. This will involve the child (and the child's passport) being handed over at a specified time, date and place for the return to occur. A child will only be placed into the care of a third party (generally a grandparent or other close relative) in limited circumstances, which most often arise if the applicant does not hold a visa to enter the UK to execute the child's return personally.

In the event that the respondent does not confirm his or her position at Court when the return order is made, the order may be structured to give the respondent, say, 7 days to indicate if he or she will return with the child, failing which the child will be placed into a named person's care in advance of the return.

Return orders can otherwise specify the exact flight upon which a child should return, or the method of transport for this to occur. Depending on the facts of the case and wherever geographically possible, the Court can order for the child to be returned on direct flights to the country of origin. Extensive travel by way of road or rail is to be avoided to prevent respondents re-abducting en route. If connections through other countries are unavoidable, where appropriate the Court can also determine that any connecting flight take place via a state that is a signatory state to the Hague Convention.

The Court should only order the return to a particular jurisdiction and not to a particular address or town/city unless agreed. In federations or multi-jurisdictional states such as the USA, Australia or Mexico, the Court should order the child's return to the exact state of habitual residence (eg, to the State of California or New South Wales, rather than to the USA or Australia).

III: A word on undertakings

Undertakings are very commonplace in Hague proceedings. Undertakings are legally-binding, solemn promises to the Court, made by parties themselves, which carry the force of a court order¹. They often include:

¹ S. 14, Contempt of Court Act 1981, supported by CPR 81

- i. To purchase flights for the respondent and/or child to return;
- ii. Not to intimidate, harass or pester the opposing party or child;
- iii. Not to attend the airport upon the child's return;
- iv. Not to issue (or indeed, to withdraw) any criminal proceedings in respect of the respondent for any alleged act of abduction;
- v. Not to remove the child from the care and control of the respondent, save for any agreed or court-ordered contact.
- vi. To issue on-notice proceedings in the country of origin upon return to determine issues of custody;
- vii. To seek for the terms of a return order to be mirrored or otherwise recognised or enforced ahead of the return of the child and/or respondent;
- viii. To pay agreed payments of maintenance, ensure provision for housing, or provision for the care of the child.

Undertakings are generally time-limited, but can be put into force until the court of the country of origin holds its first inter parte hearing in any future in any custody dispute.

Whilst undertakings are native beings of Anglo-Saxon legal systems², specialist local advice must be sought ahead of any return to any other countries, in order to ensure that existing obligations and orders can be properly transposed across jurisdictions. In England and Wales, the Supreme Court has confirmed that *"judges in one country are entitled and bound to assume that the Courts and welfare services of the other country will all take the same serious view of a failure to honour undertakings given to a Court (of any jurisdiction)"*³. Practitioners however may have different experiences.

Breach of an undertaking is akin to breaching a court order, and can be the subject of serious enforcement proceedings of itself. A respondent who fails to return a child despite undertaking to do so will be in the same position as a respondent who has been ordered to return a child but has failed to do so.

IV: Appeals

Unlike other jurisdictions, there is no automatic right of appeal in Hague return cases in England and Wales. Any party who seeks to appeal the decision must first obtain permission to appeal.

Permission to appeal may be sought from the same judge who rendered the decision in question, at the very hearing where the decision is handed down. In effect, a party asks the same judge for permission to appeal their own decision, immediately upon judgment being handed down. As such, the granting of permission to appeal at this stage is generally highly unlikely, and may well be refused. It would then be open to the proposed appellant to seek permission from the Court of Appeal. This must be done within 21 days of the date of the

² As seen within an Australian Hague decision concerning undertakings within a German/Australian abduction: *Cape v Cape* [2013] Fam CAFC 114

³ *Re M (Child: Abduction Undertakings)* [1995], Butler-Sloss LJ

decision⁴. Applications for permission to appeal out of time are far rarer and much more difficult to mount without good reason.

The proposed appellant would then have to convince the Court of Appeal that there was a real (as opposed to fanciful) prospect of success in their appeal⁵. If there is, permission to appeal may be granted on paper (or following a short oral hearing). The substantive appeal would then be heard in due course.

