INTERNATIONAL KIDNAPING RESPONSE FOR FUN AND PROFIT:

GETTING THE KIDS HOME & MAKING THE BAD GUYS PAY

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I. Introduction

This article is not intended to be a comprehensive examination of every claim or defense that might be asserted in a Hague Convention case. Rather, it is intended to be of practical assistance to practitioners facing such cases, by providing three discussions.

The following section provides a basic review of the Hague Convention's history, structure, and operation, with appropriate citations and directions for use by practitioners, which is organized in a way intended to be of maximum ease of use in drafting court filings.

Next, the article sets out a step-by-step explanation of what to file to actually obtain return of a child, with some forms, and directions as to where to find others. The article presumes that the abducted child has been brought ***to*** the United States, but the law and steps are largely the same, in reverse, to obtain return of a child that has been abducted ***from*** the United States to another contracting state.

Finally, this article turns to how to get paid – the mechanisms available to shift to the abductor the cost of international child abduction.

II. Hague Convention Basics

A. Framework of the Hague Convention

A proceeding seeking the return of a child from one signatory country to another is governed by the "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980" [commonly referred to as "the Hague Convention"], and its implementing legislation, the International Child Abduction Remedies Act ("ICARA").[1] The United States of America has been a Contracting State under the Convention since July 1, 1988; there are at this time 52 contracting States.[2]

The Hague Convention addressed the increasing problem of international child abduction in the context of international law while respecting rights of custody and visitation under national law.[3] According to its Preamble, the Convention aims "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[4]

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[1] 42 U.S.C. §§ 11601-11610.

[2] The list of participating countries is maintained at http://travel.state.gov/hague_list.html.

[3] Hague Convention, Art. 1., *Mozes v. Mozes*, 239 F.3d 1067, 1069-70 (9th Cir. 2001); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999).

[4] Hague Convention, Preamble, T.I.A.S. No. 11670 at 4.

As a treaty entered into by the United States, the Hague Convention is on par with the Constitution of the United States, and supersedes any conflicting statute, case, or rule. The objectives of the Convention are: under Article 1(a), to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and under Article 1(b), to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.[5]

Because the language of the Convention is somewhat conclusory, United States courts look to two sources of official commentary for guidance: (1) the Explanatory Report by Elisa Perez-Vera, the official Hague Conference reporter (the "Perez-Vera Report"); and (2) the Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction ("Legal Analysis") found in the Federal Register.[6] As the Legal Analysis notes:

> [The Perez-Vera] explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the convention available to all States becoming parties to it.[7]

One of the paramount purposes of the Hague Convention is to "restore the status quo and deter parents from crossing international borders in search of a more sympathetic court."[8] The Convention sought to eliminate this motivation by allowing for the prompt return of abducted children.[9]

It can hardly be adequately stressed that the Convention does ***not*** give rise to custody proceedings; as explained in greater detail below, it is concerned with return of children to their countries of habitual residence, which is where any custody proceedings should be held. To the degree that the order rendered by a court deciding a Hague Convention case provides physical "custody" of a child, it does so only long enough to allow a petitioner to reach and enter another State, and perhaps long enough to initiate appropriate custody proceedings there.[10]

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[5] Hague Convention, Art. 1; *see also In re Prevot*, 59 F.3d 556, 558 (6th Cir. 1995).

[6] 51 Fed. Reg. 10503 (Mar. 26, 1986).

[7] *Id*.

[8] *See Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376 (8th Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (*Friedrich I*); *see also Mozes*, *supra*, 239 F.3d at 1070.

[9] Hague Convention, Art. 2, *Mozes*, *supra*, 239 F.3d at 1070.

[10] While it is within the court's authority to release the child into the physical custody of the mother, the father, or some third party, in order to facilitate the required return, as a practical matter, courts resolving such petitions tend to turn the child over to the left-behind parent, for return to the country of which the left-behind parent is a resident at the time of the decision. This could be a different country from the one from which the child was wrongfully removed or retained. *See* Perez-Vega Report ¶ 110:

> . . . when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the

B. Jurisdictional Issues

Preliminary questions regarding whether a court can and will properly make a Hague Convention determination concern both choice of forum and the decision that is to be made.

1. Territorial Jurisdiction, Time Limits, and Age of the Child

The Hague Convention is not much concerned with the niceties of jurisdiction, but rather is deliberately expansive in scope, stating that a proceeding may be initiated in any State (meaning country) "to which the child has been removed or in which it has been retained."[11] It does not appear to make a difference ***why*** a child is within the territorial jurisdiction of a court, or for how long. If a court finds that a child has been "removed to" or "retained in" that territorial jurisdiction for ***any*** amount of time, a Hague Convention action may be filed there.

ICARA provides that a Hague Convention action may be filed in "any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."[12] ICARA ***also***, however, defines "petitioner" as one who files a petition ***in court***, and times the "commencement of proceedings" as of the court filing, and not the application filed with a Central Authority, either in the other country or in the United States.[13]

Where a child was located in one U.S. state at the moment that a petition for return of child was filed with the Central Authority of the State of a left-behind parent, but was relocated in a second U.S. state when a formal court action was filed, and a third U.S. state when that action was actually heard, the U.S. state where the child ***was*** at the time of the ***court filing*** technically continues to have jurisdiction to hear the case, even if no person involved has any significant connection to that jurisdiction.[14] Venue transfers in these cases seem to be handled somewhat *ad hoc*.

