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Comments

The Hague International Child Abduction Convention and The International Child Abduction Remedies Act: Closing Doors to the Parent Abductor

I. INTRODUCTION

International child abductions committed by parents[1] involved in a marital breakup have become a worldwide problem.[2] Although children are abducted both to and from any given country, the American public generally has focused on the abduction of American children to foreign countries.[3] Of course, parents of any nationality

1. The term "parent" is a generic term used throughout this comment to refer to the person or agency exercising custody over the child. For example, a grandparent, foster parent or child welfare agency, rather than the natural parent, may be a party to the custody dispute.

2. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 100 (1980) [hereinafter Bodenheimer, *International Child Abduction*]. Just as the number of marriages between people of different nationalities has increased, so has the number of divorces. Frequently, when such a marriage ends, one parent may take the child back to that parent's home country. *Id.*

3. *See International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 91 (1988) [hereinafter *Hearings of Feb. 3, 1988*] (testimony of Holly Planells, President, American Children Held Hostage). Ms. Planells, a U.S. citizen whose child was abducted by the father and removed to Jordan, spoke in support of the implementing legislation. Jordan is not a party to the Hague Convention.

experience the same trauma from a child abduction. In the words of David W. Lloyd, General Counsel of the National Center for Missing and Exploited Children, "[W]hether [children] are citizens or foreign nationals wrongfully brought to and retained here or whether they are American citizens wrongfully taken to and retained in another nation, they are all our children."[4] At first glance, one may conclude that this view is more easily adopted philosophically than in a real life situation. The notion of the world, rather than an individual country, as "home" to children seemingly runs contrary to a nation's paternalistic notions of the family and childrearing, as well as an inclination to protect and provide for its children, both physically and culturally.[5] Upon reflection, however, one might conclude that a multinational solution to various national, paternalistic claims is necessary to ensure the welfare of the child. Paternalism is a necessary element of parenting; thus, parenting the "world's children" requires a holistic, world-encompassing approach.

In this light, the International Child Abduction Remedies Act, ICARA,[6] the implementing legislation for the Hague Convention on Civil Aspects of Child Abduction,[7] is a revolutionary move. Under ICARA and the Convention, a child who has been abducted to the United States by an American parent must be promptly returned to her pre-abduction home.[8] While this action thwarts the efforts of the U.S. citizen, it ultimately ensures the prompt return of the American children abducted to foreign countries pursuant to the broader sense of reciprocity under the Convention.

Apart from the cultural and political concerns of sovereign nations, the Hague Convention and ICARA also reach the more personal and immediate needs of the parents. The practical problems which accompany the emotional turmoil experienced by a parent seeking the

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4. *Id.* at 82 (statement of David W. Lloyd, General Counsel, National Center for Missing and Exploited Children).

5. *Id.* at 93 (testimony of Holly Planells, President, American Children Held Hostage). Although her son was born in Jordan, he lived in the United States from shortly after birth until he was abducted at age 5. Believing that her son should be raised in the United States, Ms. Planells stated, "He was a hostage in a foreign land despite his dual nationality. He did not know anything about Jordan, its language, its people and its powerful religio[n]. He was as much of an American as me." *Id.*

6. International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 42 U.S.C. §§ 11601-11610 (1988)) [hereinafter ICARA].

7. Convention on the Civil Aspects of International Child Abduction, October 25, 1980, 19 I.L.M. 1501, *reprinted in* 51 Fed. Reg. 10,498 (1986) [hereinafter Hague Convention or Convention].

8. *See infra* text accompanying notes 158-63.

return of an abducted child are particularly acute when the child has been taken out of the country. Language barriers, different legal systems, and sheer distance greatly add to costs for legal representation and investigative services necessary to find the child. Furthermore, it is often difficult for the aggrieved parent to obtain effective assistance from state authorities in the country to which the child has been taken.[9]

The most devastating effects of child abductions are felt by the children themselves. Although parents are the persons best suited to understand the child's needs and to decide with whom the child should live upon a marital break-up, the discord resulting from separation or divorce often causes the parents to argue over custody—with each unwilling to compromise in the interest of the child. If the parents do not reach agreement regarding custody, the courts must step in and resolve the issue. A parent who fears she will lose a court battle, or who is dissatisfied with a custody decision, may resort to self-help by simply taking the child and starting life anew in another location. "Child-snatching"[10] unwittingly has been encouraged by the U.S. legal system because, oftentimes, the abducting parent is able to move out of state, re-open litigation, and be awarded custody by a court in the new jurisdiction.[11] This same phenomenon occurs on an international level. Instead of receiving parental support in adjusting to the family break-up, the child becomes a pawn in the battle between her parents.[12] By mandating the immediate return of

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9. Bodenheimer, *International Child Abduction*, *supra* note 2, at 110-11. The following passage reflects the dilemma confronting a parent when his child had been abducted from the United States and taken to another country:

> Most Americans who experience the abduction of a child across international frontiers are at a complete loss about what to do and where to turn. There is no office in this country that is equipped to give them the necessary aid and direction. If they travel to the country where they presume the child to be, seeking help from the authorities, they find themselves shunted from one agency to another with no one office charged with responsibility to assist them. Attorneys in both countries run into the same difficulties, especially when the whereabouts of the abductor and child are unknown. They can attest to the enormous expenditures for travel, detective services, and other costs incurred by their clients in foreign abduction cases, not to speak of the emotional stress and strain involved.

Id.

10. "Child-snatching" is a term used to refer to the act of a non-custodial parent taking or failing to return a child despite a custody order. A. LOWENFELD, CONFLICT OF LAWS § 9.04, at 827 (1986).

11. *Id.* at 835.

12. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115, 116 (1968) [hereinafter UCCJA]. In a prefatory note, the U.L.A. commissioners acknowledged that the emotional harm done to children who have been abducted as a result of a custody dispute "can hardly be overestimated . . . . A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society." *Id.*

children, the Hague Convention and ICARA attempt to reduce the incentive to abduct.

In the spirit of international cooperation to deter parental child abductions globally, and with an eye toward securing the return of American children wrongfully removed to foreign lands, the United States ratified the Hague Convention on December 31, 1981. By joining the Convention, the United States hoped "to spare children the detrimental emotional effects associated with transnational parental kidnapping."[13] Member countries to the Hague Convention[14] recognize that the problem of international child abductions cannot be solved by each country's solitary efforts to keep "their" children within "their" borders.[15] They agree that concerted efforts between countries are necessary to deter parents from abducting children and to promote fair, uniform resolutions of subsequent custody claims.[16] Cooperation also promotes trust between countries, encouraging them to return abducted children with the knowledge that other countries will do likewise. Nations, while retaining their paternalistic powers over children, have greater opportunity to look at the abduction problem less emotionally than parents engaged in a legal battle. A rational approach would call for looking to the protection of "all our" children, not merely the children of a particular nation. The Hague Convention had this notion in mind when it acknowledged

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13. Letter of Submittal from Secretary of State George P. Schultz to President Ronald Reagan (Oct. 4, 1985), *reprinted in* 51 Fed. Reg. 10,495 (1986).

14. The 29 member nations to the Hague Conference are: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Norway, Netherlands, Portugal, Spain, Sweden, Switzerland, Surinam, Turkey, United Kingdom, United States, Venezuela, and Yugoslavia. *International Child Abductions: A Guide to Applying the 1988 Hague Convention with Forms*, 1989 A.B.A. SEC. FAM. L. 13 n.23 (G. DeHart ed.) [hereinafter *A.B.A. Guide*].

15. *See* 134 CONG. REC. H1174 (daily ed. Mar. 28, 1988) (statement of Rep. Lantos). Mr. Lantos testified:

> [T]his implementing legislation. . .is a long overdue U.S. response to a heart-wrenching problem. Several countries are now fully participating in the convention, and as we become a partner in the convention most of the European nations are poised to join us. In my discussions with representatives with both the European parliaments and different European legislatures, I have heard a great deal of support for a system to return children wrongfully taken from their country by a noncustodial parent. I think we can safely say that with the implementing bill, the legislation before us, we will join a larger international community of nations committed to bringing children back to their parents.

Id. at H1176-77.

16. H.R. REP. No. 525, 100th Cong., 2d Sess. 5, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 386 [hereinafter H.R. REP. No. 525].

"that the interests of children are of paramount importance in matters relating to custody."[17]

This comment examines the Hague Convention and ICARA to determine the extent to which they deter future parental child abductions and further the interests of abducted children as well as those of the aggrieved parent. The analysis begins by discussing the issues resulting from the underlying custody determinations, and evaluating the impact of past and current domestic law on child abductions, as well as on the Hague Convention and ICARA. Two recent U.S. legislative enactments, the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA)[18] are analyzed as to their attempts to address international child abduction and their interplay with the Hague Convention and ICARA.[19] The comment also discusses the Strasbourg Convention,[20] an earlier international convention which addressed parental child abductions. Finally, the comment analyzes the administration and procedures of the Hague Convention and its U.S. implementing legislation, ICARA, with a comparison of how these acts differ from past efforts to deter international child abductions.

II. The Nature of the Underlying Problem: Resolving Custodial Disputes in the Courts

While the Hague Convention does not address the underlying merits of custody disputes, the potential or existing custody decision is often the cause of the abduction. Whether a custody decree is already in effect or is yet to be decided, the parent contemplating an abduction often seeks to litigate or relitigate the custody issue in the forum of his choice, since that forum may likely rule in his favor. Historically, "forum shopping"[21] has proven lucrative in the United States, thus encouraging abductions. For a case in which the aggrieved parent is foreign, forum shopping often could mean protracted and burden-

17. Hague Convention, *supra* note 7, at preamble; 19 I.L.M. at 1501.

18. Parental Kidnapping Prevention Act, Pub. L. No. 96-611, 94 Stat. 3566 (1980) (codified as amended in scattered titles and sections of the U.S.C.) [hereinafter PKPA].

19. Depending on the law invoked (the UCCJA, the PKPA, or the Hague Convention), the court may not be required to resolve the underlying custody issue. *See infra* notes 164-71 and accompanying text.

20. *See infra* notes 126-52 and accompanying text.

21. *See* Miller v. Superior Court, 22 Cal. 3d 923, 943, 587 P.2d 723, 151 Cal. Rptr. 6 (1978). Forum shopping refers to the actions of non-custodial parents, unhappy with a custody decree, who abduct their children in order to obtain a more favorable decision in another jurisdiction. *Id.*

some litigation in the United States. When an American parent abducts a child from the child's foreign parent, the foreign parent seeking the child's return through the use of ICARA must utilize U.S. courts.[22] Therefore, a discussion of the development of child custody law in the United States is important to an understanding of what the foreign parent will encounter. This discussion will also provide United States parents with an idea of what they might encounter abroad should they need to invoke the Hague Convention.

A. *Balancing the Interests of the Government, the Parents, and the Child*

Distinct but related interests that must be considered in a custody suit include those of each parent, the child, and the government. A parent's psychological interest in rearing his child and enjoying the child's company is recognized as a fundamental aspect of American society.[23] Acknowledged legal rights of the parents include the right of childrearing—to exercise custody of their children.[24] Although the child is the subject of the suit, and the custody determination is made to further the child's well-being, the child is not considered a party to the suit.[25] The child's interests are not protected adequately in a custody proceeding in which the attorneys represent only the parents as parties to the suit.[26] Likewise, the judge has not been found to be the proper representative of the child since the judge guides the proceeding in relation to counsels' advocacy for the parents.[27] Finally, each government has an interest not only in

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22. Hague Convention, *supra* note 7, at art. 12; 19 I.L.M. at 1502. The judicial or administrative authority of the Contracting State in which the abducted child is located conducts the judicial proceedings under the Convention. *Id.*

23. H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 789 (2d ed. 1988) [hereinafter CLARK, LAW OF DOMESTIC RELATIONS]. Clark notes that the parents' interests "must be given some weight, not merely because they are related to the child's welfare, but because we recognize that a parent's interest in the training, upbringing and companionship of his child has an independent importance in our society which must be respected." *Id.*

24. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (providing a history of cases which consider due process rights in relation to child custody issues).

25. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 294 (1986) [hereinafter Blakesley].

26. Schepard, *Cooperative Custody*, 64 TEX. L. REV. 687, 736 (1985) [hereinafter Schepard]; Note, *Lawyering for the Child: Principles of Representation in Custody & Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1134 (1978).

27. Schepard, *supra* note 26, at 736; Bersoff, *Representation for Children in Custody Decisions: All that Glitters is Not Gault*, 15 J. FAM. L. 27, 29-36 (1976-77).

protecting the legal rights of its citizens—children as well as parents—but in promoting uniform laws regulating family life.[28]

These interests often conflict. As the interests of one party are fostered, the interests of one or more of the other parties may be jeopardized.[29] Unfortunately, the adversarial nature of custody proceedings encourages the physical and psychological manipulation of the child by the parents in order to gain custody.[30] This tension between the parents' interests and the child's interest is unavoidable so long as custody is decided in an adversarial court proceeding.[31]

B. *Historical Development of Custody Jurisdiction in U.S. Courts*

The adversarial nature of custody proceedings, which aggravates the problem of forum shopping, both affects and is affected by the courts' ability to exercise jurisdiction over the dispute. Child custody law in the United States is fraught with ambiguity and confusion regarding jurisdiction over custody decrees.[32]

During the nineteenth and early twentieth centuries, the domicile[33] of the child provided the sole basis for jurisdiction in custody cases.[34] Although the domicile theory was advantageous in that it established

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28. Maynard v. Hill, 125 U.S. 190, 205 (1888). Traditionally, the United States government has taken an active role in the regulation of family life, as expressed by the United States Supreme Court in *Maynard*: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Id.*

29. Blakesley, *supra* note 25, at 380. "The interests of the parents, the child and the states concerned ought to be balanced in the child custody setting . . . . Society's interest in thwarting child snatching would go into the balance." *Id.*

30. Schepard, *supra* note 26, at 737-38.

31. Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83, 99-100 (1977) [hereinafter Bodenheimer, *The U.S. Approach*]. Counseling and educational programs are being developed to foster conciliatory, non-coercive custody decisions between parents who are faced with custody decisions. *Id. See also* Schepard, *supra* note 26, at 735-43.

32. *See generally* Blakesley, *supra* note 25, at 291-97. Part of the ambiguity exists because courts have not distinguished between subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction gives a court the power to adjudicate the matter itself while personal jurisdiction gives the court power to bind the persons involved. In the United States, both are required. *See infra* notes 33-55 and accompanying text.

33. "Domicile" is defined as "that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." BLACK'S LAW DICTIONARY 435 (5th ed. 1979).