From an enforcement perspective, this is particularly relevant where the unsuccessful respondent to a Hague matter is making an application to permission to appeal. Within the application for permission to appeal, the proposed appellant must apply for a stay of execution. For example, if a respondent has been ordered to return a child within 14 days, they would be best advised to apply for permission to appeal as soon as possible within that timeframe and to seek a stay of execution from the Court of Appeal. If the Court of Appeal considers there to be a possibility of some merit within the application for permission to appeal, it will often stay the return order until the permission application has been fully determined.

If, however, the respondent above were to fail to return the child within the 14 day period and failed to apply for permission to appeal and a stay, he or she may well face enforcement proceedings as the court-ordered provisions for the child's return will have been breached. A judge may not look too kindly on a respondent who alleges some prospect of a spurious appeal in the future if it falls outside the timeframe for a permission application to be mounted.

In the event that any permission for appeal is unsuccessful, the conditions of the original return order will resume.

If permission for appeal is granted and thereafter, if the appellant is unsuccessful in their substantive appeal, the original return order will stand and will remain in force. Its terms will generally be amended to provide for the child's return within the same timeframe. If the original return order determined that the child should be returned within 14 days, the Court of Appeal may well amend the return order to read that the child should be returned within 14 days of the date of the decision of the Court of Appeal. All other directions and undertakings would be amended accordingly.

If permission for appeal is granted and thereafter, if the appellant is successful in their substantive appeal, it is open for the respondent to appeal this decision to the UK Supreme Court (albeit on a far more limited basis). In Hague and non-Hague abduction matters, there are cases in which applicants have won in the High Court, lost in the Court of Appeal, but thereafter won in the UK Supreme Court. In those circumstances the UK Supreme Court may

⁴ FPR 2010, Rule 30.4

⁵ FPR 2010, Rule 30.3(7)

either remit the matter to High Court for further directions (as in the matter of Re J⁶), or may well make its own return order with immediate effect (as in the matter of Re KL⁷).

V: Enforcement proceedings: When a respondent refuses to return

In circumstances where an applicant has not only been successful in obtaining a return order, but has also overcome the possible hurdles of a set aside application or an appeal, when then can he or she do to ensure the child is returned if the respondent refuses?

The first port of call may be to apply for a collection order.

A collection order allows a child to be retrieved from a named person or persons. It empowers the Tipstaff to remove the child from the person holding him or her, and directs him to deliver the child into the care of a nominated person.

If the child is found, the child will be placed in the custody of a named person. The order permits the Tipstaff to enter premises to retrieve the child and to arrest anyone whom he has reasonable cause to believe has disobeyed or obstructed the order; anyone so arrested must be brought before the court as soon as practicable but in any event no later than the working day immediately after arrest. The Tipstaff works in conjunction with local social services and/or Police to ensure that a child will be removed from the care of one person and placed into another.

In extreme cases, the Court can order that the child be removed from the respondent and placed into foster care, pending the collection of the child by the applicant.

It is technically possible for such orders to be obtained without notice to the other party. However, the Court will seldom grant them in this manner without good reason; one example would be if there is evidence of the respondent 'going to ground' or otherwise absconding with the child, and that the welfare of the child necessitates immediate intervention without notice to the respondent.

The Tipstaff plays a central role in any enforcement proceedings. The Tipstaff has a vast range of court-appointed powers, and he is the enforcement officer for all orders made in the High Court. He holds jurisdiction throughout England and Wales. Every applicable order made in the High Court is addressed to the Tipstaff in children and family matters (eg 'The Court hereby directs the Tipstaff of the High Court of Justice, whether acting by himself or his assistants or a police officer as follows...')⁸. The Tipstaff may effect an arrest and then inform the police. Sometimes the local bailiff or police will detain a person in custody until the Tipstaff arrives to collect that person or give further directions as to the disposal of the matter. The Tipstaff may also make a forced entry although there will generally be a uniformed police officer standing by to make sure there is no breach of the peace.