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latter's present place of residence.

[11] Hague Convention, Art. 16. Unfortunately, ICARA uses the word "state" inconsistently, in some sections using the word to refer to countries, as where it speaks of "state of habitual residence" in 42 U.S.C. § 11603(f)(1), but also defining the word "State" in 42 U.S.C. § 11602(8) as "any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States."

[12] 42 U.S.C. § 11603(4)(b).

[13] 42 U.S.C. §§ 11602(4) & 11603(b)&(f)(3).

[14] ICARA is a little unclear about where a petition should be filed, stating that a Hague Convention action is commenced by filing "a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. § 11603(b). This creates two difficulties. First, a petition for return is often filed first, not in a court, but with the Central Authority of another country, then transferred to the American Central Authority, and ultimately turned over to private counsel for the filing of an action court filing. The children's physical location can easily change one or more times during that process, and their actual location can be uncertain when the time comes to file. Second, as a technical matter, an abductor getting wind of an impending Hague Convention filing could evade the law as phrased by the simple expedient of stepping over the state line with the children in the hours before it can be filed. Since the Convention

Proceedings must be "commenced" (by the filing of a court petition for return in the State where the child is located) within one year of the removal or retention, in order to fall within the Hague Convention provision requiring "the return of the child forthwith" if the requisite substantive findings are made.[15]

If a longer period has gone by, a court may still order the return of the child, ***unless*** the court determines that the child "is now settled in its new environment."[16] What this means, from a practical perspective, is that a defensive claim for the alleged abducting parent is available, or not, depending on the promptness with which the left-behind parent seeks relief and actually gets a case on file in a court.

The Convention, by its own terms, "ceases to apply" when the child attains the age of 16 years.[17] In keeping with normal rules of statutory construction, this time limit presumably goes to the ***initiation*** of proceedings, not the final order, so as not to provide any incentive for delay.

2. Either Federal or State Courts May Make the Hague Determination

Under the terms of ICARA, both state and federal district courts have original and concurrent jurisdiction.[18] Neither court is entitled to a priority of jurisdiction.[19]

Hague Convention judgments by either state or federal courts ordering or denying a return of a child are afforded full faith and credit.[20] However, full faith and credit is only to be accorded a decision if a Hague Convention claim was actually adjudicated in the action in accordance with both the Hague Convention and ICARA.[21] Thus, a Hague determination should not be considered either precluded or implied from a state court custody decision.

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encourages "all appropriate measures in order to obtain the voluntary return of the child" (Art. 10), it is common for the authorities to give notice of impending proceedings. In practice, some judges have implied a "or has been located" clause into § 11603(b), but the matter is awkward.

[15] Hague Convention, Art. 12; 42 U.S.C. § 11603(4)(f)(3).

[16] *Id*.

[17] Hague Convention, Article 4.

[18] 42 U.S.C. § 11603.

[19] *See*, *e.g.*, *Lops v. Lops*, 140 F.3d 927, 943 (11th Cir. 1998).

[20] 42 U.S.C. § 11603(g); *Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997) (full faith and credit accorded to a federal decision); *Burns v. Burns*, 1996 WL 71124, (E.D. Pa. 1996) (full faith and credit relating to a state decision).

[21] 42 U.S.C. § 11603(g); *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir. 2002).

A case may be removed from state court to federal court, and delay by the state court in making a determination is by itself considered a valid reason for removal.[22] Further, the federal abstention doctrine applicable to domestic relations generally does not apply to Hague Convention cases.[23]

3. Factors to Consider in Deciding Whether to File in Federal or State Court[24]

Under ICARA, the petitioner may choose the court in which to file a Hague Convention proceeding. It should be heard in ***any*** forum on an expedited calendar, but practical concerns could lead to different results in different places.

An important consideration in making this choice is the petitioner's belief as to which court would likely be able to hear the matter in the shortest period of time. Checking the dockets of the various potential courts can help determine which court can hear the matter soonest. It is also wise to investigate the manner in which Convention cases are heard. Federal courts, for instance, tend to treat Hague return petitions as petitions for writs of habeas corpus, a procedure designed to provide virtually immediate relief.

The most time consuming part of a Hague Petition is educating the court about the Convention, with an emphasis on the need for prompt judicial action. An important fact in determining choice of forum, therefore, may well be the familiarity of the various potential courts with prior Hague cases. To assist in educating a court new to the issues, counsel can request the U.S. Central Authority in the Department of State to send the court its form letter on the background, purpose and requirements of the Convention.

Federal courts have historically been reluctant to get involved with domestic cases and are less likely to treat a Hague Petition like a traditional custody case – a mistake often made by state courts accustomed to hearing divorce cases. The petitioner, or petitioner's counsel, might also have a belief that a potential forum has a bias – against petitioner, counsel, or even against giving Hague Convention cases proper and prompt consideration.

Another practical consideration in the petitioner's choice of venue is the expertise and experience of the petitioner's attorney in the various courts. If an attorney is not admitted to practice in federal court, taking the time to get admitted would probably not be beneficial.

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[22] 28 U.S.C. § 1441(a); *Lops v. Lops*, 140 F.3d 927, 943 (11th Cir. 1998).

[23] *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) (*Silverman I*).