34. Blakesley, *supra* note 25, at 291. The rationale for the domicile theory was that each state holds jurisdiction to determine the civil status of its inhabitants; custody suits determine the child's status. Therefore, the state in which the child is domiciled has jurisdiction to hear the custody case regarding that child. Under this theory, the courts did not concern themselves with in personam jurisdiction. *Id.* at 291 n.2. For a discussion of the role in personam jurisdiction now plays in custody suits, *see infra* notes 52-55 and accompanying text.

jurisdiction in only one state at a time, it was criticized for not taking the child's welfare into proper account.[35] Critics believed that the state of the child's domicile was not necessarily the best forum to decide custody of the child.[36] Another state might share an equal or greater interest in the dispute, as well as greater access to necessary evidence, in which case that state should be able to exercise jurisdiction.[37]

In 1947, two landmark cases widened and clarified the scope in which states could find jurisdiction over child custody disputes. First, in *Sampsell v. Superior Court*,[38] the California Supreme Court held that concurrent jurisdiction could exist in both the state of the child's domicile and the state of the child's residence or presence if that state had a "substantial interest" in the welfare of the child.[39] Second, in *Halvey v. Halvey*,[40] the U.S. Supreme Court announced that a custody decree issued in one state was entitled to recognition and enforcement in sister states to the extent that the original state could enforce the decree.[41] Consequently, a sister state could find concurrent jurisdiction and modify the existing custody decree to the same extent as the state which originally issued the decree.[42]

Following *Sampsell* and *Halvey*, courts found jurisdiction based on one or more of the following factors: the child was domiciled in-state; the court held personal jurisdiction over one or both parents; the child or at least one parent lived in-state.[43] Upon finding jurisdiction under one of these alternative bases, a court virtually was free to adjudicate the custody determination in the child's best interests.[44] The result was that many courts took advantage of the

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35. CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 457. The critics argued that more than one state often assumed jurisdiction for custody cases and, even though stating they were following the domicile rule, they were in fact using other factors, primarily the welfare of the child, to determine jurisdiction. *Id.*

36. *Id.*

37. *Id.*

38. 32 Cal. 2d 763, 197 P.2d 739 (1948).

39. *Id.* at 779.

40. People of the State of New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

41. *Id.* at 614. The Court stated that a custody decree "has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." *Id.*

42. *See, e.g.*, Ford v. Ford, 371 U.S. 187 (1962) (South Carolina could exercise jurisdiction to modify Virginia custody decision since decision had no res judicata effect in Virginia).

43. *See, e.g.*, Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948) (jurisdiction based on child's domicile within the state); Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948) (jurisdiction based on child's residence in state); Van Gundy v. Van Gundy, 244 Iowa 488, 56 N.W.2d 43 (1952) (jurisdiction based on parent's domicile in-state); Green v. Green, 351 Mass. 466, 221 N.E.2d 857 (1966) (personal jurisdiction over one or both parents).

44. Blakesley, *supra* note 25, at 292.

"best interests of the child" rationale to exercise modification jurisdiction rather than defer to the forum which issued the original custody decree.[45] Often a court would hear a custody case which had already been decided; or one court would initiate custody proceedings even though another court was already in the process of deciding the same case.[46] The ability of state courts to exercise concurrent jurisdiction over a custody case created uncertainty regarding the validity of original custody decrees and modifications to original decrees.[47]

A 1953 U.S. Supreme Court decision, *May v. Anderson*,[48] further added to the jurisdictional confusion in custody battles. In *May*, the Court held that in personam jurisdiction[49] over the respondent was necessary in order to bind the respondent to a custody order.[50] In his dissent, Justice Jackson vigorously criticized the majority opinion for treating child custody as a property right of the parent and for ignoring the child's welfare.[51] Contemporary state court decisions

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45. S. KATZ, CHILD SNATCHING 61-71 (1981) [hereinafter KATZ]. Since states have the ability to hold concurrent jurisdiction in custody matters, parents were able to forum shop for favorable jurisdictions which would be willing to modify prior custody decrees. "Forum shopping" is a phrase which denotes the strategic advantage a party gains by having a suit litigated in a particular forum. The ability to forum shop encouraged parents who were dissatisfied with a prior custody decree to abduct their child and move to a jurisdiction that did not give much deference to sister state decrees and which was willing to modify existing decrees from other states. *Id.*

The clean hands doctrine was used to prevent parents from taking undue advantage of the ability to forum shop and to deter parental child abductions. Under the clean hands doctrine, "a parent who has taken a child to a second state in violation of an existing custody decree should not be allowed to bring a modification action in the second state." *Id.* at 65. Unfortunately, the clean hands doctrine was not entirely successful in limiting the exercise of concurrent jurisdiction or in deterring parental child abductions. *Id.* at 66-67.

46. *See, e.g.*, Kovacs v. Brewer, 356 U.S. 604 (1958) (changed circumstances allow modification of sister-state custody decree).

47. KATZ, *supra* note 45, at 61-71. Custody proceedings, unlike most other types of judicial proceedings, are not considered final judgements because they are potentially modifiable. Sampsell v. Superior Ct., 32 Cal. 2d 763, 780, 197 P.2d 739 (1948).

48. 345 U.S. 528 (1953). In *May*, the Court invalidated the father's custody decree because the Wisconsin court which issued it did not have personal jurisdiction over the mother, who was living in Ohio. In the majority opinion, Mr. Justice Burton stated, "In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony." *Id.* at 534.

For an in-depth analysis of this case, *see* Hazard, *May v. Anderson: Preamable to Family Law Chaos*, 45 VA. L. REV. 379 (1959) [hereinafter Hazard].

49. In personam jurisdiction, as an aspect of personal jurisdiction, refers to the authority of the court over the parties to the suit. CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 456.

50. *May*, 345 U.S. at 534.

51. *Id.* at 541 (Jackson, J., dissenting). Jackson argued that:

> The difference between a proceeding involving the status, custody and support of children and one involving adjudication of property rights is too apparent to require

regarding personal jurisdiction over the respondent parent in a custody suit often ignore or circumvent *May*.[52] Some jurisdictions accomplish noncompliance with *May* by characterizing custody suits as determinations of the child's status, for which personal jurisdiction over the respondent parent is unnecessary.[53] Other jurisdictions have found personal jurisdiction through the use of long-arm statutes.[54] Regardless of the theory offered, the courts' willingness to make and modify custody decrees resulted in a jurisdictional nightmare which aggravated the problem of parental child abductions, both domestic and international.[55]

III. National & International Attempts to Promote the Recognition and Enforcement of Existing Custody Decrees

By the 1960s, repeated modifications of custody decrees and child snatching flourished in the United States.[56] Two domestic pieces of

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> elaboration. In the former, courts are no longer concerned primarily with the proprietary claims of the contestants for the "*res*" before the court, but with the welfare of the "*res*" itself. Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children. To speak of a court's "cutting off" a mother's right to custody of her children, as if it raised problems similar to those involved in "cutting off" her rights in a plot of ground, is to obliterate these obvious distinctions. Personal jurisdiction of all parties to be affected by a proceeding is highly desirable, to make certain that they have had valid notice and opportunity to be heard. But the assumption that it overrides all other considerations and in its absence a state is constitutionally impotent to resolve questions of custody flies in the face of our own cases.

Id. (emphasis in original).

See also H. Clark Jr., Cases and Problems on Domestic Relations 1029-40 (3d ed. 1988) [hereinafter Clark, Cases & Problems] (discussing implications of *May*). *See generally* Hazard, *supra* note 48, at 390-406 (critique of controversy surrounding *May*).

52. *See* Clark, Law of Domestic Relations, *supra* note 23, at 461-63 (discussing implications of *May*). While some states rely on *May* "as their reason for refusing to enforce the custody decrees of other states,. . .[d]ecisions in other states have taken positions contrary to the apparent holding in *May v. Anderson*, either by ignoring that case, by giving it a limited construction, or by rejecting its teaching outright." *Id.* at 462 (footnotes omitted).

53. *Id.* at 469. *See, e.g., In re* Marriage of Susan Hudson and Ronald R. Hudson, 434 N.E.2d 107, 117 (Ind. Ct. App. 1982) (custody determination is adjudication of child's status; personal jurisdiction of respondent not required).

54. E. Scoles & P. Hay, Conflict of Laws 526 (1982) [hereinafter Scoles & Hay]. The use of long-arm statutes provides jurisdiction over a spouse who has left the state where the other spouse remains. Long-arm statutes are not applicable when both parents have left the state of the marital domicile; in that event, the state will probably not be able to exert personal jurisdiction over the spouse. *Id.*

55. UCCJA, *supra* note 12, at preface; 9 U.L.A. at 115. In their prefatory note, the Commissioners noted the "growing public concern over the fact that every year thousands of children are shifted from state to state, and to other countries, as well as from one family to another, while their parents battle over their custody in the court of several jurisdictions." *Id.* at 115-16.

56. R. Crouch, Interstate Custody Litigation: A Guide to Use and Court Interpretation of the Uniform Child Custody Jurisdiction Act ix (1981) [hereinafter Crouch].

legislation emerged in an attempt to curb the increasing numbers of parents engaged in modification-induced forum shopping and child abductions. In 1968, to remedy "the chaotic condition of interjurisdictional custody law,"[57] the National Conference of Commissioners on Uniform State Laws[58] adopted the Uniform Child Custody Jurisdiction Act (UCCJA).[59] Then, in 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA)[60] to complement the mandates of the UCCJA and to strengthen certain weaknesses which had become apparent in it.[61] While the United States struggled to enact effective domestic custody legislation, other countries were addressing the problem of international child abductions.[62] By 1972, the European Ministers of Justice had begun investigating problems of international child abductions. On May 20, 1980 they opened for signature the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (hereinafter the Strasbourg Convention).[63]

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57. *See* Bodenheimer, *The U.S. Approach*, *supra* note 31, at 91.

58. The National Conference of Commissioners on Uniform State Laws, organized in 1892, promotes uniformity in state laws by drafting proposals of legislation designed to be adopted by individual state governments. The Commission includes members from each state, the District of Columbia and Puerto Rico. The Commission is composed of judges, lawyers, law school professors and legislators. 9 U.L.A. III (1988).

59. UCCJA, *supra* note 12, at preface; 9 U.L.A. at 116.

60. PKPA, *supra* note 18; 28 U.S.C. § 1738A (1982 & Supp. 1988).

61. Blakesley, *supra* note 25, at 296. These weaknesses included variances in how states enacted the UCCJA, partly due to ambiguous language which was interpreted differently among jurisdictions. For examples of different interpretations and ambiguities, *see* CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 473.

62. The Hague Convention Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants (Hague X), *opened for signature* Oct. 5, 1961, 658 U.N.T.S. 143 [hereinafter 1961 Convention]. The 1961 Convention attempted to establish rules governing the recognition and enforcement of foreign custody decisions. However, the members of the Convention were unable to reach an agreement regarding enforcement of custody decisions, and the Convention has been deemed essentially ineffectual. The Council of Europe incorporated ideas from the 1961 Convention and prepared a Convention on the Recognition and Enforcement of Custody Decisions, along with a proposal for a complementary Convention which would establish an international tribunal to resolve conflicting custody decisions. Droz & Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155, 205-06 (1981) [hereinafter Droz & Dyer]. The 1961 Convention did not address the problem of parental kidnapping. Bodenheimer, *International Child Abduction*, *supra* note 2, at 101 n.17. For a discussion of the 1961 Convention, *see* Comment, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L L. 669, 688-89 (1980) [hereinafter Comment, *Treaty Responses*].

63. European Convention on the Recognition and Enforcement of Decisions Concerning Child Custody and on Restoration of Custody of Children, May 20, 1980, 19 I.L.M. 273 [hereinafter Strasbourg Convention]. The Council of Europe first considered the topic of international child abductions at their Seventh Conference (Basle, May 15-18, 1972). The Council established a committee of governmental experts empowered to draft a Convention. In 1976, the Swiss delegates presented a draft Convention. By 1979, the Committee had drafted a Convention which incorporated suggestions from the Swiss delegates. Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV. 285, 303 (1985-86) [hereinafter Stotter].

A. *The Uniform Child Custody Jurisdiction Act (UCCJA)*

1. *Purpose and Objectives*

The most pervasive non-federal statutory response to child custody and child abductions is the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA is a compilation of suggested regulations which become binding on a state only when the state has adopted them, with or without modification.[64] Not a reciprocal law, the UCCJA applies regardless of whether the foreign jurisdiction has adopted it.[65] The Act specifies general objectives intended to promote cooperation between states in determining which forum shall exercise initial custody jurisdiction,[66] and provides rules regarding modification of existing custody decrees.[67] The UCCJA attempts to deter child abductions by mandating full faith and credit[68] to sister-state and foreign-country custody decrees.

2. *Jurisdictional Requirements*

The UCCJA provides four different bases that can be used to assert subject matter jurisdiction over initial custody determinations as well as for modification of existing decrees.[69] Regardless of which

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64. UCCJA, *supra* note 12; 9 U.L.A. at III. The Act has been adopted in various forms by every state in the United States, and by the District of Columbia and the Virgin Islands. For a detailed discussion of the various versions of the UCCJA adopted by the states, *see* Blakesley, *supra* note 25, at 316-25. For a table of state code citations, *see* CROUCH, *supra* note 56, at 75-82.

65. *See* Miller v. Superior Court, 22 Cal. 3d 923, 935-36 n.8, 587 P.2d 723, 151 Cal. Rptr. 6 (1978).

66. UCCJA, *supra* note 12, at § 1; 9 U.L.A. at 123-24. The nine general purposes of the UCCJA specified in Section 1 are: 1) avoid jurisdictional competition, so that the child is not continually shifted from one state to another in order for the parents to forum shop; 2) promote cooperation among the courts, so that a custody decree is made in the state which can best promote the interests of the child; 3) assure that custody litigation ordinarily takes place in the state in which the family has closest connection; 4) deter continuing custody litigation, thereby promoting greater home stability for the child; 5) deter abductions aimed at obtaining custody awards; 6) avoid re-litigation once a custody decree has been issued; 7) facilitate enforcement of custody decrees; 8) promote the exchange of information and assistance between various state courts having an interest in the child; and 9) promote uniformity among the states which enact the law. *Id.*

67. *See infra* notes 78-81 and accompanying text.

68. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

69. UCCJA, *supra* note 12, at § 3; 9 U.L.A. at 143.

jurisdictional basis is used, the child's presence in itself is not determinative. Even if the child and the parent are both in the state, the court may determine that jurisdictional requirements of the UCCJA have not been met.[70] Conversely, the court may assert jurisdiction without the child being present in the state.[71]

The two primary bases which allow a court to exercise jurisdiction are the "home state"[72] basis and the "child's best interest" basis.[73] While the "home state" basis establishes that a court in the child's home state has original jurisdiction to decide a custody suit, another state having equal or stronger ties with the child may share concurrent jurisdiction in the "child's best interest."[74] In order to assert "child's best interest" as the basis for jurisdiction, the court must find: 1) the child and at least one parent have a significant connection to the state; and 2) substantial evidence regarding the child's present and future welfare is available in the state.[75]

A state court may also exercise jurisdiction if the child has been abandoned or requires emergency protection from abuse or neglect and is present in the state.[76] Finally, a court may assert jurisdiction

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70. *Id.*; 9 U.L.A. at 144. *See, e.g.,* Allen v. Allen, 64 Haw. 553, 645 P.2d 300, 306 (1982) (physical presence of child and mother in Hawaii for only one month insufficient to allow assertion of jurisdiction).

71. UCCJA, *supra* note 12, at § 3(c); 9 U.L.A. at 144. *See, e.g.,* Middleton v. Middleton, 227 Va. 82, 314 S.E.2d 362 (1984) (physical presence of child not required for Virginia to assert custody jurisdiction where child wrongfully taken to England by mother).

72. UCCJA, *supra* note 12, at § 2; 9 U.L.A. at 143-44. "Home state" is defined as the state in which the child lived with a parent or someone acting as a parent, for at least the six months prior to the present action (or if the child is less than six months old, then from the time of birth). *Id.*

73. *Id.* at § 3; 9 U.L.A. at 144. *See also* Blakesley, *supra* note 25, at 299-302.