⁶ *In the matter of J (a child)* [2015] UKSC 70

⁷ *In the Matter of KL (A Child)* [2013] UKSC 75

⁸ FPR PD12D, 7.4

Collection orders are draconian measures and are made in the rarest of cases. Before attempting this, a Judge may seek to explore all other alternatives ahead of a return. A judge may either make a collection order with a view to there being a further urgent hearing, or make a collection order to apply with immediate effect for the child to be placed in the care of the applicant.

A collection order for a further hearing would be structured as follows:

IT IS ORDERED THAT:

12. *The child AA must be [placed into the care of the applicant] / [provided with accommodation by the appropriate local authority] on a temporary basis, namely until a further hearing of the court which must take place within three clear working days after [the applicant's care of the child] / [the provision of such accommodation] begins.*
13. *If the respondent and/or any other person served with this order is in a position to do so, he or she must each deliver the child into the charge of the Tipstaff.*
14. *If the respondent or any other person served with this order is not in a position to deliver the child into the charge of the Tipstaff, they must each:-*
 - (a) *inform the Tipstaff of the whereabouts of the child, and of the place at which the child resides within England and Wales if such is known to them; and*
 - (b) *also in any event inform the Tipstaff of all matters within their knowledge or understanding which might reasonably assist him in locating the child, and*
 - (c) *if it is requested by the Tipstaff, the address at which that person will be living in England and Wales and (if practicable) a telephone number and email address at which that person can be contacted.*
15. *The respondent and/or any other person served with this order must not (i) remove or (ii) knowingly permit the removal of the child from the jurisdiction of England and Wales.*
16. *The respondent and any other person served with this order must each hand over to the Tipstaff (for safe-keeping until the court makes a further order) as many of the following documents as are in his or her possession or control:-*
 - (a) *every passport relating to the child, including an adult's passport by which the child is also permitted to travel, and every identity card, ticket, travel warrant or other document which would enable the child to leave England and Wales; and*
 - (b) *every passport relating to the respondent and every identity card, ticket, travel warrant or other document which would enable the respondent to leave England and Wales.*

17. *The respondent and/or any person served with this order must not (a) make any application for, (b) obtain, seek to obtain, or (c) knowingly permit, encourage or support any steps being taken to apply for, or obtain any passport, identity card, ticket, travel warrant or other document which would enable either (a) the child, or (b) the respondent to leave England and Wales.*
18. *The respondent and any other person served with this order must, as soon as is practicable after it comes to his or her knowledge inform the Tipstaff of any information referred to in paragraph 14(a) and (b) above.*
19. *The respondent and any other person served with this order must, if practicable before any such change takes place and in any event as soon as is practicable inform the Tipstaff of any changes in the information provided by that person pursuant to paragraphs 14 and 18 above.*
20. *This order or a faxed or scanned copy of it must be personally served upon the respondent and upon any other person whom it is proposed to make liable under it, but if the respondent or any other person refuses or evades or seeks to evade personal service, the court will consider that he or she has been validly served if the effect of the order has been brought to his or her attention.*
21. *The obligations under paragraphs 12 – 14 above will continue until the Tipstaff locates the child and the obligations under paragraphs 15 – 19 inclusive will continue until the court by further order provides otherwise, but if the Tipstaff has not located the child by [the date 6 months after the making of the order] this order shall lapse in its entirety.*

For an immediate collection order, the order would be structured as follows:

The Tipstaff of the High Court of Justice, whether acting by himself or his deputy or an assistant or a police officer, shall:

- (a) *As soon as practicable take charge of the child/children AA, BB and CC and then [to place the children / child into the care of the applicant] or [into the control of the appropriate local authority];;*
- (b) *enter, if necessary by force, and search any premises in which he has reasonable cause to suspect that [either / any] of the [children / child], and/or the respondent to be present and which, after taking all reasonable steps to do so, he remains unable to secure permission to enter;*
- (c) *whilst one or more of the entries referred to in sub-paragraph (f) hereof remains operative, arrest any person whom he has reasonable cause to believe has been served with the Collection Order and has disobeyed any of the obligations imposed by paragraphs 13 – 16 of it, and shall explain to that person the ground for the arrest and shall bring him or her before the court as soon as practicable and in any event no later than the working day immediately following the arrest;*