[24] Adapted, with thanks, from discussion in Patricia M. Hoff, *Hague Child Abduction Convention Issue Briefs* (Obstacles to the Recovery and Return of Parentally Abducted Children Project, American Bar Association Center on Children and the Law, 1997).

In short, the following are beneficial questions to ask when deciding choice of venue:

1. Which court can hear the matter sooner?
2. Does either court have experience with Hague cases?
3. Is either the state or federal court more likely than the other to mistakenly treat the case as a substantive custody matter?
4. Is there any reason to believe that either the state or federal court has any bias against petitioner, counsel, or the proper decision of Hague Convention cases?
5. Is the attorney admitted, and have experience litigating, in federal court?

By asking the right questions ahead of time, savvy counsel can get a Hague Convention case heard – and in an appropriate case, get a child returned – far more quickly and efficiently than might otherwise be the case.

4. Only the Question of Return – Not Custody – Is to Be Determined

The Hague Convention analysis is ***not*** a determination of custody rights. Under Article 19 of the Hague Convention and 42 U.S.C. § 11601(b)(4), "a United States district court has authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim."[25]

The essence of the inquiry by a court hearing a Hague Convention case is to determine ***ONLY*** whether the removal or retention of a child from another country was "wrongful."[26] If so, the court is to order the return of the child to that place for the court there to decide the merits of the custody dispute,[27] unless the alleged abductor can establish one of a few defenses.[28] As bluntly stated by the Ninth Circuit Court of Appeals: "The conclusion that a child has been wrongfully removed under the Convention obligates a court to order him returned to the country from which he was taken."[29]

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[25] *See*, *e.g.*, *Friedrich I*, *supra*, at 1400 (citing 42 U.S.C. § 1160(b)(4)).

[26] This substantive issue is explored in detail below.

[27] *See*, *e.g.*, *Ohlander v. Larson*, 114 F.3d 1531, 1534, 1541 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 702 (1998); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II").

[28] Of particular importance, the abductor may attempt to show that the child would suffer a "grave risk" of "physical or psychological harm" if the child was returned. Hague Convention, Art. 13(b), 42 U.S.C. § 11603(e)(2)(A); *See*, *e.g.*, *Ohlander v. Larson*, 114 F.3d 1531, 1534, 1541 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 702 (1998); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II").

[29] *Gonzalez v. Gutierrez*, ___ P.3d ___ (No. 02-55079, 9th Cir., Nov. 20, 2002).

However, as the Legal Analysis points out:

> The obligation to return an abducted child to the person entitled to custody arises only if the removal or the retention is wrongful within the meaning of the Convention.[30]

The question thus becomes whether one parent's act of removing or retaining the child is in breach of the other parent's rights of custody under the law of the State of the child's habitual residence.[31] This is not to say that a ***custody dispute*** between the parents is conducted under the law of the child's State of habitual residence – the law of the State of habitual residence "is taken into consideration only so as to establish the wrongful nature of the removal."[32]

The essential inquiry made in a Hague proceeding therefore splits into three questions: ***Where*** was the child's habitual residence? Did the parent who had the child in the other contracting state ***have*** a right of custody under the law of the State of the children's habitual residence, which was actually being exercised (or would have been but for the removal or retention)? If so, did the removing or retaining parent's actions ***violate*** those rights?

If the child's habitual residence is in another State, and the child was removed, or retained, from that State in violation of a right of custody of the left-behind parent, the child is to be returned to the other country forthwith.[33] A federal or state court has jurisdiction under the Hague Convention to make a determination regarding return if proceedings filed in that court attempt to resolve the above issues (required for a Hague Convention determination), as to children found within the territorial jurisdiction of that court when the action is filed. It is to the specific questions "to be resolved" that this examination now turns.

C. Substantive Issues

1. The Child's Habitual Residence at the Time of Removal or Retention

The term "habitual residence" is not specifically defined in either the Hague Convention or ICARA; the Perez-Vera Report makes it clear that this omission was deliberate, for the purpose of requiring courts to treat the issue as "a question of pure fact, differing in that respect from domicile."[34] As discussed below, however, some American courts have come to the opposite conclusion, despite the deference accorded to the Perez-Vera report, and have decided that the question is one of law, or at least a mixed question of law and fact.

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[30] 51 Fed. Reg. at 10506.

[31] *See* Hague Convention, Art. 3, T.I.A.S. No. 11,670 at 4; *Friedrich I*, 983 F.2d at 1400

[32] Perez-Vera Report at ¶ 36.

[33] *See Vaile v. District Court*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, Apr. 11, 2002).

[34] Perez-Vera Report at ¶ 66.

In many cases, children of divorce spend at least some time with each parent, even when those parents live in different countries. Hague cases often arise during actual or purported visits or "trial periods" in the country of the alleged abducting parent. It is important for counsel to fully explore who lived where, when, and for what reason, as the reviewing court will want to know the details of the decision leading up to travel from one country to another, and then what happened once the child was there.[35]

A handful of decisions illustrate the importance of determining the child's "habitual residence" to the outcome of these cases. In *Feder v. Feder*,[36] Mr. Feder had convinced Mrs. Feder to come to Australia with their son, Evan. They remained in Australia for six months, during which Mr. Feder was gainfully employed, and changed his driver's license. The couple obtained housing, and enrolled their child in school. After six months, Mrs. Feder decided she was unhappy in Australia, and together with Evan, returned to the United States of America without Mr. Feder's consent.