74. UCCJA, *supra* note 12, at § 3 comments; 9 U.L.A. at 144. The term "closest connection" signifies the state that is best able to exercise jurisdiction in the child's interest, because it has the most significant evidence regarding the child's present or future care and personal relationships. The child, as well as one of his parents, should have a close connection to the state exercising jurisdiction. Blakesley, *supra* note 25, at 299. For an example of an application of the "significant connections" basis, *see* Bigelow v. Bigelow, 119 Mich. App. 784, 327 N.W.2d 361 (1982) (California and Michigan had equal connections, Michigan could rule on child custody to promote general principles of UCCJA).

75. UCCJA, *supra* note 12, at § 3; 9 U.L.A. at 143-44. *See also* Bolson v. Bolson, 394 N.W.2d 361, 364 (Iowa 1986) (sufficient evidence for jurisdiction based on child's best interest since children resided in California for only one month but previously resided in Iowa for five years; grandparents and father still domiciled in Iowa).

76. UCCJA, *supra* note 12, at § 3(a)(3); 9 U.L.A. at 144. *See, e.g.,* Nelson v. Nelson, 433 So. 2d 1015 (Fla. Dist. Ct. App. 1983) (Florida could not exercise emergency jurisdiction because alleged mistreatment not occurring within state); Roberts v. Dist. Ct. of Larimer Co., 198 Colo. 79, 596 P.2d 65 (1979) (father's allegations that child was underweight and needed dental care did not show sufficient emergency situation).

if no other state is able, or if another state defers jurisdiction and it is in the best interests of the child.[77]

Jurisdiction to modify a custody decision is further restricted by the UCCJA's requirement that states recognize and enforce sister-state and foreign-country custody decrees.[78] If concurrent jurisdiction exists, sections six through eight of the UCCJA govern which forum should actually exercise jurisdiction and whether that forum should honor a prior custody decree. If an action is pending, a second forum may not exercise jurisdiction unless the initial forum stays the proceeding.[79] Pursuant to section 7, a court may decline to exercise jurisdiction on grounds of forum non conveniens or in deference to another forum whose exercise of jurisdiction will be in the best interests of the child.[80] Section 8 codifies the "clean hands doctrine" by allowing a court to decline jurisdiction if it determines that the parent initiating the proceeding has acted wrongfully—abducted the child—and the denial is just under the circumstances.[81] A potential

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77. UCCJA, *supra* note 12, at § 3(a)(4); 9 U.L.A. 144. *See also In re* B.R.F., a minor, 669 S.W.2d 240, 248 (Mo. Ct. App. 1984) (Missouri appellate court held New Jersey could properly assume jurisdiction after mother died, where grandmother in state and no other state met UCCJA jurisdictional requirements).

78. UCCJA, *supra* note 12, at § 13; 9 U.L.A. at 276. *See also* Bodenhemier, *The U.S. Approach*, *supra* note 31, at 92.

79. UCCJA, *supra* note 12, at § 6; 9 U.L.A. at 219. If a state were to exercise jurisdiction contrary to the guidelines of the UCCJA, any judgment made by the court would not be recognized by sister-states. *See* CROUCH, *supra* note 56, at 26-33.

80. UCCJA, *supra* note 12, at § 7; 9 U.L.A. at 233-34. *See, e.g.*, Tiscornia v. Tiscornia, 154 Ariz. 376, 742 P.2d 1362 (1987). In *Tiscornia*, the Arizona Court of Appeals affirmed the trial court's decision to decline to exercise jurisdiction pursuant to the forum non conveniens provisions of Section 8 of the UCCJA. Upon their separation, the parents agreed that the children would live with their mother in France, while the father remained in Arizona. When the father sought to modify visitation rights under the agreement in Arizona, the court determined that France had closer ties to the children and the mother and therefore, that the French court was the proper forum. *Id.* at 1363.

81. UCCJA, *supra* note 12, at § 8; 9 U.L.A. at 251. The clean hands doctrine allows concurrent jurisdiction but limits exercise of that jurisdiction. This, in turn, makes it unlikely that courts will exercise jurisdiction where a parent has wrongfully abducted unless the child's welfare is in danger. SCOLES & HAY, *supra* note 54, at 523-29. *See also* Pace v. Pace, 510 So. 2d 1031 (Fla. Dist. Ct. App. 1987). Applying the clean hands doctrine, the Florida District Court of Appeals affirmed the trial court's assertion of jurisdiction under the UCCJA and upheld the trial court's order permitting the wife to move the child to the country of Aruba (where she resided) even though the child's father claimed he held a California court order preventing the child's removal. *Id.* at 1032. The mother had been awarded temporary custody in Florida in 1982, after which her husband abducted the child, kept the child hidden from the mother, and fraudulently obtained a California custody order. *Id.* at 1031. The Florida trial court based its assertion of jurisdiction on the facts that the parties were married in Florida, had raised their child there, and had obtained divorce and custody decrees in Florida. *Id.* at 1032. The court also refused to reward the father's success in secreting the child for so long by allowing a change of forum. *Id.* The clean hands doctrine is limited, however, as shown in Schmidt v. Schmidt, 227 N.J. Super. 528, 548 A.2d 195 (N.J. Super. Ct. App. Div.

problem arises under the UCCJA when concurrent jurisdiction is possible and neither parent holds a valid custody decree. Under these circumstances, the parents may engage in a "race to the courthouse" in order to commence proceedings in their respective, preferred forum, often overlooking the interests of their child in order to satisfy their own interests.[82]

Under the UCCJA, personal jurisdiction is not a prerequisite to adjudication of the custody dispute. However, in order to comply with the Supreme Court plurality in *May v. Anderson*,[83] both personal and subject matter jurisdiction must exist in order for sister-state courts to grant full faith and credit to the original decree.[84] The issue which remains unsettled, therefore, is whether or not a custody decree made pursuant to the UCCJA but without personal jurisdiction over the respondent is valid, or can be afforded full faith and credit.[85]

1988). In *Schmidt*, the abducting parent—the mother—succeeded in convincing the New Jersey Superior Court to exercise jurisdiction over custody of her child based on the fact that she had provided adequate notice to the aggrieved father and had asserted "best interests" of the child. In *Schmidt*, the father, a West German citizen, and the mother, an American citizen, lived in West Germany where their first child was born. The mother fled to New Jersey with their son when he was a year and a half old. The father obtained an *ex parte* order for the return of his son from the West German court. When the mother refused to return the child, the father filed an action in the New Jersey state court to enforce the West German court order. The New Jersey court held that it had jurisdiction to decide the custody issue, and that the doctrine of forum non conveniens did not require the case to be transferred to West Germany. *Id.* at 196. Upon finding that the father's *ex parte* order was unenforceable because the order was obtained without proper notice to the wife, the court concluded that the UCCJA does not require recognition and enforcement of the West German custody decree. *Id.* at 198. The court noted that the child had been in the United States for a total of 19 months, due to a trial delay. *Id.* Because the child had become settled in New Jersey, the court ruled that it would be in the best interest of the child to have the case heard in New Jersey. *Id.* Although the court recognized the mother's abduction of the child, it reasoned that New Jersey should take jurisdiction in order to prevent "the child [from becoming] a pawn in a jurisdictional chess game." *Id.* at 199. Thus, the clean hands doctrine did not prevent the abducting parent from obtaining jurisdiction in the forum of her choice. This case exemplifies how a parent might abduct a child and, through procedural technicalities, be allowed to obtain a favorable custody judgment in the United States under the UCCJA.

82. *See* Blakesley, *supra* note 25, at 365.

83. 345 U.S. 528 (1953).

84. *Id.* at 528-29. Justice Burton delivererd the opinion of the Court:

> The question presented is whether, in a habeus corpus proceeding attacking the right of a mother to retain possession of her minor children, an Ohio court must give full faith and credit to a Wisconsin decree awarding custody of the children to their father when that decree is obtained by the father in an *ex parte* divorce action in a Wisconsin court which had no personal jurisdiction over the mother. For the reasons hereafter stated, our answer is no.

Id.

85. CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 469. *See also* Blakesley, *supra* note 25, at 340. For an example of different treatment by states, *see* McAtee v. McAtee, 323 S.E.2d 611, 612 (W. Va. 1984) (circuit court has jurisdiction to award custody to one parent without obtaining personal jurisdiction over the other); Hart v. Hart, 74 N.C. App. 1, 327

The jurisdictional bases of the UCCJA are designed to assure not only that one state exercises jurisdiction at any given time, but also that jurisdiction is premised on the interests of the child, rather than on the convenience or interests of the parents.[86] Although the guidelines for jurisdiction improved judicial cooperation between sister-states, they have not achieved the desired uniformity in judicial determinations.[87] Commentators have specifically criticized the language of the UCCJA for being too flexible and vague, thus making the Act vulnerable to multiple interpretations.[88] The UCCJA has not completely resolved the problems of "home state favoritism" nor the misuse of the "best interests of the child" test to determine jurisdiction.[89]

3. *International Application*

Absent legislation, foreign country custody decrees are recognized and enforced under principles of comity.[90] The Recognition of Foreign

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S.E.2d 631, 635 (1985) (UCCJA does not require personal jurisdiction over non-resident parent). *Cf.* Dean v. Dean, 447 So. 2d 733, 735 (Ala. 1984) (child custody proceeding is in personam proceeding requiring in personam jurisdiction).

86. Blakesley, *supra* note 25, at 302.

87. *See generally* Sampson, *What's Wrong with the UCCJA? Punitive Decrees and Hometown Decisions Are Making a Mockery of this Uniform Act*, 3 FAM. L. ADVOC. 28 (1981); KATZ, *supra* note 45, at 30-33; Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977).

88. Blakesley, *supra* note 25, at 359. Some examples of ambiguity include interpretations of the application of "unclean hands" and "inconvenient forum." *See* CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 472-73.

89. Blakesley, *supra* note 25, at 359. Blakesley noted that the "PKPA and the UCCJA expressly include the 'best interests of the child' as a basis of jurisdiction. Whether or not the potential for abuse has been minimized successfully is not clear at this time." *Id.* at 315-16 (footnote omitted). These observations suggest the difficulty of quantifying an acceptable level of application of the "best interests of the child" test.

90. "Comity" is defined as the principle that "courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 242 (5th ed. 1979); *See also* Hilton v. Guyot, 159 U.S. 113, 202-03 (1895). In *Hilton*, the court noted that:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administation of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment or any other special reason why comity of this nation should not allow it full effect, the merits of this case should not . . . be tried afresh . . . upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Id.

Nations Judgments section of the Restatement (Second) of Conflict of Laws, section 98, states: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned." Comment b of section 98 of the Second Restatement supplies the rationale that "[j]udgments rendered in a foreign nation are not entitled to the protection of full faith and credit. In most respects, however, such judgments, provided that they are valid under the rule of section 92, will be accorded the same degree of recognition to which sister state judgments are entitled."[91] Commentators disagree on the extent to which foreign-country custody decrees have been given recognition and enforcement in U.S. state courts.[92] However, in the United States there is general agreement that if a foreign parent takes a child from the United States in violation of a U.S. custody decree, the home country of the abducting foreign parent often finds reason to deny the child's return to the United States. The United States perceives a situation in which "most foreign countries will exercise independent jurisdiction based upon the child's presence in their territory and will decide who is entitled to custody based upon their own domestic relations laws."[93]

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91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §92 (1971). Under Section 92, a sister-state judgment is considered valid if:

(a) the state in which it is rendered has jurisdiction to act judicially in the case; and
(b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
(c) the judgment is rendered by a competent court; and
(d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.

Id.

92. Bodenheimer, *The U.S. Approach*, *supra* note 31, at 86. *See also* Blakesley, *supra* note 25, at 372-73. Blakesley states: "The amount of respect given a decree from a foreign nation varies from state to state and from fact situation to fact situation, although the available cases show a willingness to recognize foreign decrees based on laws which comport with or approximate UCCJA standards." *Id. Cf.* Comment, *Treaty Responses*, *supra* note 62, at 669 (recognition and enforcement of foreign country custody decrees is more speculative). The Comment states that "[w]ith few exceptions, state courts have chosen to relitigate child custody cases rather than enforce foreign nation decrees." *Id.* at 674.

For an example of a state application, *see In re* Marriage of Ben-Yehoshua, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979), in which the California Court of Appeals enforced an Israeli custody decree made after the father had snatched children away from the mother in California. The court found that even though the father had taken the children back to their homeland, the Israeli court had closer connections to the children and was better able to decide custody. *Id.* at 84-86.

93. *Parental Kidnaping: Hearings on S98-472 before the Subcommittee on Juvenile Justice of the Committee on the Judiciary*, 98th Cong., 1st Sess. 42 (1983) [hereinafter *Hearings of May 25, 1983*] (statement of James G. Hergen, Assistant Legal Adviser of Consular Affairs,

Given this perception of the way in which foreign courts handled custody suits, the UCCJA Commissioners took a bold stance in drafting section 23—the provision which authorizes the Act's international application:

> The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.[94]

Section 23, in conjunction with section 13, requires recognition and enforcement of foreign country decrees if they are based on laws which approximate UCCJA standards.[95] As with the remainder of the UCCJA provisions, section 23 is binding unilaterally. That is, the state adopting section 23 is bound by its terms, regardless of whether the foreign country has a similar law.

Although the international provision of the UCCJA has reinforced the U.S. courts' cooperation in international custody disputes, uncertainty regarding the recognition and enforcement of foreign country custody decrees still exists. The law is unsettled regarding interpretation of the section 23 requirement for "reasonable notice and opportunity to be heard." Service of notice provisions of the UCCJA must be consistent with the Due Process Clause of the United States Constitution[96] or else they will be unconstitutional or

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Office of the Legal Adviser, U.S. Department of State). Hergen stated:

> [T]he Passport Office frequently encounters cases where the courts of a foreign jurisdiction award custody of a child to the abducting parent, despite the fact that a court in the United States already has made a custody determination. In some instances, the abducting parent's acquisition of custody occurs by automatic operation of law in the foreign jurisdiction.

Id. at 44.

Courts in each country generally use their own substantive standards for all phases of custody adjudication, including jurisdiction, ordering original custody decrees, and modifying existing decrees. *See* Gaw, *When Uncle Sam Needs to Come to the Rescue*, 9 FAM. ADVOC. 24, 25 (1987) [hereinafter Gaw]; Note, *American and International Responses to International Child Abduction*, 16 N.Y.U. J. INT'L L. & POL., 415, 423 (1984) [hereinafter Note, *Responses*].

94. UCCJA, *supra* note 12, at § 23; 9 U.L.A. at 326.

95. *Compare* Com. *ex rel* Zaubi v. Zaubi, 492 Pa. 183, 423 A.2d 333 (1980) (Pennsylvania courts compelled to recognize valid custody decrees from foreign nations) *with* Al-Fassi v. Al-Fassi, 433 So. 2d 664 (Fla. Dist. Ct. App. 1983) (Bahamian custody decree not recognized since Bahamian Court did not hold jurisdiction in substantial conformity with UCCJA).