- (d) *cause any person arrested pursuant to sub-paragraph (c) above to be detained until he or she is brought before the court and, as soon as practicable during any such period of detention, give to that person the opportunity to seek legal advice;*
- (e) *keep safely, until further direction of the court, any document handed over to him pursuant to paragraph 16 of the Collection Order;*
- (f) *initiate in respect of this direction and the Collection Order entries of a Port Alert and on the PNC and WICU systems that are to remain operative until further order of the court or until the Tipstaff is satisfied that he has fully executed his primary duties under the Collection Order whereupon he may cancel or amend the entries on the expiration of at least two business days from the date upon which he notifies the applicant either personally or through solicitors in writing of his intention to do so; and*
- (g) *inform the National Ports Office and the police of the powers conferred by this direction on the Tipstaff acting by a police officer.*

Alternatively, the Judge may otherwise wish to make a further return order or make further directions with a tight timeframe, with a view to suspending the collection order until a further attempt to return takes place. This should provide the respondent with sufficient impetus to ensure the child's return. It may be structured as:

1. *The applicant's application for a collection order is granted, but shall be stayed to permit the respondent to return or cause the return of the child [name] to the jurisdiction of [state] by 23.59pm on [date].*
2. *In event that the Respondent fails to return the child pursuant to paragraph 1 above, the matter shall be listed on [date] for further directions in relation to the collection order.*

The return date may be listed within 48 hours of the date by which the child is to return.

VI. Contempt of Court

Where a party fails to comply with a court order, or breaches an order, provided that the procedural rules are followed, it is possible for an application to be made for the party in breach to show cause why they should not be held in contempt of court. It is necessary to show that there is a wilful non-compliance with the terms of the order.

In Hague Convention return orders it is good practice to attach a penal notice to the relevant parts of the Order that prescribe the steps that the party should take to comply with the order. A penal notice says:-

If you, [name] disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

If any other person who knows of this order and does anything which helps or permits you [name] to breach the terms of this order they may be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

Procedural steps have to be taken to ensure that the penal notice is personally served upon that party. The application for a contempt also has to be served on that party. If a party is found in contempt of court the Court holds a wide range of powers in order to punish the contempt.

These can include fines and unpaid work obligations, but what are more likely in the terms of a Hague Convention breach is a term of imprisonment. A term of imprisonment can be up to 12 months. In the case of wilful breach, if the party with whom the child is in the UK is held in contempt of court and imprisoned, then, in the normal course, the left-behind parent will be invited during to come to England and Wales to collect the child. As an immediate remedy the child would normally be placed in the care of the local authority (social services) pending the arrival of the other parent.

VII: When a failure to enforce becomes a human rights issue

A further recent development has come in the form of litigation before the European Court of Human Rights in this area. A steady flow of cases from Strasbourg have indicated the need for expeditious execution and enforcement of child abduction return orders, and that a state can be held to be in violation of an applicant's rights to family life if the state fails to act with the required speed.

The European Court has repeatedly highlighted the need for children proceedings to be determined with speed, and states are required to balance the rights of abducted children and applicants on the one hand with the rights to a fair trial on the other.

This was seen previously in GN v Poland⁹. In this case, the Court came down firmly against the state and its lax approach to enforcement.

Most recently, the case of Oller Kaminska v Poland¹⁰ highlighted the real pitfalls of enforcement, here relating to an abduction from Ireland to Poland.

The Court firstly reaffirmed that the norms set down in Brussels II bis and in the Hague Convention are all based on the overriding principle that in all decisions concerning children, their best interest must be paramount (as per X v Latvia¹¹). It went on to highlight that all states were under a positive obligation to take all measures that could reasonably be expected of them to enforce the decision ordering the child's return, and the Polish Government themselves conceded that non-enforcement of the Return Orders had constituted an interference with the applicant mother's right to respect for her private and family life.