The court scrutinized the case law and held that "there is no real distinction between ordinary residence and habitual residence." The court declared the minor's habitual residence at the time of the removal to be the place where he had been living with both of his parents and attending school for the previous six months, finding that six months is "a significant period of time for a four-year old child." The court specifically adopted a ***child-centered*** view of habitual residence. Specifically, the court said that habitual residence is determined by looking back in time, and determining the place, at the moment of removal, where the child had been physically present for a sufficient amount of time to show a settled purpose to be, focusing on the child's circumstances. Where the child was in school, a home had been purchased, and the parents were working, the court considered that the test was easily met.

The *Feder* court recognized that the mother went to Australia reluctantly, but found that she consented to the move, and was not coerced. The court found that Mrs. Feder had a "settled purpose" to remain in Australia and that, therefore, Evan was settled: "That Mrs. Feder did not intend to remain in Australia permanently and believed that she would leave if her marriage did not improve does not void the couple's settled purpose to live as a family in the place where Mr. Feder had found work."[37] Australia was found to be Evan's habitual residence, and therefore was the proper jurisdiction to determine the parties' conflicting claims for custody.

Other courts have expanded upon the analysis in *Feder*. In *Mozes*, *supra*, the mother had relocated to the United States in 1997 with the children, and a year later filed for divorce. It was then that the father filed a Hague Convention petition for return; despite the passage of time, the appellate court

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[35] *See Toren v. Toren*, 26 F. Supp. 2d 240, 243 (D. Mass. 1998) (habitual residence was in United States with mother, regardless of fact that parents had agreed that children would return to Israel on a date certain and that United States was not intended to be the children's "permanent residence").

[36] 63 F.3d 217 (3d Cir. 1995).

[37] *Id*. at 224.

remanded the question of whether the children's habitual residence had been changed to the United States to the district court.[38]

In *Silverman II*,[39] however, a deeply-divided Eighth Circuit held that the determination of "habitual residence" was not strictly a factual inquiry, but a "conclusion of law or at least a determination of a mixed question of law and fact," altering the review on appeal from determination of "clear error" to a *de novo* review.[40]

Feder characterized the habitual residence inquiry as a search for an indication of a "settled purpose" to relocate, not necessarily "forever," but at least that the family must have a "sufficient degree of continuity to be properly described as settled."[41] The courts seem to be in agreement that such a "settled purpose" cannot be found when the intention of one of the parties to remain in a foreign country is concealed from the other spouse,[42] or when the presence of the other spouse or children in a foreign country is the result of involuntary coercion or abuse.[43]

But it also seems clear that a reviewing court can choose to ignore evidence of abuse as the reason for the passage of sufficient time in the foreign country to find a "settled purpose," as the dissent in *Silverman II* complained that it was only the father's abuse that caused the mother and children to remain in Israel beyond the month of their arrival.

There is a significant level of consistency in the foreign decisions with the basic reasoning of *Feder*. In *Cohen v. Cohen*,[44] for example, the parties came ***from*** Israel to New Jersey. The mother took the child back to Israel in April, 1992, against the wishes of the father. He applied under the Convention for the return of the child to the United States from Israel, and his request was granted. Even though the mother argued that her job and move to the United States of America was temporary, and that

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[38] *Id*., 239 F.3d at 1075-76.

[39] *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) (*Silverman II*), *reversing on rehearing* 312 F.3d 914 (8th Cir. 2002).

[40] *Id*., citing *Mozes*, *supra*, 239 F.3d at 1073, and quoting from *Feder*, *supra*, 63 F.3d at 222 n.9. This holding indicates a split of authority, with the majority of the Eighth Circuit claiming that it was aligned with the Third and Ninth Circuits, despite the language in the Perez-Vera Report. The dissent, however, claimed that majority mis-read the position of the Ninth Circuit, and was in direct opposition to clear holdings from the First and Second Circuits, which require a finding of "clear error" to overturn a lower court decision as to habitual residence. *See Silverman II*, *supra*, dissenting opinion of Justice Heaney, citing *Blondin v. DuBois*, 238 F.3d 153 (2d Cir. 2001); *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000).

[41] *Id*., 63 F.3d at 222-23; *see also In re Bates*, No. CA 122-89 High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989).

[42] *Ponath v. Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001).

[43] *Tsarbopoulos*, *supra*.

[44] Dist. Court of Tel Aviv, May 25, 1992, Hiltonhouse/Cohen.

she did not have immigrant status here, the court found that the United States of America was the habitual residence ***of the child*** and ***that*** was the determining factor of the Convention.

2. The Left-Behind Parent's "Rights of Custody"

Presuming the petitioning parent establishes that another country was the habitual residence of the child at the time of the child's removal or retention, the next question is whether the left-behind parent had "rights of custody" regarding that child. The Hague Convention provides three potential sources of custody rights: (1) operation of law, (2) judicial or administrative decision, or (3) an agreement having legal effect under the law of that State.[45]

a. Operation of Law

A left-behind parent will have ***some*** kind of relationship with the child at issue (i.e., natural parent married to the other parent, putative parent, divorced custodial parent, divorced non-custodial parent, etc.) The first step in determining rights of custody is to determine the relationship between the left-behind parent and the child.