96. U.S. CONST. amend. 14, § 1. Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

unconstitutionally applied. The language of UCCJA section 23 is troublesome because it varies from the language employed for domestic notice under the UCCJA[97] as well as from *Mullane v. Central Hanover Trust*,[98] a U.S. Supreme Court case which enunciates the standard for meeting due process service of notice requirements.[99] A California Supreme Court case, *Miller v. Superior Court*,[100] typifies the problem courts encounter when interpreting international notice requirements under the UCCJA. In *Miller*, the California Supreme Court plurality ruled that an Australian court order awarding temporary custody to the Australian father was enforceable in California when notice of the Australian court order was served on the mother's attorney. The Court based its holding on the fact that the original order was temporary in nature, and found that service on the attorney met both UCCJA and U.S. constitutional standards.[101] Chief Justice Bird, dissenting, argued that the Austrialian father's attempts to give notice of the custody hearing to the American mother were insufficient to meet the Due Process requirements of the Fourteenth Amendment to the United States Constitution[102] because "[t]he only attempt to notify her of the . . . hearing was made by delivering Harry's affidavit and application for change of custody to . . . the attorney who had represented Patricia . . . only one hour and fifty five minutes before the hearing."[103]

Although the UCCJA calls for the recognition and enforcement of foreign country custody decrees, courts hearing international cases under the UCCJA may find further reasons not to enforce foreign country judgments due to provisions regarding changed circumstances

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> State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

97. UCCJA, *supra* note 12, at § 5; 9 U.L.A. at 212, provides in part: "(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice. . . ." *Id.*

98. 339 U.S. 306 (1950).

99. *Id.* The *Mullane* court stated that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

100. Miller v. Superior Court, 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978).

101. *Id.* at 928.

102. *Id.* at 945.

103. *Id.* at 937; *see also* Laskosky v. Laskosky, 504 So.2d 726, 731 (Miss. 1987) (American mother received reasonable notice and opportunity to be heard when notice of Canadian custody hearing delivered to mother's attorney prior to attorney informing court she no longer represented mother).

and the best interests of the child. Although all U.S. jurisdictions have adopted the UCCJA, many states have variations in the versions they have enacted.[104] These variations, coupled with vague language in the original draft, expose the UCCJA to conflicting interpretations which prevent it from achieving its intended deterrent effect.[105] Consequently, although the UCCJA promoted uniformity of custody decisions to some extent, it did not succeed in curbing the rise of parental child abductions.

B. *The Parental Kidnapping Prevention Act (PKPA)*

1. *Purposes and Objectives*

The continued pattern of inconsistent and conflicting decisions regarding modification of custody decrees and the increasing numbers of domestic parental child abductions resulted in intervention at the federal level of government. On December 28, 1980, Congress enacted the Parental Kidnaping Prevention Act (PKPA),[106] federal legislation which bolsters the UCCJA by requiring all United States jurisdictions to recognize and enforce sister-state decisions regarding custody and visitation rights.[107] Initial custody decrees issued in compliance with the terms of the PKPA, now are due full faith and credit by sister states.[108] Assistance in locating abducting parents is also provided by allowing access to the Parent Locator Service[109] and resources of the

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104. UCCJA, *supra* note 12, at Table of Jurisdictions; 9 U.L.A. at 115.

105. *Hearings of Feb. 3, 1988*, *supra* note 3, at 80. For example, in supporting concurrent jurisdiction provisions in ICARA, David W. Lloyd referred to the conflicting interpretations of UCCJA Article 23:

> We already have a situation where State courts could modify foreign decrees under Article 23 of the Uniform Child Custody Jurisdiction Act. Unfortunately, we have had a lack of uniformity in application of that, and it is our belief that if the Congress restricts jurisdiction of these cases to State courts there is a grave danger that the procedures of the Convention will not be uniformly applied, and that would be no better than where we are with the UCCJA.

Id.

106. PKPA, *supra* note 18; 28 U.S.C. § 1738A (1982 & Supp. 1988).

107. *Id.* According to Clark, "Congress passed the PKPA primarily to implement the Full Faith and Credit Clause of the Constitution as it applies to custody decrees." CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 476.

108. PKPA, *supra* note 18; 28 U.S.C. § 1738A (1982 & Supp. 1988) provides: "(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State." *Id.*

109. *Id.* The Parent Locator Service is established under Section 453 of the Social Security Act, 42 U.S.C. § 653 (1980). Section 453 requires the Parent Locator Service to obtain and transmit information regarding the whereabouts of a parent obliged to pay child support, while Section 463 of the Social Security Act authorizes the use of the Parent Locator Service to find missing parents involved in domestic parental kidnapping cases. *Id.*

Federal Bureau of Investigation under the Fugitive Felon Act.[110]

2. *Federalization*

In essence, the PKPA "federalizes" certain provisions of the UCCJA by requiring state courts to apply uniform standards for exercising modification jurisdiction to existing domestic custody decrees.[111] Although initially there was some confusion concerning the role of federal courts in deciding custody cases under the PKPA, in 1987, the U.S. Supreme Court apparently resolved the issue in *Thompson v. Thompson*.[112] The Court found that in enacting the PKPA, Congress did not intend to create a federal cause of action for disputes regarding the enforcement of sister-state custody decrees. Instead, the Court reasoned, Congress intended to set federal standards which would require the states to afford full faith and credit to domestic child custody decrees.[113]

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110. PKPA, *supra* note 18; 18 U.S.C. § 1073 (1982). *See generally* Comment, *The Conflict Between the Parental Kidnaping Prevention Act and the Extradition Act: Naming the Custodial Parent Both Legal Guardian and Fugitive*, 19 ST. MARY'S L.J. 1047 (1988). According to the author:

> Under the Fugitive Felon Act, when felony arrest warrants have been issued against interstate kidnapers by state agents upon proof of flight to avoid prosecution, the F.B.I. is authorized to investigate the interstate kidnapings. The Parent Locator Service, on the other hand, is administered at the state level with each state operating a service primarily to enforce child support obligations. States now have the option, however, to enter into an agreement with the Federal Parent Locator Services of the United States Department of Health and Human Services. The federal service avails requesting state agencies of address information collected from federal agencies which utilize social security identification numbers. Addresses obtained from this service are used to track the alleged parental kidnaper. The combined effects of the Parent Locator Service and the Fugitive Felon Act were intended by Congress to help discourage noncustodial parental kidnaping by increasing the likelihood that criminal penalties will be imposed upon interstate violations. Thus, the noncustodial parent who attempts abduction and flight to another state now risks extradition and criminal penalties pursuant to federal law.

Id. at 1063-64. *See also* Comment, *Returning United States Children Abducted to Foreign Countries: The Need to Implement The Hague Convention on the Civil Aspects of International Child Abduction*, 5 B.U. INT'L L.J. 119, 131 n.72 (1987) (quoting Comment, *Snatching Legislative Power: The Justice Department's Refusal to Enforce the Parental Kidnapping Prevention Act*, 73 J. CRIM. L. & CRIMINOLOGY 1176, 1185 n.3 (1982)).

111. The term "federalizes" refers to the concept caused by the preemption of state laws in favor of federal laws that are intended to control the area of law. *See, e.g.*, Murphy v. Woerner, 748 P.2d 749, 750 (Alaska 1988). In *Murphy*, the Supreme Court of Alaska found that although both the UCCJA and the PKPA govern child custody disputes, the PKPA provides a uniform federal standard to ascertain modification jurisdiction in child custody proceedings. *Id. See also* Johnson v. Denton, 542 So. 2d 447, 449 (Fla. Dist. Ct. App. 1989). The Florida District Court of Appeals affirmed that "where the PKPA and the state's version of the UCCJA conflict, the PKPA preempts state law." *Id.*

112. 798 F.2d 1547 (9th Cir. 1986), *aff'd*, 108 S. Ct. 513 (1988).

113. *Thompson*, 108 S. Ct. at 518-20.

Like the UCCJA, the PKPA provides for the "best interests of the child" as one means of obtaining subject matter jurisdiction.[114] The PKPA does not address the question of whether a custody decree issued without personal jurisdiction, as required by *May v. Anderson*,[115] is nonetheless entitled to recognition and enforcement.[116] Unlike the UCCJA, the PKPA contains no provision for enforcement of foreign country custody decrees. However, the PKPA does not prohibit international enforcement at the state level,[117] so state codes which incorporate the international provision into the UCCJA do not conflict with the terms of the PKPA.[118]

Although the PKPA is designed to complement the UCCJA, there are notable differences between the two laws. The first area of distinction concerns initial jurisdiction. Under section 3 of the UCCJA, jurisdiction may be found equally under either the "home state" basis or the "best interest of the child" basis.[119] However, the PKPA, while recognizing these two bases for jurisdiction, prioritizes them, favoring the "home state" basis over the "best interest of the child" basis.[120] Prioritizing serves to restrict the frequency of custody decree modifications.[121] Next, the UCCJA allows continuing jurisdiction[122] as long as at least one parent is living in the state and maintains contact with the child; if both parents have left the state, it will lose its continuing jurisdiction.[123] The PKPA allows the state to retain jurisdiction so long as either the child or one parent lives in the

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114. PKPA, *supra* note 18; 28 U.S.C. § 1738A(c)(2)(B)(ii) (1982 & Supp. 1988). UCCJA, *supra* note 12, at § 3(a)(2); 9 U.L.A. at 143.

115. 345 U.S. 528 (1953).

116. CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 486 & n.80.

117. For a discussion regarding the PKPA ommission of any provision for enforcement of foreign country custody decrees, *see id.* at 481. Clark states that: "[T]he PKPA, due to its relationship to the Full Faith and Credit Clause, contains no provision concerning the enforcement of the custody decrees of foreign countries." *Id.* (footnote omitted). *See also* Note, *Responses*, *supra* note 93, at 685. The author states that: "[G]ranting full faith and credit to a foreign nation custody decree is an extremely controversial action which might jeopardize passage of the bill." *Id.*

118. CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 481.

119. UCCJA, *supra* note 12, at § 3; 9 U.L.A. at 143.

120. PKPA, *supra* note 18; 28 U.S.C. § 1738A (1982 & Supp. 1988). *See also* CROUCH, *supra* note 56, at 91.

121. For a general discussion of the differences in approaches to jurisdiction between the UCCJA and the PKPA, *see* CLARK, LAW OF DOMESTIC RELATIONS, *supra* note 23, at 478-84. *See also* Blakesley, *supra* note 25, at 352-56.

122. UCCJA, *supra* note 12, at § 14 comment; 9 U.L.A. at 292. Continuing jurisdiction refers to the principle whereby the court that issued the original custody decree retains jurisdiction to modify the decree under local law. *Id.*

123. *Id.* at commissioners' note.

state.[124] Therefore, under the PKPA, the original state may retain jurisdiction so long as one parent lives there, regardless of whether he maintains contact with the child. Third, the PKPA has not had an affirmative impact on international child custody disputes because it does not address enforcement of foreign country custody decrees. The absence of such a provision allows each state to determine its own recognition and enforcement guidelines regarding international abductions. Consequently, foreign parents faced with international abductions to the United States will not benefit from a uniform, national standard for affording full faith and credit to foreign country custody decrees.

Domestic legislation failed to curb the rise of parental child abductions within the United States. Parents frustrated with custody disputes often resorted to self-help measures; the philosophy of "seize and run" proved effective in an environment in which courts willingly exercised modification jurisdiction. When domestic legislation failed to curb the rise of international child abductions, countries were forced to look to one another for support and assistance.[125]

C. *Strasbourg Convention*

The Strasbourg Convention[126] is an international treaty established by the European Council. It provides rules for the recognition and enforcement of custody decrees made by countries who are signatories to the Convention.[127] In the preamble to the Convention, the signatories acknowledge the increased number of cases involving international child abductions and "the difficulties of securing adequate solutions to the problems caused by such cases."[128] Resolution of the problems and the welfare of the abducted children will be enhanced

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124. PKPA, *supra* note 18; 28 U.S.C. § 1738A(d) (1982 & Supp. 1988). *See also* SCOLES & HAY, *supra* note 54, at 530-31 (when only one parent continues to live in forum state, PKPA maintains jurisdiction in forum state rather than transferring jurisdiction to child's present home state).

125. *See* Stotter, *supra* note 63, at 289. For the 10 year period between 1975 and 1985, the number of reported cases of children abducted from the United States to other countries grew steadily. While only five cases were reported in 1975, 304 cases were reported in 1985; by 1985, nearly 2,000 children had been reported abducted from the United States to other countries. *Id.*

126. Strasbourg Convention, *supra* note 63.

127. *Id.* The Strasbourg Convention is a regional convention established by the Council of Europe. Article 23 provides that non-European countries may accede to the Strasbourg Convention by invitation. *Id.* at art. 23. The signatories to the Strasbourg Convention are Austria, Belgium, Cyprus, England, France, West Germany, Greece, Italy, Ireland, Liechtenstein, The Netherlands, Portugal, Spain and Switzerland. *See* CROUCH, *supra* note 56, at 97.

128. Strasbourg Convention, *supra* note 63, at preamble.

by establishing "legal co-operation" between the signatories.[129]

General provisions of the Strasbourg Convention resemble those of the Hague Convention.[130] The Strasbourg Convention applies to children under 16 years of age,[131] and covers rights of access[132] as well as wrongful removals.[133] Central Authorities cooperate with each other in order to execute the purposes of the treaty,[134] and perform specified duties to assist in locating abducted children and return them once enforcement is granted.[135] Finally, although the Strasbourg Convention is designed to enforce existing custody decrees, under a very narrow set of circumstances, it also can obligate a country to return a child who was abducted prior to the issuance of a custody decree. In that event, the parent may obtain a custody decision from the child's home state after the abduction has occurred in order to invoke the Strasbourg Convention for return of the child.[136]

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129. *See* Comment, *The Hague Convention on Civil Aspects of International Child Abduction: The Need for Ratification*, 10 N.C.J. INT'L L. & COM. REG. 463, 477-78 (1985). The Strasbourg Convention gives deference to the role of the Central Authorities and permits discretion of the presiding judges over mandatory return of a wrongfully removed child. "[T]he Council believed that discretion would not be abused, because the requesting state's courts could retaliate by keeping a child in its jurisdiction contrary to the abusing court's custody order." *Id.* at 478.

130. Overlapping members of both the Hague Convention and the Strasbourg Convention were able to share suggestions and ideas for both treaties. The Hague Convention sought to design a return agreement which would be simpler to implement and more accessible to additional members. Bodenheimer, *International Child Abduction*, *supra* note 2, at 100-03.

131. Strasbourg Convention, *supra* note 63, at art. 1(a).

132. *Id.* at art. 11. "Decisions on rights of access and provisions of decisions relating to custody which deal with the right of access shall be recognized and enforced subject to the same conditions as other decisions relating to custody." *Id.* at art. 11(1).

133. *Id.* at art. 4.

134. *Id.* at art. 3(1). The Central Authorities transmit requests for information regarding proceedings under the Convention, provide information about the custody law of their respective States, and keep each other informed of any problems encountered in carrying out the Convention. *Id.* at art. 3(2).

135. *Id.* at art. 5. The Central Authorities must take appropriate action, including the initiation of judicial proceedings, to discover the child's whereabouts; to avoid prejudice to the child or applicants; to secure recognition or enforcement of the decision; to secure return of the child when enforcement is granted; and to inform the requesting party of progress made on the applicant's behalf. *Id.* at art. 5(1).

136. Strasbourg Convention, *supra* note 63, at art. 12. Article 12 provides:

> Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person.

Id.

However, pursuant to Article 18 of the Convention, a Contracting State may make a reservation to not be bound by the provisions of Article 12. In such an event, "[t]he decisions of this Convention shall not apply to decisions referred to in Article 12 which have been given in a Contracting State which has made such a reservation." *Id.* at art. 18.