⁹ (2171-14) [2016] ECHR 667

¹⁰ Oller Kaminska v. Poland - 28481-12 (Judgment - Right to respect for private and family life) [2018] ECHR 70

¹¹ X v Latvia (App No 27853/09)

When approaching the question of whether the Polish Authorities have taken all measures that they could reasonably have been expected to take in order to ensure that the mother's family rights were recognised, the Court squarely came to the conclusion that Poland had failed. In this matter, the proceedings for the enforcement lasted some nine months, which directly contributed to the length of the stayed enforcement proceedings. Furthermore, the enforcement proceedings suffered yet another long delay, owing to the appeal lodged with the Supreme Court. As such, the enforcement of a first return order did not finish until February 2012, notwithstanding having been issued in October 2009.

The Court therefore concluded that there was no enforcement of the second Return Order for seven months, and that it effectively took the Polish Authorities over a year to decide that an Irish Return Order was enforceable. During this time, the mother had absolutely no contact with the child. Although there was some acknowledgement of the complexity of this matter, the Court was not impressed with an argument mounted by the Polish Government that this contributed as a factor in the delay.

In actual fact, in relation to enforcement, it seems the applicant mother took matters into her own hands. She travelled over to Poland, and when spending time with the child, the mother effected a return to Ireland herself, in the midst of exhausting levels of litigation.

The Court went on to unanimously hold the state of Poland responsible for a violation of Article 8 of the Convention, and furthermore, awarded the Mother €15,000 in relation to damages, and a further €10,000 in relation to costs and expenses incurred by this application. The question that does remain however is whether the child would have ever been returned to Ireland, if the mother had not returned the child herself. Whilst the judgment of the Strasbourg Court is understandably less detailed on that issue, the question does arise.

VIII: Tips for successful applicants

In the light of the above, a number of issues of best practice arise in relation to the preparation of cases with return orders, and indeed in relation to case management of Hague proceedings as a whole. Some may include:

- a. Issuing and engaging in proceedings swiftly: As with all children and child abduction proceedings, being quick off the mark is vital. Securing a return order in weeks rather than months or even years has obvious beneficial effects on the relationship between the abducted child and the left behind parent. Enforcement orders follow in the same vein.
- b. Foreseeing any issues that could thwart a return: Great care should be taken to ensure that all passports are valid and in date, well in advance of any return. If not, urgent interim directions for the renewal of a passport must follow. Some countries furthermore require six months' validity on a passport before permitting entry. Visas may also be an issue, not only for the child, but for anyone accompanying the child upon return. This may well be an issue within proceedings as a whole; many foreign nationals can find that applying for a visa to enter the UK is a long and expensive process, which

can hamper their ability to take part in proceedings, give live oral evidence, or effect a child's return. This should be identified as a possible issue as soon as possible. Judges have been known at directions hearings to make respectful requests of the British authorities to permit an applicant to enter the UK for the purposes of attending a final hearing where required.

- c. Securing a tight timeframe for return: Once successful, applicants and their solicitors should be keen to ensure that all is in place for the child to return. At the final hearing, applicants are best advised to come armed with provisional return flights within a workable but robust timetable. Ensure that arrangements are made for any port alerts to be lifted and for passports to be returned appropriately and in good time for the date of return.
- d. Having very detailed prescriptive court orders: leave no 'wiggle room'; ensure all orders are scripted to the letter in as much as is possible. Recite the provisional flights or method of transport for a return, along with identified dates. Highlight who is to return the child, and by what time.
- e. Remedying any failures to act: in the event that a respondent fails to do what he or she has been ordered to do, ensure that this is immediately brought to the attention of the Court and/or remedied as soon as possible.
- f. Ensuring applicants can spend time with the child ahead of a return: where timeframes and budgets permit, applicants are best advised to spend time with children ahead of any return, particularly when the children are older. This may involve attending the final hearing, or before where possible. Having ongoing and positive interim contact with a child can prove to be the factor that ensures an older child feels comfortable boarding a plane home.
- g. Taking specialist local advice as soon as possible: this is vital to ensure that any undertakings or orders will be appropriately followed and enforced across jurisdictions. Only specialist local legal advice can help with this, to ensure that return orders are obtained swiftly and enforced appropriately.