In the United States, generally, married parents are presumed to have joint legal and physical custody. Even after divorce, a parent with joint legal custody generally has an equal right to determine questions such as where the child attends school, and any proceeding to alter the *status quo* of custody and visitation must pass due process muster.[46] When a child has been removed to the United States from another country determined to be the child's habitual residence, however, the underlying parent-and-child law of that country should be reviewed to see if a left-behind parent with whatever relationship exists between the child and that parent has a legal right of custody as defined by the law of that country. The Convention is "deliberately expansive" on this point, and counsel should be sensitive to allowing the widest possible scope of a basis of rights under the law of other States for the exercise of "rights of custody" by a parent.[47]

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[45] Hague Convention, Art. 3; T.I.A.S. No. 11,670 at 5.

[46] *See*, *e.g.*, *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996) (where parties have joint legal custody, a party threatened with a loss of parental rights must be given an opportunity to disprove any evidence presented, and all changes to visitation must pass due-process muster to stand); *Wiese v. Granata*, 110 Nev. 1410, 887 P.2d 744 (1994) (due process requires that notice be given before a party's substantial rights (such as custody) are affected).

[47] As the Ninth Circuit noted:

> [T]he Convention favors the interpretation of custody rights that would allow the "greatest possible number of cases to be brought into consideration." *Perez-Vera Report* ¶ 67. The Convention was drafted with the intent of encompassing many custodial situations emanating from many different legal regimes. . . . Paragraph 67 introduces the three sources of rights from which custody may be identified. First, custody may arise by "operation of law," so that custodial rights may be found *ex lege*, even though a custodial decision has not yet been made. *Perez-Vera Report* ¶ 68.

Gonzalez v. Gutierrez, ___ P.3d ___ (No. 02-55079, 9th Cir., Nov. 20, 2002).

Additionally, the "law" referred to in Article 3 of the Hague Convention encompasses both substantive law and the conflict of law rules of the State of habitual residence, so that the inquiry into whether the parent has custody rights entails a determination of whether the other country's parent-and-child laws would apply its own or United States law in the circumstances:

> Thus, custody *ex lege* [as a matter of law] can be based either on the internal law of the State of the child's habitual residence, or on the law designated by the conflict rules of that State.[48]

There are several possible complications beyond the scope of this paper that can arise once the parent-child relationship and law of the habitual residence are known.[49] In the majority of cases, however, the issue will be a simple one.

b. Judicial or Administrative Decision

Simply put, a tribunal might have determined the extent of a left-behind parent's rights of custody by decision. The reference in Article 3 to a "judicial or administrative decision" as a source of custody rights is "used in its widest sense," specifically contemplating that such a decision "may have been issued by the courts of the State of the child's habitual residence as well as by the courts of a third country."[50]

c. Agreement Having Legal Effect

Article 3 state that rights of custody may arise "by reason of an agreement having legal effect under the law of [the State of habitual residence]."[51] This can take several forms.

If the parties are still married, such an agreement could consist of a writing in the form of a property settlement or separation agreement, or even a letter, if the law of the State of habitual residence grants legal effect to such a writing. If the parties are already divorced, such an agreement could be a property settlement agreement (whether merged or not in a decree of divorce), or other document in or outside court proceedings, again depending on how the law of the State of habitual residence

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[48] Perez-Vera Report at ¶ 68.

[49] *See*, *e.g.*, *Gonzalez v. Gutierrez*, ___ P.3d ___ (No. 02-55079, 9th Cir., Nov. 20, 2002) (exploring legal ramifications of Mexican law of *patria potestas* on rights of custody relating to unmarried parents).

[50] *See* Perez-Vera Report at ¶ 69.

[51] Hague Convention, Art. 3; T.I.A.S. No. 11,670 at 5.

treats such writings. It is even possible that such an agreement could be entirely oral, if proof adequate to the court was presented.[52]

3. Whether the Left-Behind Parent was "Actually Exercising" Rights of Custody

Article 3(b) of the Hague Convention provides that a removal or retention can only be considered wrongful if, "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

This will usually be a straight-forward factual inquiry. However, certain scenarios can create legal uncertainty, as in the case of a left-behind non-custodial parent who has little contact, or no physical or legal custody, of the child at issue. The Hague Convention also makes an explicit distinction between rights of custody and rights of access, which "include the right to take a child for a limited period of time to a place other than the child's habitual residence,"[53] but which do not give rise to a right to seek return of the child to the left-behind parent's country.[54]

4. Whether the Removal or Retention was "Wrongful"

a. Definitions of Removal and Retention

The cases addressing the question of the harms suffered by children from international abduction speak of those harms stemming from either "the 'removal [of a child] from its habitual environment,' or by 'a refusal to restore a child to its own environment after a stay abroad.'"[55]

The official commentary gives more specific descriptions:

> Generally speaking, "wrongful removal" refers to the taking of a child from the person who was actually exercising custody of the child. "Wrongful retention" refers to the act of keeping the child without the consent of the person who was actually exercising custody.

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[52] *See*, *e.g.*, *In re B (a minor*), 2 F.L.R. 249, Fam. 606 (1994) (English court holding that father who lacked formal custodial rights yet physically cared for child possessed "rights of custody").

[53] Hague Convention, Article 5.

[54] Hague Convention, Article 21.