1. *Enforcement Provisions and Exceptions*

The Strasbourg Convention is a complex document which contains many loopholes in the requirement for recognition and enforcement of foreign custody decrees.[137] While Article 7 provides the basic rule that "[a] decision relating to custody given in a Contracting State shall be recognized and, where it is enforceable in the State of origin, made enforceable in every other Contracting State,"[138] Articles 8 through 10 specify various grounds for refusing to recognize and enforce otherwise valid foreign custody decrees. Under Article 8, three conditions must be met before the requested country is required to return an improperly removed[139] child: 1) the sole nationality of the child and both her parents must be of the country which made the earlier custody determination; 2) the child must have been habitually residing in that country; and 3) the request for custody restoration must be made to a Central Authority within six months of the wrongful taking.[140] If these conditions are met, none of the exceptions will apply and the child must be returned.[141] If the requirement of nationality is not met, the child's return is not mandatory and exceptions under Articles 9 and 10 may become applicable, depending upon the particular circumstances of the case.[142] Article 9 provides three basic exceptions to recognition and enforcement of custody decrees. The first exception relates to notice. Unless the abducting parent has purposely concealed his whereabouts, he will not be bound by the foreign decree if he "was not duly served"

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137. For informative discussions on the Strasbourg Convention, *see* Jones, *Council of Europe Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children*, 30 INT'L & COMP. L.Q. 467 (1981); and Ekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281 (1982) [hereinafter Ekelaar].

138. Strasbourg Convention, *supra* note 63, at art. 7.

139. *Id.* at art. 1(d). "Improper removal" is defined as:

> the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:
>
> (i) the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised;
>
> (ii) a removal which is subsequently declared unlawful within the meaning of Article 12.

Id.

140. *Id.* at art. 8.

141. *Id.* at art. 8(2).

142. Ekelaar, *supra* note 137, at 323. If the nationality requirement is not met, but the six month time limitation is, Article 9 exceptions apply; in all other cases, the broad exceptions of Article 10 apply. *Id.*

with notice of the proceeding in reasonable time to prepare a defense.[143] Next, the contracting state may refuse to recognize and enforce a foreign custody decree if the decision was made in the absence of the defendant parent and jurisdiction was not based on: a) the defendant's habitual residence; b) the habitual residence of both parents, with one parent being still habitually resident; or c) the child's habitual residence. The third exception contained in Article 9 specifies that unless the child had habitually resided in the requesting state for at least one year prior to the child's abduction, the requested state may refuse to return the child if the "decision is incompatible with a decision relating to custody which became enforceable in the State addressed before the removal of the child."[144]

Article 10 exceptions can be used in addition to those contained in Article 9.[145] Under Article 10, recognition and enforcement may be refused if "the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed"[146] or if new circumstances warrant refusal in the best interests of the child.[147] The requested state also may refuse to return the child if at the time the proceedings are initiated, the child has stronger connections with the requested state than with the requesting state.[148] If the custody decision is incom-

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143. Strasbourg Convention, *supra* note 63, at art. 9(1)(a).

144. *Id.* at art. 9. Article 9 provides that recognition and enforcement may be withheld if:

> (a) in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence; but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement where service was not effected because the defendant had concealed his whereabouts from the person who instituted the proceedings in the State of origin;
>
> (b) in the case of a decision given in the absence of the defendant or his legal representative, the competence of the authority giving the decision was not founded:
>
> (i) on the habitual residence of the defendant, or
>
> (ii) on the last common habitual residence of the child's parents, at least one parent being still habitually resident there, or
>
> (iii) on the habitual residence of the child;
>
> (c) the decision is incompatible with a decision relating to custody which becomes enforceable in the State addressed before the removal of the child, unless the child has had his habitual residence in the territory of the requesting State for one year before his removal.

Id.

145. *Id.* at art. 10(1).

146. *Id.* at art. 10(1)(a).

147. *Id.* at art. 10(b). *See also* Bainham, *The Practitioner: Family Law Notes*, 138 NEW L.J. 336 (1988) (discussion of English case declining to return two children under Article 10(b) because they spent nearly two years in England before father sought to enforce French custody order, despite fact that mother wrongfully removed children to England).

148. Strasbourg Convention, *supra* note 63, at art. 10(1)(c).

patible with a prior decision enforceable in the requesting country, and declining to enforce the decision would promote the child's welfare, the return of the child can also be refused.[149]

Finally, proceedings under the Strasbourg Convention may be adjourned on any of the following conditions: 1) an ordinary review of the original custody decree has been initiated; 2) custody proceedings initiated prior to those commenced by the requesting country are pending in the requested country; or 3) another decision regarding custody of the child and enforcement of the original custody decree is pending.[150]

The number and intricacy of exceptions in the Strasbourg Convention, as well as reliance on the principle of nationality, inhibit the Convention's effectiveness. If the child and both parents are nationals of the country from which the child was abducted, the child must be returned, presumably without consideration of the child's best interests. However, if the nationality principle is not met, ever-broadening exceptions may be triggered. The six-month time limit for submission of the application places an undue burden on the applicant and induces the defendant to hide the child. Finally, Article 17 allows a contracting country to include the broad exceptions of Article 10 in any provisions which allow for Article 9 exceptions.[151] Given the nationality requirement and the potential for widespread use of Article 10 exceptions, a contracting country may lose any meaningful protections offered under the Strasbourg Convention. Finally, the Convention is limited in membership, so its effects will not be far-reaching.[152]

IV. Hague Convention on the Civil Aspects of International Child Abduction and the United States Implementing Legislation, the International Child Abduction Remedies Act

A. *The Hague Convention on the Civil Aspects of International Child Abduction*

1. *Introduction*

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention) is a multinational

149. *Id.* at art. 10(1)(d).
150. *Id.* at art. 10(2).
151. *Id.* at art. 17.
152. The United States is not a member and has not been invited to join.

treaty designed to establish uniform rules regarding cases of international child abduction. In 1976, the issue of international child abductions resulting from marital breakups was introduced during a planning meeting of the Thirteenth Session of the Hague Conference on Private International Law.[153] The Conference established a committee (Special Committee) empowered to research and prepare a draft Convention to alleviate the problem of international parental child abductions. An extensive report prepared for the Special Committee[154] identified the following sociological factors which have accelerated both the volume and frequency of international child abductions: improvements in international transportation; greater freedom and ability to cross borders; increased numbers of marriages between persons from different countries; and a general liberalization in the granting and recognition of divorces.[155] After completing its investigation, the Special Commission drafted the Hague Convention on the Civil Aspects of International Child Abductions, which was unanimously adopted[156] on October 24, 1980 at the Fourteenth Session of the Hague Conference.[157]

2. *Objectives*

The specific objectives of the Hague Convention are two-fold: to secure the prompt return of wrongfully removed or retained[158] chil-

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153. Stotter, *supra* note 63, at 291. The Peace Palace at The Hague, Netherlands, is home to the Hague Academy of International Law. The Academy hosts various international conferences, including the Hague Conference on Private International Law. The Hague Conference on Private International Law is a multinational organization established by treaty to unify rules for various areas of private international law. The First Session of the Hague Conference on Private International Law was held in 1893. The Conference convenes at the Peace Palace once every four years. Since the mid-1950s, the Conference has prepared more than 24 conventions, including the Hague Convention on International Child Abductions. Droz & Dyer, *supra* note 62, at 157-59.

154. Stotter, *supra* note 63, at 291. *See also* Hague Conference, Legal Kidnapping, *Questionnaire and Report on International Child Abduction by One Parent*, PRELIM. DOC. No. 1 (1978) [hereinafter Dyer Report]. This report was prepared by Mr. Adair Dyer, First Secretary of the Permanent Bureau of the Hague Convention. *Id.*

155. Stotter, *supra* note 63, at 291-92.

156. *Id.* at 291.

157. The official history and commentary of the Convention was prepared by Elisa Perez-Vera. The report is contained in *Actes et documents de la Quatorzieme Session*, 3 CHILD ABDUCTION (Permanent Bureau of the Hague Conf. on Private Int'l Law ed. 1980). The report may be ordered from: Netherlands Government Printing & Publishing Office, 1 Christoffel Plantijnstraat, Post-Box 20014, 2500 EA The Hague, Netherlands. *See* Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503-04 (1986) [hereinafter Legal Analysis].

158. Legal Analysis, *supra* note 157, at 10,503. "Wrongful removal" is the taking of a child from the person who actually exercised custody, while "wrongful retention" is the

dren to the country of their habitual residence, and to ensure that visitation rights are respected between the Contracting States.[159] The Hague Convention is a novel and unique approach to the problem of parental child abductions because it does not require the enforcement of existing custody decrees; instead, it allows a court to determine whether to order a child returned irrespective of the existence of a custody decree. The Convention is designed to compel the abducting parent to return the child voluntarily.[160] If the parent refuses, the Convention provides procedures for effecting the child's return under court order.[161] In recommending Senate approval for ratification of the Convention, United States President, Ronald Reagan, summarized the aims of the Convention with the following words:

> The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.[162]

Inherent in the philosophy of the Convention is the notion that strict application of the Convention provisions is necessary to deter future abductions.[163]

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keeping of a child without the consent of the custodial person. Wrongful retention does not include the situation in which the custodial person denies the non-custodial person his visitation rights. The law in the state of the child's habitual residence determines whether the removal or retention is wrongful. *Id.*

159. Hague Convention, *supra* note 7, at art. 1(b); 19 I.L.M. at 1501. *See also* Legal Analysis, *supra* note 157, at 10,498-505.

160. Hague Convention, *supra* note 7, at art. 7; 19 I.L.M. at 1502.

161. *Id.*

162. *See* Letter of Transmittal from President Ronald Reagan (Oct. 30, 1985), *reprinted in* 51 Fed. Reg. 10,494, 10,495 (1986) [hereinafter Transmittal Letter]. The Convention is private civil law, not criminal law, so abduction is wrongful in a civil, not a criminal sense. Unlike the UCCJA, the Hague Convention does not seek to extradite the wrongdoer, although the Convention does not bar independent criminal action from being taken. Legal Analysis, *supra* note 157, at 10,505.

163. As stated by Secretary of State, George Schultz:

> If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring

3. *The Hague Decision to not Address Custody Jurisdiction*

The drafters of the Hague Convention failed to reach a consensus regarding the recognition and enforcement of foreign custody judgments: while some countries felt that the courts should retain broad discretion to review foreign custody decisions in order to promote the interests of the given child, others believed that full recognition and enforcement of foreign custody judgments was necessary to deter parental kidnapping.[164] The United States joined this second group.[165] As a compromise measure between these two divergent viewpoints, the Hague Convention does not address recognition and enforcement of foreign custody decrees. Instead, it mandates the prompt return of an abducted child to her country of origin, subject to specified exceptions provided by the Convention, regardless of any existing or pending custody decrees. In other words, a decision to return the child must be made in accordance with Convention guidelines and may not be based on the merits of the underlying custody dispute.[166] Once the child is returned home, the appropriate judicial body in her home state generally will determine custody on the merits of the case.[167]

A potential problem exists regarding the effect the Hague Convention will have on the UCCJA. The Convention itself does not replace or exclude other U.S. legislation, such as UCCJA, which afford remedies in child custody cases.[168] Article 34 states in part: "[T]he . . . Convention shall not restrict the application of . . . the law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights."[169] Under this provision, a foreign applicant holding a

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> parental kidnapping, as the legal and other incentives for wrongful removal or retention will have been eliminated. Indeed, while it is hoped that the convention will be effective in returning the child in individual cases, the full extent of its success may never b[e] quantifiable as an untold number of potential parental kidnappings may have been deterred.

Letter of Submittal from George P. Schultz (Oct. 4, 1985), *reprinted in* 51 Fed. Reg. 10,494, 10,496 (1986).

164. Bodenheimer, *International Child Abduction*, *supra* note 2, at 102.

165. *Id.*

166. Hague Convention, *supra* note 7, at art. 19; 19 I.L.M. at 1503.

167. Bodenheimer, *International Child Abduction*, *supra* note 2, at 102-03.

168. Hague Convention, *supra* note 7, at art. 34; 19 I.L.M. at 1504.

169. *See* Bodenheimer, *International Child Abduction*, *supra* note 2, at 112-13. Professor Bodenheimer feared that a foreign applicant will have a more difficult time retrieving a child from the United States given the return restrictions in the Convention. Professor Bodenheimer reasoned that "[t]he Convention's time limits and exceptions would become part of the state law; in other words, the restrictions would be read into the international provision of the UCCJA." *Id.* at 113.

valid custody decree who seeks the return of a child abducted to the United States may invoke either or both the UCCJA and the Hague Convention. The aggrieved parent may prefer to invoke the UCCJA because it mandates recognition and enforcement of foreign custody decrees.[170] In that way, the parent would regain actual custody of her child by having her legal custody recognized and enforced. Under the Hague Convention, however, the parent would be asserting only her right to actual custody, not legal custody rights granted under the decree. She would run the risk of the respondent asserting one of the exceptions, not available under the UCCJA, in order to avoid returning the child. If the respondent prevailed, the child would remain in the United States where the state court might be able to assert jurisdiction to relitigate, and possibly modify, the foreign-country decree. If the applicant parent does not hold an enforceable custody decree, the Convention is, of course, superior to the UCCJA or PKPA in obtaining the immediate return of the child.[171]

4. *Scope of Coverage*

The Convention is binding when the country of the child's habitual residence and the country to which the child has been abducted legally have enacted the Hague Convention.[172] To date, eleven countries have enacted the Convention as law.[173] If the child is abducted only to a different location within the original contracting state, the Convention will not apply. For example, if a child is abducted from one U.S. state to another, the Convention will not apply because the child has remained within the United States; thus, the complaining parent must seek recourse through domestic channels, such as the UCCJA or the PKPA.[174]

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170. *Id.* at 111.

171. Letter of Submittal from George P. Schultz (Oct. 4, 1985), *reprinted in* 51 Fed. Reg. 10,494, 10,496 (1986). "The Convention will be especially advantageous in pre-decree abduction cases where no court order exists that may be enforced under the UCCJA." *Id.*

172. Hague Convention, *supra* note 7, at art. 38; 19 I.L.M. at 1504. *See also* Legal Analysis, *supra* note 157, at 10,501 (other countries may accede to the Convention).

173. The Contracting States which have legally enacted the Convention are: Australia, Austria, Canada, France, Hungary, Luxemburg, Portugal, Spain, Switzerland, the United Kingdom, and the United States. *President Signs Law Implementing International Child Abduction Treaty*, 7 A.B.A. JUV. & CHILD WELFARE L. REP. 62 (1988). Other countries which are expected to become parties to the Convention within the next few years include the Federal Republic of Germany, Greece, Italy, the Netherlands, and Sweden. *Hearings of Feb. 3, 1988*, *supra* note 3 (written testimony of Peter H. Pfund).

174. Hague Convention, *supra* note 7, at art. 4; 19 I.L.M. at 1501. *See also* Legal Analysis, *supra* note 157, at 10,504 (specifying applicable custody laws regarding domestic and international abductions).

The Convention does not apply to all children who have been wrongfully removed from their homes across international boundaries. Children must meet five requirements in order to be protected under the Convention. First, the child must have been wrongfully removed or retained.[175] Second, the child must have resided habitually in a Contracting State immediately prior to being abducted to another Contracting State.[176] Third, the child must not have attained sixteen years of age when the wrongful removal or retention took place. In fact, even if the child was not yet sixteen when she was abducted, the Convention ceases to apply once she turns sixteen.[177] Fourth, the wrongful taking or retention must have occurred after both Contracting States involved in the incident have legally implemented the Convention.[178] Finally, another time limitation can block the automatic return of a child who meets the four previous qualifications.