**Carolina Marin Pedreño
Dawson Cornwell
IAFL WEBINAR JULY 2020**



CENTRAL AUTHORITY FOR ENGLAND AND WALES APPLICATION FORM

Please read the 'ICACU Guide to making an application' before completing this form.

Section 1: Please indicate by putting a cross in the appropriate box as to what type of application you wish to make.

Request for Return	<input type="checkbox"/>
Request for Contact	<input type="checkbox"/>
Request for Registration and Enforcement of an existing court order	<input type="checkbox"/>

Section 2: Details of child(ren).

Child 1

Surname:				
First Name:				
Date of Birth:			Male	Female
Country of habitual residence (immediately before removal):				
Passport No:				
Nationality:				

Child 2

Surname:				
First Name:				
Date of Birth:			Male	Female
Country of habitual residence (immediately before removal):				
Passport No:				
Nationality:				

Section 3: Details of parents.

Mother

Surname:	
First Name	
Date of Birth:	
Country of habitual residence:	
Passport No:	
Nationality:	
Occupation	

Father

Surname:	
First Name	
Date of Birth:	
Country of habitual residence:	
Passport No:	
Nationality:	
Occupation	

Date and place of marriage (if applicable)	
Date and place of divorce (if applicable)	

Section 4: Details of requesting individual or institution.

Surname:	
First Name	
Relationship to child(ren):	
Contact Address:	
Postcode:	
Telephone No:	
Mobile Telephone No:	
email:	

Details of your legal adviser (if any). Please note you should only provide details of a solicitor if you are actually instructing one in relation to this matter.

Name of solicitor:	CAROLINA MARIN PEDRENO
Contact Address:	DAWSON CORNWELL, 15 RED LION SQUARE, LONDON WC1R 4QT
Telephone No:	020 7242 2556
Fax No:	020 7539 4841
email:	cmp@dawsoncornwell.com

Please indicate by putting a cross in one of the boxes below whether you wish the ICACU to correspond directly with you or your solicitor. You should be aware that there could be cost implications for you if we correspond with your solicitor.

Please only correspond with me regarding my case	<input type="checkbox"/>	Please correspond with my solicitor regarding my case	<input type="checkbox"/>
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Section 5: Details of person alleged to have removed/retained/preventing contact with child(ren) and current location of child(ren).

Surname:	
First Name	
Relationship to child(ren):	
Details of location of child(ren): <u>Please provide as much information as possible</u>	
Details of other persons who might be able to supply additional information relating to the location of the child(ren)	

Section 6: Request for Return. You should only compete this section if you are making an application for return of your child(ren).

6(a): Date and circumstances of wrongful removal or retention

Please provide brief details of events leading up to removal or retention of child(ren).

6(b): Factual or legal grounds justifying the request for return of child(ren)

Please provide evidence of your rights of custody with respect to child(ren)

6(c): Arrangements for the return of children

If applying for return please indicate whether you are prepared to travel to the country to which the child(ren) have been taken, both to attend the court hearing if necessary, and to collect the child(ren) should the application be successful or indicate any other person who could do so on your behalf

Section 7: Request for Contact. You should only compete this section if you are making an application for contact with your child(ren).

7(a): Circumstances relating to the prevention of contact with child(ren).

Please provide brief details relating to the prevention of your rights of contact

7(b): Proposed arrangements for contact.

Please provide your proposal for the contact you would like to have with your child(ren)

Section 8: Civil court proceedings that have concluded or are in progress

In England and Wales (please provide copies of any court orders which have been made)

Outside England and Wales

Section 9: List of documents attached

You should include copies of any relevant court orders, statements or affidavits, and recent colour photographs of the plaintiff parent and the child(ren). Please also include copies of the child(ren)'s birth certificate and your marriage certificate (full A4 size copies which include details of both parents) or divorce decree.

Section 10: Applicant's authorisation

I authorise the requested Central Authority and its agents to act on my behalf and to do all things reasonable and necessary in connection with this application.

Signature	
Full name of Applicant (block capitals)	
Date:	