[55] *See*, *e.g.*, *Mozes v. Moze*s, *supra*, 239 F.3d at 1070 (quoting Perez-Vera Report at ¶ 11).

> The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.[56]

b. Wrongfulness of Removal or Retention

The removal or retention of a child from his or her habitual residence is "wrongful" if it is in violation of rights of custody of the left-behind parent that were actually being exercised, or would have been but for the removal or retention.

In the language of the Convention, the petitioner must show that the removal was:

> a) . . . in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[57]

The standard of proof (for whether the removal of the child was "wrongful" under Article 3) is "preponderance of the evidence."[58]

III. Getting the Kids Home – What to File

There is more than one route to the filing of a formal petition in a court in the country to which the children have been transported. A left behind parent may file an application with the Central Authority of that parent's State, to be forwarded to the Central Authority of the country in which the child is found. Alternatively, an application can be made directly to the Central Authority of the State to which the child has been brought.

In the United States, the State Department, Office of Children's Issues, handles Hague Applications through a public/private enterprise known as the National Center for Missing and Exploited Children ("National Center"), which is based in Alexandria, Virginia, but with branches in California, Florida, Kansas City, New York, and South Carolina.

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[56] 51 Fed. Reg. 10494.

[57] Hague Convention Art. 3; see also 42 U.S.C. § 111603(e)(1), (f)(2).

[58] 42 U.S.C. § 11603(e)(1); *Friedrich I*, *supra*, 983 F.2d at 1400.

The National Center attempts to first locate the child's specific location, using resources ranging from Interpol to federal and state criminal and civil government departments.[59] The National Center often will send the abducting parent a letter requesting he or she return the child voluntarily, which will sometimes solve the problem. If the letter fails, the National Center then finds an attorney in the state in which the child is located who is willing to represent the parent; the National Center maintains lists of attorneys who have volunteered to take such case, on a *pro bono* basis or otherwise.

Once the National Center has located an attorney willing to review the case, it will send the attorney a packet of available information to assist the attorney in filing the Petition. The packet should also reveal at least some evaluation of the level of flight risk or risk of physical harm to the child posed by the circumstances, which should inform counsel as to whether or not it is necessary to request the child's physical removal from the abducting parent by means of a Warrant in Lieu of a Writ of Habeas Corpus. Tell-tale signs are indications of an unbalanced abducting parent, one who is known to have firearms, or who has a history of physical violence.[60] Arguments have also been made for a Warrant based on the risk of flight. The specific considerations regarding seeking a Warrant are discussed in greater detail below.

Once an attorney has been located, the attorney and client must decide in which court to file the Petition, based on the attorney's experience and knowledge regarding the factors which would favor one court over another (see Section II of this paper, *supra*).

It is then the attorney's job to finalize a retainer agreement of some sort with the client,[61] create the necessary paperwork, educate the court on the Convention and the particular client's situation, attend such hearings as are necessary, and complete the final paperwork and physical arrangements necessary to recover the child.

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[59] The Center will often get the name and location of the child's school, the address in which the child is housed, and possibly the child's schedule if at all possible.

[60] As a practical matter, law enforcement officers are very concerned about the dangers of any pick-up efforts; it is better to err on the side of caution when assessing whether firearms will be located at the residence, and in evaluating the danger posed by an abducting parent.

[61] We suggest ***always*** having a written retainer agreement with a client, even a client who is being represented *pro bono*, governing the scope of work to be performed, whether or not it includes any appellate work after the grant or denial of the Hague Convention petition, whether the client (or another, sometimes including the client's government) is expected to pay for services rendered, or costs incurred, and if so how much and when, and what to do with any attorney's fees or costs that might be awarded against the other side.

A. Initial Petition for Return

In our opinion, the weakest "forms" in current circulation are those intended to provide a framework for an initial Petition, so we have included one of our own as Appendix 1.[62] Other printed form sets provide perfectly workable models for most other documents that will be needed.[63]

Article 8 of the Hague Convention only ***requires*** a few items of information, and they are pretty generally described: "information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child; where available, the date of birth of the child; the grounds on which the applicant's claim for return of the child is based; [and] all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be."

The Petition should be conformed to style, of course, to the federal or state court in which it is to be filed. Substantively, it should recite that it is being brought pursuant to the Hague Convention and ICARA, explicitly state the statutory jurisdiction allowing it to be brought, and include a section (which we have entitled "Status of Petitioner and Child") both describing their relationship and providing sufficient allegations from which a finder of fact could conclude that the petitioner was "actually exercising rights of custody."

Next, the Petition should detail exactly how the child happened to be removed, or retained, from the child's habitual residence. This might require detailing a straight-forward kidnap,[64] or explaining how visitation terms set out in a decree were exceeded when the child was not returned (in the latter case, the better course is to attach as exhibits the relevant court documents setting out the visitation scheme). In either case, in our experience, it has proven helpful, given the various time limits set out in the Convention, to attach a timeline or calendar showing what was supposed to happen, when, and what actually happened.

Any custody proceedings that have occurred should also be identified , and if they resulted in orders, they should be attached. If there have been any such proceedings, their relevance to the Hague Convention proceedings should be discussed (*see* Section II(B)(4), *supra*).

If "provisional remedies" are being requested, that fact should be requested in the Petition. Such a request is discussed in more detail in the following sub-section of this article.