Under Article 12, the court hearing the case is required to order the return of the child only if the judicial proceedings have been commenced within a year from the taking of the child.[179] In the event that more than one year has passed between the date of the abduction and the date on which the legal proceedings are commenced, the court has discretion to deny the child's return if the respondent demonstrates that the child has become settled in her new home. If the abductor hides the child so that the applicant does not know the child's location, the applicant cannot "initiate proceedings." Therefore, the applicant cannot meet the one year deadline for commencing proceedings, and the abductor will have gained an advantage by demonstrating that the child had become settled. Although it is likely that the court would seriously question whether the abductor should be able to retain the child, the court is not mandated by the Convention to order the child's return under these

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175. Hague Convention, *supra* note 7, at art. 3; 19 I.L.M. at 1501. *See also* Legal Analysis, *supra* note 157, at 10,503 (definition of "wrongful removal").

176. Hague Convention, *supra* note 7, at art. 4; 19 I.L.M. at 1501.

177. *Id. See also* Legal Analysis, *supra* note 157, at 10,504 (age requirements for Convention coverage).

178. Hague Convention, *supra* note 7, at art. 35; 19 I.L.M. at 1504. *See also* Legal Analysis, *supra* note 157, at 10,504. This provision is subject to multiple interpretations. Narrowly defined, if the wrongful act occurred before the Convention took effect in the Contracting State, that State would not be bound. Under a broad interpretation, that State would be bound if the wrongful taking was still unresolved after the State effectuated the Convention. *Id.*

179. Hague Convention, *supra* note 7, at art. 12; 19 I.L.M. at 1502.

circumstances.[180] If courts abuse their discretion by frequently or routinely allowing the abducting parent to retain physical custody of the child, they will undermine the goals of the Convention and promote, rather than deter, future parental child abductions.[181]

5. *Procedures for Invoking the Convention*

The person whose custody rights have been breached[182] and who is seeking the return of the child, holds the right to invoke the Hague Convention by filing a petition[183] with any Central Authority.[184] From

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180. *Id.* As stated in the Legal Analysis:

> If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.

Legal Analysis, *supra* note 157, at 10,509.

181. At the time of publication, overall statistics regarding reported cases of child abductions to the United States Department of State were not available. State Department personnel did advise that from July, 1988 through mid-September, 1989, 49 applications on behalf of United States citizens were submitted to the Hague Convention. Fifteen resulted in the child's return, either voluntarily or through the courts. For the same time period, the United States received 61 applications on behalf of parents outside the United States. Of those, 13 children were returned to the applicable member country, again, either voluntarily or through the courts. Telephone interview with Keith Jordan, Intern, United States Department of State (Sept. 20, 1989).

182. Custody rights under the Hague Convention include those derived by operation of law, from a judicial or administrative decision, or by an agreement having legal effect under the State law. The determination of whether a removal or retention is wrongful under the Convention is made in reference to the law of the child's habitual residence. A parent who holds custody rights which arise by operation of law in the country of habitual residence does not need a court order granting custody. *See* Hague Convention, *supra* note 7, at arts. 3, 15; 19 I.L.M. at 1501, 1503. *See also* Legal Analysis, *supra* note 157, at 10,506.

For example, in the United States, both parents share equal custody rights prior to the issuance of a court order. If one parent removes or retains a child without the permission of the other parent, the removing parent has acted wrongfully under the Hague Convention. *See id.* at 10,506. Likewise, if a child who was living in another Contracting State is brought to or retained in the United States, the determination of wrongfulness is resolved by looking to the law of the Contracting State in which the child had been living. *Id.*

183. Hague Convention, *supra* note 7, at art. 8; 19 I.L.M. at 1502. The application must specify the identity of the applicant, the child, and the alleged abductor; the child's date of birth, if available; the grounds on which the claim is based; and any information as to the whereabouts of the child. The application may also contain other relevant information including, but not limited to, an authenticated copy of a custody decree or a valid affidavit as to the child's habitual residence. *Id.*

184. *Id.* The Convention requires each Contracting State to designate an administrative agency which will serve as a Central Authority (CA) to implement the Convention mandates within the State. Each CA is free to implement the Convention in conformance with the legal system of its Contracting State, thus allowing for some diversity in implementation procedures. *Id. See also* Legal Analysis, *supra* note 157, at 10,511. Article 6 of the Hague Convention requires the CAs to exercise powers and duties enumerated in Article 7 (cooperate to effectuate prompt return of the child); Article 9 (transfer applications to the appropriate Contracting

the plain language of the Convention, it appears that the Convention cannot be invoked defensively, that is, by the abductor.[185] This distinction is important under circumstances in which the applicant holds a foreign-country custody decree recognizable and enforceable in the United States. In that event, if the applicant invokes only the UCCJA for enforcement of the custody decree, the issue then becomes whether the abducting parent will be bound to argue her case under the UCCJA or whether she also is able to assert the Hague Convention, specifically its exceptions, as a defense to returning the child.[186]

In order to expedite processing under the Convention, the applicant should file the petition with the Central Authority of the country to which the child has been abducted, since it is the court in that country which will decide whether the child should be returned.[187] Although the complaining party is not required to have a custody

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State); Article 10 (take all appropriate measures to obtain the voluntary return of the child); Article 11 (expedite prompt and efficient judicial and administrative proceedings); Article 15 (supply, upon request, evidence that the removal was wrongful); Article 21 (process applications for right of access in the same manner as applications for return of the child); Article 26 (bear certain administrative costs); Article 27 (decline acceptance of unfounded applications); and Article 28 (require—at its discretion—written authorization empowering it to act for the applicant). Hague Convention, *supra* note 7, at art. 6; 19 I.L.M. at 1501.

185. Article 8 states: "Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child." Hague Convention, *supra* note 7, at art. 8; 19 I.L.M. at 1502.

The Legal Analysis II(B)(1) entitled Holders of Rights Protected by the Convention, provides:

> [I]t is up to the "person, institution or other body" . . . who "actually exercised" custody of the child prior to the abduction, or who would have exercised custody but for the abduction, to invoke the Convention to secure the child's return. Article 3(a-b). It is this person who holds the rights protected by the Convention and who has the right to seek relief pursuant to its terms.

Legal Analysis, *supra* note 157, at 10,505.

186. *See* Legal Analysis, *supra* note 157, at 10,507-08 which states:

> Under Article 29 a person is not precluded from seeking judicially-ordered return of a child pursuant to laws and procedures other than the Convention. . . . Accordingly, a parent seeking return of a child from the United States could petition for return pursuant to the Convention, or in the alternative or additionally, for enforcement of a foreign court order pursuant to the UCCJA. For instance, an English father could petition courts in New York either for return of his child under the Convention and/or for recognition and enforcement of his British custody decree pursuant to the UCCJA. If he prevailed in either situation, the respective court could order the child returned to him in England. The father in this illustration may find the UCCJA remedy swifter than invoking the Convention for the child's return because it is not subject to the exceptions set forth in the Convention.

Id.

187. Hague Convention, *supra* note 7, at art. 11; 19 I.L.M. at 1502. *See also* Legal Analysis, *supra* note 157, at 10,503 (country to which child has been brought undertakes judicial or administrative proceeding for his return).

decree to invoke the Convention, the court may require that the applicant provide proof that the taking of the child is considered wrongful in the child's home country.[188] Recognizing that the act of obtaining an actual custody decree might be prohibitively time-consuming, the Convention allows for verification of a wrongful taking to be established in some form other than a decree, for example, by taking judicial notice of the home country law.[189] A custody decree or other legal document which makes no mention of the Convention or of "wrongful taking" within the meaning of Article 3, however, may not satisfy the requirement of substantiating a wrongful taking.[190] Therefore, a document with sufficient legal effect to verify that the child has been wrongfully removed or retained within the meaning of Article 3 of the Convention will be helpful in expediting the Convention's return procedures.

The pleading requirements for invoking the Convention are contained in Articles 8 and 24. Under Article 24, the applicant must submit any applications, communications or other documents to the Central Authority of the requested country in the applicant's original language as well as in an official language of the requested country unless it is not feasible to obtain a translation. In that case, a translation into either French or English will suffice.[191] The application must contain information regarding the identity of the child, the petitioner and the respondent, the birthdate of the child, and the grounds for return, including the source of custody rights.[192] The application also may contain information regarding the circumstances of the wrongful act, the suspected whereabouts of the child, and any custody agreements or relevant points of law adhered to in the applicant's country.[193] The applicant also may request an order for

188. Hague Convention, *supra* note 7, at art. 15; 19 I.L.M. at 1503.

189. Legal Analysis, *supra* note 157, at 10,509.

190. Hague Convention, *supra* note 7, at art. 15; 19 I.L.M. at 1503. Article 15 does not specify who may render a document showing the taking was wrongful. Therefore, the document may be obtained from a court or government agency, *e.g.*, the State Attorney General. If the law of the child's habitual residence does not allow for this procedure, the applicant will not be required to obtain such proof. Also, this requirement is to be used sparingly, since the purpose of the Convention is to restore the child to its factual status quo without considering the merits of the custody dispute itself. Legal Analysis, *supra* note 157, at 10,508-09.

191. Hague Convention, *supra* note 7, at art. 24; 19 I.L.M. at 1503. A Contracting State may make a reservation to prohibit the use of either English or French, but not both, in any documents sent to its Central Authority. *Id.* at art. 42; 19 I.L.M. at 1505.

192. *Id.* at art. 8; 19 I.L.M. at 1502.

193. Evidentiary documents accompanying the application are admissible in the requested State's courts or administrative bodies empowered to consider the application. Under Article 23, documents do not need to be authenticated unless specifically required by the court. *Id.* at art. 23; 19 I.L.M. at 1503.

payment by the respondent for all fees and expenses incurred in the process.[194]

The court of the requested Contracting State is required to reach a decision regarding the return of the child within six weeks from the date upon which it received notice of the child's presence within its borders.[195] If the court does not make a determination within six weeks, it will be required, upon request of the applicant or either Central Authority, to explain why the deadline has not been met.[196]

6. *Exceptions to Returning the Child*

In addition to the timing requirements which must be met for invocation of the Hague Convention,[197] there are four exceptions to the general rule that a child who has been wrongfully removed shall be returned to her habitual residence.[198] Taken as a whole, the exceptions reflect an attempt to balance the wariness of the signatories to relinquish autonomy against their commitment to deter parental child abductions on an international level. In designing the exceptions, the Convention drafters faced the difficult problem of how to serve the interests of an individual child while promoting the broad policy of the treaty. They chose to recognize the necessity for exceptions to promote the best interests of a given child, provide for workable exceptions, and encourage only their limited use.[199] Their solution serves the dual purpose of promoting the interests of any given child while enabling the signatories to maintain a workable, effective compromise.

These exceptions comprise the most controversial part of the treaty, since liberal use of them could undermine the philosophy and effectiveness of the Convention.[200] Although the Contracting States are

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194. *Id.* at art. 26; 19 I.L.M. at 1503-04. The court has discretion to charge the respondent for costs incurred by or for the petitioner, including travel expenses, payments made to locate and return the child, and legal fees. *Id.*

195. *Id.* at art. 11; 19 I.L.M. at 1502. Notice is not limited to receipt of a petition forwarded by the requesting country. Communication regarding the child's whereabouts may come from a court, an attorney, another Contracting State, or from the applicant himself. Legal Analysis, *supra* note 157, at 10,509.

196. Legal Analysis, *supra* note 157, at 10,509.

197. Hague Convention, *supra* note 7, at art. 11; 19 I.L.M. at 1502.

198. *Id.* at arts. 13, 20; 19 I.L.M. at 1502-03.

199. *Id.* at art. 13; 19 I.L.M. at 1502-03; Legal Analysis, *supra* note 157, at 10,509.

200. Bodenheimer, *International Child Abduction*, *supra* note 2, at 110. Professor Bodenheimer expressed concern that the exceptions for return outlined in the Draft Convention could undermine the objectives of the Convention:

> [T]he exceptions of Article 12 [Article 13 in the final Convention] . . . make excessive

bound to "take all appropriate measures to secure within their territories the implementation of the objects of the Convention,"[201] their courts have broad discretion whether or not to utilize the exceptions. Even though one or more of the exceptions might be met, the court may still require the child's return. Under all four exceptions, the respondent has the burden of proving that the exception has been met.[202]

a. *No Custodial Rights Exception*

If the applicant was not actually exercising physical custody[203] of the child at the time of the removal, the court may deny the return of the child.[204] In other words, if the respondent can show that the

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inroads into the "prompt return" principle. The compromise of giving the judge some residual discretion to deny the child's return under exceptional circumstances may be acceptable. But the additional exceptions are so broad that they are apt to turn what are to be summary proceedings into adversary hearings on the merits, contrary to the purposes of the Convention.

For example, the court may permit the abductor to retain the child if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take his or her views into account. Children's preferences are, of course, considered in hearings on the merits of the custody question. The return proceedings are not hearings on the merits. The exception places an inordinate burden of responsibility on children perhaps as young as six or seven years of age. It does so at a time when the children are fully dependent upon the person who abducted them and cannot help being influenced, if not pressured, by that person and perhaps other relatives. Permitting a child to block the return will make the child the ultimate judge of the abduction's success or failure.

It is hoped that this exception will be eliminated and that the other exceptions will be sufficiently narrowed to preserve the objectives of the Convention.

Id. Cf. Legal Analysis, *supra* note 157, at 10,509 which provides:

[I]t was generally believed that the courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. . . . The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies. Finally, the wording of each exception represents a compromise to accomodate the different legal systems and tenets of family law in effect in the countries negotiating the Convention, the basic purpose in each case being to provide for an exception that is narrowly construed.

Id.

201. Hague Convention, *supra* note 7, at art. 2; 19 I.L.M. at 1501.

202. Legal Analysis, *supra* note 157, at 10,509.

203. *See supra* note 182 and accompanying text.

204. Hague Convention, *supra* note 7, at art. 13; 19 I.L.M. at 1502. Article 13 states that the party opposing the return may establish that: "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. . . ." *Id.*

Under Article 8 of the Hague Convention, the complaining party must allege that he or she actually exercised custody rights and that those rights were breached. The Convention presumes the person who held custody rights actually exercised them; the abductor has the burden of proof to disprove this presumption if he wishes to prevent the return of the child. *Id.* at art. 8; 19 I.L.M. at 1502.

applicant agreed to the respondent's custody of the child prior to the removal, or acquiesced to such custody subsequent to the removal, the removal would not be considered wrongful. On the other hand, the applicant does not need to prove that he holds a valid custody decree, as the Convention proceedings are not based on the merits of the underlying legal custody rights. Instead, the applicant need only attach supporting material to his application, explaining the circumstances of actual custody and of the taking.[205] If the abductor does not return the child voluntarily and a court must make a judicial determination, the court may request extrinsic proof that the taking was considered wrongful within the law of the pre-abduction home country.[206]

b. *Grave Risk of Harm Exception*

Another exception occurs if the respondent parent can show that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[207] The drafters of the Convention were particularly sensitive to the abuse which could result from overuse of this exception.[208] The risk to the child must be "grave," not merely serious; and the term "intolerable situation" refers to circumstances such as physical or sexual abuse rather than merely a less advantageous living situation.[209] This exception is not intended as a means by which the respondent can litigate the child's best interests under the guise of potential harm.[210]

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205. *Id.* The application shall contain "the grounds on which the applicant's claim for return of the child is based . . . ." *Id.* A statement to the effect that the applicant was exercising actual custody by taking physical care of the child would be sufficient to meet Article 8(c) requirements. *See* Legal Analysis, *supra* note 157, at 10,507.

206. Hague Convention, *supra* note 7, at art. 15; 19 I.L.M. at 1503.

207. *Id.* at art. 13(b); 19 I.L.M. at 1502.

208. Legal Analysis, *supra* note 157, at 10,509-10.

209. *Id.* at 10,510.

210. *Id.* The Legal Analysis of the "grave risk of harm" exception under Article 13(b) specifies:

> This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.

Id.

c. *The Child's Preference Exception*

The court also may refuse to return a child if a child of sufficient age and maturity prefers to remain with the abducting parent.[211] Several arguments against the broad application of this exception have been offered: without determining the underlying merits regarding legal custody, the court must decide whether the child is sufficiently mature to choose in which location to live; an immature child could very well be unduly influenced by the abducting parent. Also, if the exception is construed too liberally, the child rather than the judge will effectively make a return determination under the Convention. These arguments leave several unanswered questions: Should a child who is sufficiently mature and not unduly influenced, and who prefers to live in the location which provides better educational opportunities and a more stable or affluent economic environment, be allowed to have her preference enforced? How much weight, if any, should a judge give to the child's emotional, materialistic or educational preferences? At what point should the child's preference take precedence over that of the judge—and of the aggrieved parent?[212]

d. *Public Policy Exception*

The court may also deny return of the child on grounds of public policy.[213] If the first three exceptions are vulnerable to misuse and

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211. Hague Convention, *supra* note 7, at art. 13; 19 I.L.M. at 1502-03. The provision for the age-related exception states: "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *Id.*

If the court believes the child has been unduly influenced by the abducting parent, it may give little or no weight to the child's preference in deciding whether the child should be returned to the home country. Legal Analysis, *supra* note 157, at 10,510.

212. *See* Blakesley, *supra* note 25, at 373-81. Blakesley states that:

> [w]hile all agree that child-snatching is generally harmful to children and ought to be discouraged, commentators and legislation have essentially failed to recognize that, on a given occasion, a child may actually benefit. Hence, the dilemma: do we promote a policy that is best for children in general, even though enforcement in individual cases may be harmful?

Id. at 374.

213. Legal Analysis, *supra* note 157, at 10,500. This public policy exception is intended to be used very sparingly, certainly not more often than the court would apply it in internal/domestic cases. *Id.* at 10,510-11 (citing Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 551-52 (1981)). The public policy exception states: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, *supra* note 7, at art. 20; 19 I.L.M. at 1503.

inconsistent application, the public policy exception would seem only to aggravate the issue. It is therefore generally recognized that the application of the public policy exception must be carefully restricted. Two limiting factors are suggested in interpreting the public policy exception: 1) return of the child must violate an actual law of the requested country rather than merely be incompatible with the country's policies or culture, and 2) a country should not invoke the public policy exception in applying the Convention any more frequently than it does in its own domestic judicial decisions.[214] These limitations to the public policy exception were added as a compromise measure, and enabled the exception to be adopted by a margin of one vote.[215]

7. *Central Authorities*

The Hague Convention requires that each Contracting State establish a Central Authority (CA) to assist applicants in securing the return of their children.[216] In the words of James G. Hergen, Assistant Legal Adviser for Consular Affairs, Office of the Legal Adviser, U.S. Department of State,[217] "at the heart of the Convention lies the requirement that each contracting state establish one or more official 'Central Authorities' which would serve as clearing houses for incoming and outgoing applications and which would be well equipped to provide organized, authoritative information and assistance."[218] Each CA is required to take appropriate steps "to secure the voluntary return of the child or to bring about an amicable resolution of the issues."[219] Pursuant to Article 7, the CA must "take all appropriate measures" to find the child, protect the child from harm, exchange social background information regarding the child when appropriate, provide general legal information on the law of their State, initiate judicial proceedings, facilitate or provide legal aid when appropriate, provide administrative arrangements for the safe return of the child, and maintain contact with other Central

214. Legal Analysis, *supra* note 157, at 10,511 (citing Elisa Perez-Vera, *Actes et documents de la Quatorzieme Session*, 3 CHILD ABDUCTION (1980)). Ms. Perez-Vera was the official reporter for the Convention; her report stands as the official commentary and history of the Convention.

215. *Id.* at 10,510.

216. Hague Convention, *supra* note 7, at art. 6; 19 I.L.M. at 1501. A list of Central Authorities, with addresses, is contained in *A.B.A. Guide*, *supra* note 14, at 59-67.

217. *Hearings of May 25, 1983*, *supra* note 93, at 60.

218. *Id.* at 50.

219. Hague Convention, *supra* note 7, at art. 7(c); 19 I.L.M. at 1502.

Authorities in order to carry out the policies of the Convention.[220] Since applications can be sent directly to them, each Central Authority is responsible for forwarding the application to the appropriate Central Authority depending upon the whereabouts of the child.[221] Under Article 26, each Central Authority assumes the general administrative expenses incurred in applying the Convention.[222]

8. *Rights of Access*

Rights of access, or visitation rights, are provided for under Article 21. Article 21 may be invoked in two distinct situations. First, a parent who is denied visitation rights may request assistance in securing those visitation rights from the Central Authorities. Under the Convention, however, a court cannot order the child to leave the country in order to effectuate visitation rights.[223] Article 21 specifies:

> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.[224]

Where a valid, enforceable custody decree provides for visitation rights, the non-custodial parent could invoke the applicable domestic law regarding the custody decree and request the court which is exercising jurisdiction over the custody decision to order transfer of the child in compliance with the visitation provision of the decree.[225]

Article 21 also may be invoked by a custodial parent who fears that the non-custodial parent may not return the child at the end of a visit abroad. The custodial parent may apply to the Hague Con-

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220. *See* Legal Analysis, *supra* note 157, at 10,511-13.

221. Hague Convention, *supra* note 7, at art. 9; 19 I.L.M. at 1502.

222. *Id.* at art. 26; 19 I.L.M. at 1503-04. *See infra* notes 278-80 and accompanying text for a discussion of costs.

223. Legal Analysis, *supra* note 157, at 10,513. The parent whose access rights have been infringed is not entitled under the Convention to the child's "return," but may request the Central Authority to assist in securing the exercise of his or her access rights pursuant to Article 21. *Id.*

224. Hague Convention, *supra* note 7, at art. 21; 19 I.L.M. at 1503.

225. Legal Analysis, *supra* note 157, at 10,514.

vention as a precautionary measure to ensure the child's return after the visit. Pursuant to Article 21, the custodial parent can request a performance bond or other security to ensure the return of the child.[226]

B. *International Child Abduction Remedies Act*

1. *Introduction*

a. *History*

Although the Hague Convention was signed by the United States on December 23, 1981, the U.S. implementing legislation, The International Child Abduction Remedies Act (ICARA), was not enacted until April 29, 1988.[227] During the intervening seven years, both houses of Congress as well as many professional organizations deliberated controversial components of the legislation, including court jurisdiction, requisite burdens of proof in judicial proceedings, and clarification of authentication guidelines for evidentiary purposes.[228] The U.S. State Department's Child Abduction Study Group of the Advisory Committee on Private International Law[229] initiated a study of appropriate procedures for implementing the Convention.[230] Within the Study Group, there were conflicting views as to whether implementing legislation was necessary in order to have the Convention enter into force in the United States.[231] The Study Group recommended federal legislation to ensure that the Convention would take effect in the U.S. as smoothly and promptly as possible.[232] The Group

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226. *Id.* at 10,513.

227. H.R. REP. No. 525, *supra* note 16, at 5.

228. *Hearings of Feb. 3, 1988*, *supra* note 3, at 71-73. Some of the organizations involved are the Department of State, the Family Law Section of the American Bar Association, the National Center for Missing and Exploited Children, and the Federal Bureau of Investigation. *Id. See also Hearings of May 25, 1983*, *supra* note 93.

229. *Hearings of Feb. 3, 1988*, *supra* note 3, at 35. The Advisory Committee on Private International Law represents 11 national legal organizations concerned with international unification of private law; its Study Group includes State officials, private lawyers, law professors and association representatives, all of whom are family law experts. *Id.*

230. Stotter, *supra* note 63, at 298. *See also Hearings of Feb. 3, 1988*, *supra* note 3, at 35 (testimony of Peter H. Pfund regarding State Department support of implementing legislation).

231. Stotter, *supra* note 63, at 299.

232. *Id. See also* Schmidt v. Schmidt, 548 A.2d 195 (N.J. Super. Ct. App. Div. 1988). *Schmidt* involved a child custody case heard after the United States signed the Hague Convention, but prior to the signing of the implementing legislation. The Hague Convention was found inapplicable because "Congress [had] not enacted implementing legislation outlining procedures for repatriation of children. The Convention does not become effective until Congress acts." *Id.* at 198.

focused on four areas of concern specific to the United States: 1) the need for cooperation between the federal government and the fifty-six separate jurisdictions; 2) the involvement of both federal and state courts; 3) the extremely mobile nature of the U.S. population; and 4) the absence of any requirement of United States citizens to carry identification documents.[233]

The Committee drafted federal legislation for comment by the Office of Management and Budget, as well as review by the State Department, the Department of Justice, and the Department of Health and Human Services.[234] The International Child Abduction Act, H.R. 2673, was approved by the Administration and introduced in the House of Representatives by Congressmen Gilman and Lantos in June 1987.[235] After making changes suggested at subcommittee hearings, H.R. 2673 was ultimately replaced with H.R. 3971, the bill which ultimately was enacted as the International Child Abduction Remedies Act (ICARA).

b. *Objectives*

The provisions of ICARA are meant to supplement those of the Hague Convention, but not conflict with or replace Convention guidelines. According to one proponent of ICARA:

> [t]he . . . legislation essentially explains how the Convention will operate within the context of the U.S. legal system. The legislation translates the provisions of the Convention—which are written in general terms to accomodate the legal systems in the many countries that negotiated it—into terms and procedures familiar to lawyers, judges and government officials in this country.[236]

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233. Stotter, *supra* note 63, at 299. The State Department Study Group consulted with the Department of Justice and the Department of Health and Human Services in drafting an Administration-prepared bill which would provide uniform implementation of the Convention. *Hearings of Feb. 3, 1988*, *supra* note 3, at 35.

234. *Hearings of Feb. 3, 1988*, *supra* note 3, at 35.

235. At the same time that Representatives Lantos and Gilman introduced H.R. 2673, an identical bill, S. 1347, was introduced by Senators Simon, Wallop, Dixon, Cranston, Gore, Stennis and Exon. In February 1988, H.R. 2673 was replaced by H.R. 3971 and H.R. 3972 which split up the provisions regarding the Internal Revenue Service and the Social Security Act. H.R. 3972 was subsequently merged into H.R. 3971. A slightly amended version of the act, which clarified the provision for concurrent jurisdiction, was passed by the House on April 25, 1988. *See* H.R. REP. No. 525, *supra* note 16, at 7; 1988 U.S. CODE CONG. & ADMIN. NEWS at 388-89. *See also Hearings of Feb. 3, 1988*, *supra* note 3, at 62; *A.B.A. Guide*, *supra* note 14, at 17.

236. *Hearings of Feb. 3, 1988*, *supra* note 3, at 70. (prepared statement of Patricia M. Hoff, Co-chairman, Child Custody Committee of A.B.A. Family Law Section).

In addition to declaring that the Act implement the Hague Convention and that its provisions complement those of the Convention, the Act also recognizes the international character of the Convention and the need for its uniform international interpretation.[237] Section 2 reiterates that the legislation does not provide procedures for resolving underlying custody disputes but instead, "for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights."[238]

c. *The U.S. Central Authority*

Under section 7 of ICARA, the President is charged with designating a federal agency to serve as the U.S. Central Authority.[239] The President established the U.S. Central Authority in the Office of Citizens Consular Services in the State Department, Bureau of Consular Affairs.[240] Subject to section 9(c) of ICARA, the Central Authority is empowered to issue regulations to carry out the Convention.[241] Interim Regulations setting forth the functions of the U.S. Central Authority have been adopted in their original form.[242] Under the Regulations, the CA is empowered to further the goals of the Convention by maintaining communication with various U.S. agencies and with Central Authorites in other member countries. Generally, the CA shall:

> cooperate with the Central Authorities of other countries party to the Convention and promote cooperation by appropriate U.S. state

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237. ICARA, *supra* note 6, at § 2(b)(3); 42 U.S.C. § 11601 (1988).

238. *Id.* at § 2.

239. *Id.* at § 7(a); 42 U.S.C. § 11606 (1988).

240. Exec. Order No. 12,648, 3 C.F.R. 579 (1988), *reprinted in* 24 WEEKLY COMP. PRES. Doc. 1038 (Aug. 11, 1988), designates the State Department's Bureau of Consular Affairs as the United States Central Authority. *See A.B.A. Guide*, *supra* note 14, at 18. *See also* International Child Abduction, 22 C.F.R. § 94 (1989) [hereinafter State Department Regulations].

The State Department is particularly suited to house the Central Authority because the State Department already had provided assistance to parents faced with an international child abduction prior to the United States' ratification of the Hague Convention. Under its previous role, the State Department was limited to the following actions: 1) assisting in locating the child either directly or in consultation with foreign authorities; 2) monitoring the welfare of the child and advising the host country of any evidence of child abuse; 3) providing lists of foreign law firms; 4) providing general information regarding the foreign country's domestic laws and procedures; and 5) under certain situations, imposing passport restrictions. The State Department could not provide detailed legal advice, cause its officers to take physical custody of the child, force the child's return, or intercede in custody proceedings in the foreign court. *Hearings of May 25, 1983*, *supra* note 93, at 33-34 (testimony of James G. Hergen, Assistant Legal Advisor for Consular Affairs, Office of the Legal Advisor, U.S. Department of State).

241. ICARA, *supra* note 6, at § 9(c); 42 U.S.C. § 11608 (1988).

242. State Department Regulations, *supra* note 240, at § 94.

> authorities to secure the prompt location and return of children wrongfully removed to or retained in any Contracting State, to ensure that rights of custody and access under the laws of one Contracting State are effectively respected in the other Contracting States, and to achieve the other objects of the Convention.[243]

The Regulations also provide specific duties the CA must perform depending upon whether the child was abducted to the United States[244] or from the United States.[245]

Under section 9 of ICARA, the Central Authority is required to exchange information regarding the location of the child with other federal or state agencies or departments in accordance with applicable federal or state privacy laws.[246] Likewise, the federal or state government agencies are mandated to provide such information. Shared information is limited to that which would help locate the particular child, but could not adversely affect any federal or state law enforcement or national security interests. The Central Authority is also authorized to obtain information from the Parent Locator Service[247] on behalf of any applicant to the Central Authority.[248] As specified in the legislative history to ICARA:

> The provision would parallel the authority to provide Parent Locator Services in domestic parental kidnapping cases. Only information as to the most recent address and place of employment of the absent parent or child would be provided. . . . The Parent Locator Service would be authorized to provide information only with respect to the missing parent and child. This information only could be

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243. *Id.* at § 94.3.
244. *Id.* at § 94.6
245. *Id.* at § 94.7.
246. *See* H.R. REP. No. 525, *supra* note 16, at app.; 1988 U.S. CODE CONG. & ADMIN. NEWS at 401. (Letter from Dan Rostenkowski, Chairman, U.S. House of Representatives, Committee on Ways and Means, to Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives). The importance of adherence to the Privacy Act was pointed out by Rep. Rostenkowski in the letter as follows:

> Sharing information about the possible whereabouts of kidnapped children is important but in doing so we must be careful not to violate the privacy of other citizens. Limiting the information that can be released to the most recent address and place of employment of the absent parent and child, as section 463 of the Social Security Act provides, and assuring that the basic provisions of the Privacy Act also apply will protect against the inappropriate release of information.