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[62] We have created a full form set, for all documents discussed in these materials. Space limitation prevented us from reprinting them all in these materials, but we would gladly provide an electronic copy, either at the seminar, or by e-mail anytime thereafter. Please contact the author directly with any such requests.

[63] In our opinion, some of the best of these can be found in Gloria DeHart, ed., INTERNATIONAL CHILD ABDUCTIONS, A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS, 2D ED. (ABA Family Law Section, 1993) ("Guide"). The book is a great resource, and includes the relevant sections from the Federal Register, the text of the Hague Convention, and ICARA, the Legal Analysis, and other reference materials.

[64] Sometimes, a simple explanation is all that is required. In one of our prior cases, the judge read a sentence of our Petition to the respondent at the initial hearing in the form of a question. The respondent proudly declared that "Of ***course*** I planned to and kidnaped my child." This made the remainder of the case relatively straightforward.

The relief requested should be specifically and clearly set out, along with a notice of hearing that would be adequate for the jurisdiction's domestic relations law in an interstate custody case.[65] If attorney's fees and costs are requested, they should be specifically identified in the Petition. Our sample form sets out such a request, and the relevant points and authorities necessary should counsel have to brief the issue are set out below in the next section of this article. Finally, many courts require an attorney verification, in place of a client affidavit, which is often impossible to get in a timely manner from a client in a foreign country.

Some courts new to Hague Convention cases will also require counsel to brief just why the court can, or should, grant the Petition, along with the Petition itself. The materials in Section II of this paper were designed to provide an easy organization of information and citations for insertion into such a brief.

B. Documents to Be Filed along with the Initial Petition for Return

Because of the nod in ICARA to "the applicable law governing notice in interstate child custody proceedings,"[66] the better procedure is to file a "Declaration Establishing the Habitual Residence of the Child(ren)" in every Hague Convention case, using the format of the local version of the Uniform Child Custody Jurisdiction Act or Uniform Child Custody Jurisdiction and Enforcement Act in the state where the Petition is filed.

For the same reason, a separate Notice of Petition Under Hague Convention, also known as Notice of Hearing, should probably be filed, in addition to the statement of notice of hearing in the Petition itself, although local rules may govern this choice.

If it is feared that the abducting parent has some likelihood of trying to get a custody order in the local state courts, in an effort to frustrate or confuse the proceedings, it is probably worth taking the time to obtain a Notice of Stay of Custody Proceedings, which recites Article 16 of the Hague Convention. This should be served on the respondent, and can be filed in the state court if a custody action is initiated by the abducting parent. Such a notice should always be obtained if counsel is aware of any ongoing or concurrent custody proceedings; its filing puts all parties and courts on notice that the Convention prohibits any court from making a custody determination due to the filing of the Petition.

Finally, many courts appreciate counsel's filing (or attaching to the Petition as an exhibit) a proposed Order Directing Return of Minor Child, as the form of order required will not be known to courts new to such matters. Having such a proposed order prepared and attached can even allow all requested relief to be granted at the very first hearing, in some cases, without any further delay; some Hague Convention cases can be resolved in a day or two between initial filing and final orders.

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[65] *See* 42 U.S.C. § 11603(c).

[66] *Id*.

Depending on local practice, there may also be a required civil cover sheet, a filing fee,[67] or other local court forms.

If it is determined that the child is not in danger, the Petition for Return (and all the necessary accompanying documents) can be personally served by a process server. If counsel determines that there is a danger, or the decision has been made to seek a warrant in lieu of writ of habeas corpus (see next subsection), the assistance of the local law enforcement agency can usually be obtained to serve the documents on the respondent.

C. Documents to Be Filed If it Is Determined That an Emergency Pick-up Is Warranted

If counsel determines that there is a danger of harm to the child (or others), or of flight by the abducting parent to avoid return of the child, the Hague Convention specifically authorizes the obtaining of "provisional remedies."[68] Not all cases require an emergency pickup. The attorney must determine whether or not the court can be persuaded that an emergency exists which will justify such a warrant for emergency pickup. Facts that might justify the request would include a history of domestic violence, information that the child might be in danger with the abducting parent, or a history in which the child has previously been successfully hidden from the left behind parent.

Under ICARA, the court hearing a Hague Convention case is specifically empowered to "take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition."[69]

However, ICARA also includes a "limitation on authority" stating that no court issuing any such provisional remedies may "order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."[70] In practice, this statement has caused a great deal of confusion and delay in federal courts unfamiliar with state court procedures, as the courts attempt to verify that they can, for example, issue emergency pick-up orders for the protection of children, which procedures are not set out on the face of many states' versions of the UCCJA, but are either contained in other statutes, or a product of state common law.

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[67] Some courts require a token filing fee, such as $5.00, ***despite*** the express admonition in Article 26 of the Hague Convention that: "Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers." Similarly, ICARA states, in 42 U.S.C. §11607(a), that: "No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention."

[68] Hague Convention, Article 7(b).

[69] 42 U.S.C. § 11604(a).

[70] 42 U.S.C. § 11604(b).

Accordingly, if it is deemed necessary to pick up the child at the time of service of the Petition for Return, to secure the child's safety during the pendency of proceedings, counsel should prepare and file a separate Petition for Warrant in Lieu of Writ of Habeas Corpus, a proposed Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus, and a proposed Warrant in Lieu of Writ of Habeas Corpus. If the court hearing the matter is unfamiliar with procedures, it might also be a good idea to either flesh out the Petition for Warrant, specifying in detail the grounds under which it may be issued, or file a separate brief on the subject.