Id.
247. ICARA, *supra* note 6, at § 7(d); 42 U.S.C. § 11606 (1988). *See supra* note 109 and accompanying text for a discussion of the Federal Parent Locator Service and the Fugitive Felon Act.
248. ICARA, *supra* note 6, at § 11; 42 U.S.C. § 11609 (1988).

> transmitted to a Federal, State or foreign authority or an applicant, petitioner or respondent under the terms of the Convention.[249]

The Parent Locator Service will not charge fees for locating the abductor parent pursuant to ICARA.[250] In the event the Central Authority is unable to secure the information it seeks from the Parent Locator Service, it may then request the information from other departments or agencies.[251]

2. *Filing an Application Through ICARA*

In order to start Convention proceedings for the return of a child abducted to the United States, the applicant[252] must file a petition with the U.S. Central Authority or the Central Authority of any other Convention member.[253] In the United States, the application must be submitted in English.[254] Notice to the respondent must be served "in accordance with the applicable law governing notice in interstate child custody proceedings."[255] If the Central Authority is unable to persuade the respondent to return the child voluntarily, the Central Authority will provide the applicant with information regarding legal assistance so that the applicant can pursue a judicial remedy.[256]

3. *Judicial Actions*

a. *The Role of the Judiciary*

State courts and U.S. district courts share concurrent original jurisdiction for actions under the Hague Convention.[257] The decision

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249. H. R. REP. NO. 525, *supra* note 16, at 10; 1988 U.S. CODE CONG. & ADMIN. NEWS at 391.

250. ICARA, *supra* note 6, at § 11; 42 U.S.C. § 11609 (1988).

251. *Id.* at § 9(d); 42 U.S.C. § 11608 (1988).

252. *Id.* at § 3; 42 U.S.C. § 11602 (1988). "Applicant" is any person who files an application with any Central Authority for return of a child allegedly wrongfully removed or retained, or for the effective exercise of rights of access under the Convention. *Id.*

253. *Id.* at § 4; 42 U.S.C. § 11603 (1988).

254. State Department Regulations, *supra* note 240, at § 94.5.

255. ICARA, *supra* note 6, at § 4(c); 42 U.S.C. § 11603 (1988). *See also* H.R. REP. NO. 525, *supra* note 16, at 11; 1988 U.S. CODE CONG. & ADMIN. NEWS at 393. In the event the child is located in one United States jurisdiction, where the applicant is filing the petition, and the respondent is located in another United States jurisdiction, the notice requirements of the jurisdiction in which the petition was filed will govern. *Id.*

256. State Department Regulations, *supra* note 240, at § 94.6.

257. ICARA, *supra* note 6, at § 4(a); 42 U.S.C. § 11603 (1988).

to provide concurrent jurisdiction was strenuously debated in House hearings,[258] with the federal administration, represented by the U.S. Department of Justice, opposing concurrent jurisdiction.[259] The core of the argument disfavoring concurrent jurisdiction was that child abductions fall within the domain of family law, which is traditionally a state court matter.[260] Testifying on behalf of the American Bar Association, and in favor of concurrent jurisdiction, Patricia M. Hoff[261] reasoned that ICARA does not require resolution of the underlying custody case, and that many federal courts have been willing to hear "actions for damages that arise in the context of interstate child custody disputes. Federal judges have successfully adjudicated the tort claims stemming from parental kidnapping without becoming enmeshed in the merits of the underlying custody dispute."[262] The benefit of concurrent jurisdiction cannot be underestimated. The applicant who fears home state favoritism of a state court will be able to bring the suit in a federal court.[263] Interestingly, the first reported case of an action under ICARA, *In the Matter of Sarah Isa Mohsen, a minor, Isa Yousif Mohsen, v. Leann Fleetwood Mohsen*,[264] was brought in federal court. In *Mohsen*, the father, a citizen of the country of Bahrain, attempted to regain actual custody of the couple's daughter pursuant to ICARA. The U.S. District Court for the District of Wyoming dismissed the petition on the

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258. *See International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 100th Cong., 2d Sess. 1 (1988) [hereinafter *ICAA Hearings*] (statements for and against concurrent jurisdiction).

259. *Id.* at 28-54.

260. *Id.* at 44. Mr. Stephen J. Markman, Assistant Attorney General for Legal Policy, Department of Justice, testified that concurrent jurisdiction would "enmesh [the Federal courts] in the types of domestic relations matters that Federal courts have never handled." *Id.*

261. *Id.* at 68. Ms. Hoff testified in her capacity as Co-chairman, Child Custody Committee of the Family Law Section, American Bar Association and as a member of the Family Law Section's ad hoc committee on the ratification and implementation of the Hague Convention. *Id.*

262. *Id.* at 65.

263. *See ICAA Hearings*, *supra* note 258, at 66. Comparing domestic child abductions to international child abductions, Ms. Hoff explained:

> [t]he benefit of and the need for Federal court jurisdiction in addition to State court jurisdiction, then, may be even more pronounced in an international abduction case where the party seeking return is truly a foreigner . . . . The choice of court will be at the election of the parent abroad who has been dispossessed of the child's custody unilaterally by the person alleged to have taken the child wrongfully or retained the child wrongfully in this country. It will give that person the opportunity to elect the forum that could most expeditiously hear the claim, and affords to the person abroad as many avenues of redress as are available.

Id.

264. 715 F. Supp. 1063 (D. Wyo. 1989).

grounds that since Bahrain is not a party to the Convention, Mr. Mohsen has no rights under ICARA.

Courts are bound to accord full faith and credit to judgments and court orders of sister-state courts regarding return actions pursuant to the Convention.[265] Courts are empowered to take action under either Federal or state law in order to protect the child's well-being or to prevent further removal or concealment prior to the completion of the judicial proceedings.[266] A court may not order the child removed from the person who is exercising actual control of the child without satisfying applicable state law requirements.[267]

b. *Evidence and Burdens of Proof*

Applications, supporting documents, and other information submitted to the U.S. Central Authority or to U.S. courts does not need to be authenticated.[268] ICARA requires the petitioner to prove by a preponderance of the evidence[269] that the child has been taken wrongfully. In earlier drafts of the implementing legislation, a respondent who opposed the child's return was required to show by clear and convincing evidence[270] that one or more of the exceptions to returning

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265. ICARA, *supra* note 6, at § 4(g); 42 U.S.C. § 11603 (1988). A court decision to return a child or to deny the return of a child shall be given full faith and credit throughout the United States jurisdictions. However, the possibility of an appeal from a return order or an order denying return is not prohibited. *Id.*

266. *Id.* at § 5; 42 U.S.C. § 11604 (1988).

267. *Id.*

268. *Id.* at § 6; 42 U.S.C. § 11605 (1988).

269. A "preponderance of evidence" is defined as "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1064 (5th ed. 1979).

270. *Id.* at 227. "Clear and convincing proof" is defined as "[g]enerally, . . . proof beyond a reasonable, *i.e.*, well-founded doubt." *Id. See also* Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980) (citing 30 AM. JUR. 2D *Evidence* § 1967):

> The requirement of "clear and convincing" or "satisfactory" evidence does not call for "unanswerable" or "conclusive" evidence. The quality of proof, to be clear and convincing, has also been said to be somewhere between the rule in ordinary civil cases and the requirement of criminal procedure that is, it must be more than a mere preponderance but not beyond a reasonable doubt. It has also been said that the term "clear and convincing" evidence means that the witnesses to a fact must be found to be credible, and the the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. Whether evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence.

Id. at 178.

the child were met.[271] However under the final version of ICARA, only the exceptions for "grave risk of harm"[272] and "fundamental principles of the requested State"[273] must be proved by clear and convincing evidence.[274] All other exceptions—the child is settled in a new home[275]; the petitioning parent was not exercising actual custody at the time of the taking;[276] and the child objects to being returned[277]—need be proved only by a preponderance of the evidence.[278] Decreasing the burden of proof enables the respondent to prevent more easily the child's return to her habitual residence. The decrease reflects a step back from the U.S. position to disfavor the abducting parent, and may warrant suspicion regarding the U.S. commitment to recognizing the "international character of the Convention."[279]

c. *Costs*

Section 8 of ICARA governs the allocation of costs and fees associated with an action for the return of an abducted child. ICARA requires the U.S. Central Authority to bear administrative costs for

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271. *See* H.R. REP. No. 525, *supra* note 16, at 391. *See also* H.R. 3971, 100th Cong., 2d Sess. (1988). This earlier version of the bill, debated February 18, 1988, differs from the final version regarding the burdens of proof required to prove an exception to returning the child. This earlier version required all exceptions to be proved by clear and convincing evidence. The provision reads, "In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing by clear and convincing evidence that one of the exceptions set forth in article 12, 13, or 20 of the Convention applies." *Id.* at § 3(d).

See also Hearings of Feb. 3, 1988, supra note 3, at 38. On behalf of the State Department, Peter Pfund submitted a prepared statement in support of the "clear and convincing" standard:

> The respondent . . . must . . . demonstrate by clear and convincing evidence that one of the exceptions provided by the Convention applies, *i.e.*, the respondent must meet a higher burden of proof in order to provide the legal basis for a finding that the return obligation of the Convention does not apply and that the return of the child may be refused. This provision seeks to help the left-behind parent to overcome what is often a home-court advantage of the other parent in the country of that parent's origin. It is intended to ensure that the exceptions to the Convention's return obligation are sufficiently hard to demonstrate so that their interpretation and applications does not become so broad as to provide a precedent in the United States that could undermine the purpose of the Convention and could have the effect abroad of providing a basis for refusal to return children to the United States.

Id.

272. Hague Convention, *supra* note 7, at art. 13(b); 19 I.L.M. at 1502.
273. *Id.* at art. 20; 19 I.L.M. at 1503.
274. ICARA, *supra* note 6, at § 4(e)(2)(A); 42 U.S.C. § 11603 (1988).
275. Hague Convention, *supra* note 7, at art. 12; 19 I.L.M. at 1502.
276. *Id.* at art. 13(a); 19 I.L.M. at 1502.
277. *Id.* at art. 13(b); 19 I.L.M. at 1502-03.
278. ICARA, *supra* note 6, at § 4(s)(B); 42 U.S.C. § 11603 (1988).
279. *Id.* at § 2(b)(3)(A); 42 U.S.C. § 11601 (1988).

processing an application.[280] The applicant is responsible for legal fees, court costs and travel expenses unless governmental or private programs assist in covering the expenses.[281] However, if the respondent refuses to return the child voluntarily, and the action proceeds to court, the court ordering the return of the child is mandated to charge the respondent for all costs in securing the child's return unless the respondent "establishes that such order would be clearly inappropriate."[282]

ICARA is designed to honor the international philosophy of the Hague Convention without violating U.S. constitutional standards of due process. Both state and federal courts are available for the foreign applicant, and the courts are obligated to charge the respondent for costs which otherwise would have been assumed by the applicant. The effectiveness of ICARA will depend largely on how the courts apply the exceptions to the factual basis of a given case. Although the burdens of proof have been lowered from clear and convincing to preponderance of the evidence for three of the exceptions—that the applicant was not actually exercising custody at the time of the removal, that the child objects to the return, or that the child has become settled in the new environment—the courts should not be too willing to allow widespread use of the exceptions. Otherwise, potential abductors will be encouraged either to conceal the child's whereabouts in order to meet the one-year deadline and assert that the child has become settled, or induce the child into objecting to the return.

V. Conclusion

In comparison to previous attempts to deter child abductions by requiring recognition and enforcement of custody decisions, the Hague Convention and ICARA are revolutionary. In the United States, domestic parental child abductions have been encouraged by shortcomings within the legal system. Since custody decrees are not final orders, prior custody decisions were often relitigated or modified. A parent could not assume that a custody decree would protect her parental rights; the noncustodial parent could abduct the child and obtain a new, conflicting custody decree in another jurisdiction. Children were sometimes abducted repeatedly, by one parent and

280. *Id.* at § 8(A); 42 U.S.C. § 11607 (1988).
281. *Id.* at § 8(b)(2); 42 U.S.C. § 11607 (1988).
282. *Id.* at § 8(b)(3); 42 U.S.C. § 11607 (1988).

then the other. Subsequent conflicting custody decrees were legally ineffective and pragmatically useless. This environment of legal uncertainty led to legislation requiring the recognition and enforcement of sister-state custody decisions.

The problems of forum-shopping and home state favoritism also occur worldwide, with more significant ramifications. As the number of international marriages has increased, so has the occurrence of international parental child abductions. Sheer distance, language barriers, and differences in cultural, legal, and economic systems intensify the trauma felt by the aggrieved parent as well as by the child. These factors also foster distrust between the populace of each country and reinforce governmental notions of paternalism, so that home-country favoritism is promoted. Recognition and enforcement of custody decrees are undermined in the sense that the countries involved in the kidnapping dispute oftentimes are the home countries of the respective parents; each country asserts nationalistic claims to the child, regardless of whether a custody decree has been issued.

The Hague Convention does not require enforcement of prior custody decrees; nor does it concern itself with the underlying merits of the custody dispute. Instead, it seeks to expeditiously restore the living situation which immediately preceded the wrongful taking. By requiring the immediate return of abducted children to their pre-abduction homes, the Hague Convention members have extended notions of *parens patriae* internationally. *Parens patraie*, the notion of the state as sovereign and as guardian of the child, is not foresaken, but instead, shared and enlarged among the signatories to the Convention. The requirement of returning the child regardless of the existence of a custody order requires a commitment to the integrity of judicial systems throughout the membership of the Convention.

If the Convention and ICARA have a down-side, it lies in the breadth of the exceptions. Courts which too easily allow the abductor to keep the child by utilizing one or more of the exceptions not only undermine the goals of the Convention, but also circumvent the interests of the child to the advantage of the abductor. On the other hand, although potential for abuse exists, the exceptions are necessary in order for member countries to balance their notions of sovereignty with those of international cooperation. The courts cannot escape balancing the best interests of the child against the needs and wishes of her parents and the goals of the Convention. Despite the fact that the courts are not to consider the underlying merits in reaching their

decisions, they may be required to examine some of the same determinative facts which are relevant to the custody dispute.

Ironically, although the Convention and ICARA do not consider the underlying merits of the custody dispute, their success ultimately may depend on the manner in which such disputes are resolved. An assumption must be made that the underlying dispute will be resolved according to proper legal procedures in an unbiased manner, or the Convention would be irrational. That is, countries would be unwilling to return a child to her pre-abduction home if they believed the courts there would act unjustly. The Convention must also assume that nationalism will not be a factor in the determination of the underlying custody dispute. The Hague Convention has committed itself to an honor system under which the child will be returned to her home country where the courts are entrusted to reach a balanced, just resolution of the underlying custody dispute. If the assumptions prove to be incorrect and home country courts render custody decrees improperly, disputing parents and the judicial entities considering cases under the Convention undoubtedly will utilize whatever means available to circumvent the confines of the Convention.

The Hague Convention and ICARA, however, should positively influence the way in which courts will resolve the underlying custody disputes. First, by promptly returning children to their pre-abduction homes, the courts will deter future acts of parental child abductions, as incentives for the wrongful takings will have been eliminated. Second, by allowing the courts in the child's domiciliary country to determine the legal alternatives for resolving the underlying custody dispute, the Convention affirms the integrity of that country's judicial system. Without coercion, this Convention-wide affirmation encourages just, unbiased resolutions of the underlying custody disputes.

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