Local procedures might vary, but we have found it most expedient to have the Warrant executed by the U.S. Marshals. This requires filling out the necessary forms with the Marshals' office and providing the Marshals with a 24 hour number at which someone can be reached. It is advisable to contact the specific authorities on their preferred procedures prior to getting the pickup order. There is a standard "coordination form USM 285" in use for the United States Marshals' Service.

Also, in our experience, the Marshals have not been satisfied with some of the form orders published for this purpose, on their conclusion that such orders do not adequately authorize the Marshals to use such force as is necessary to accomplish recovery of the child. Accordingly, at their request, our orders for pick up include language along the following lines, in addition to the form "pick-up" language:

> **AUTHORITY TO SEARCH PREMISES**
>
> This Order gives the U.S. Marshal or any of his/her deputies and any peace officer within the State of Nevada the authority to use any and all force to enter and search the premises at ADDRESS, Las Vegas, Nevada 891XX, or any other place where NAME OF CHILD is reasonably believed to be present, for the purpose of determining whether CHILD is present.

D. Legal Authority For Use in Requesting an Emergency Pick-up

If the court questions its ability to order the requested pick-up, despite the existence of a *bona fide* emergency, the following points and authorities may be of use to practitioners.

Under the heading "provisional remedies," 42 U.S.C. § 11604(a) specifically empowers a court to enter such orders as are necessary, under federal or state law, "to prevent the child's further removal or concealment before the final disposition of the petition."[71] A request for such an order would be that the child at issue be taken into custody for her protection at the local child shelter until the hearing on the merits proceeds.

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[71] The Convention itself contemplates such provisional orders. Article 7 of the Convention, requires a Court to:

> take all appropriate measures – . . . (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; . . . (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child . . .; (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child . . . .

The Court may have concerns with 42 U.S.C. § 11604(b), which provides that a court may not order a child to be removed from a person having physical control of the child "unless the applicable requirements of state law are satisfied." In other words, the question is whether state law permits an *ex parte* temporary child custody order pending further hearing and final disposition of the petition.

The Court's concern is well-grounded from the face of ICARA, and the question posed has been asked by several federal district court judges in identical circumstances. In *In re Application of McCullough*, 4 Supp. 2d 411(U.D. Pa. 1998) a Canadian father filed a petition for return under the Hague Convention, along with an ex parte petition for the issuance of warrant in place of a writ of habeas corpus, seeking to take the two children of the parties into custody. The facts indicated that the mother might flee the area or country with the children.

The court issued the warrant without notice, finding that the provisional measure was consistent with the spirit of the Convention:

> Accordingly, this court had to promptly determine an issue not addressed in Feder: the propriety of an ex parte request to seize children who were alleged to have been wrongfully removed from their "habitual residence." Under the ICARA, which implements the Convention, any court exercising jurisdiction of an action seeking the return of a child "may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition. 42 U.S.C. § 11604(a). At the same time, the Act prohibits a court from granting a provisional remedy pursuant to § 11604(a) which would remove a child from "a person having physical control of the child unless the applicable requirements of state law are satisfied." 42 U.S.C. § 11604(b). I find support in both Federal procedural rules, and in the substantive and procedural law of Pennsylvania, for the extraordinary emergency relief being sought by petitioner. *Id.*

4 F. Supp. 2d at 414. In finding that the provisions of state law had been satisfied, justifying the *ex parte* removal of the children from the mother, the court went on to discuss the application of the "best interests" concept in the provisional remedy setting. Recognizing that the "best interests" standard does not apply to a determination of the merits of the Convention claim, the court held, nevertheless, that the "best interest" standard is applicable to the discrete determination of whether a provisional remedy is proper.

It is for this reason that both state law and the facts of the case are relevant. If the law did not allow such *ex parte* orders, or the facts indicated no danger of flight, the order would not be appropriate. *See Tsalafoas v. Tsalafaos*, 34 F. Supp. 2d 320 (D.C. Md. 1999) (when state law does not provide for *ex parte* procedures to cause the arrest or taking into protective custody of a child, the provisions of ICARA do not confer jurisdiction to obtain such relief); *Klam v. Klam*, 797 F. Supp. 202 (E.D.N.Y. 1992) (facts were insufficient for *ex parte* relief transferring immediate custody of children, where there was no indication of likelihood of flight and both parties had extensive ties to the area and had participated in litigation there).

As one nationally-recognized expert has capsulized the question:

> Certain situations may necessitate interim remedial measures before the court can hear the Hague return case. Under 42 U.S.C. 11604, petitioner may request the court to order provisional remedies to protect the well-being of the child or to prevent the child from being abducted or concealed again before final disposition of the case.
>
> The request for provisional remedies may be made in the return petition, or in a separate pleading filed immediately prior to filing the petition for return. Examples of the kind of relief petitioner may seek pending the outcome of the Hague case include orders: prohibiting the respondent from removing the child from the jurisdiction; directing respondent to post a bond; requiring respondent to surrender passports to the court; directing law enforcement officers to remove the child from the alleged abductor before the hearing on the Hague petition, ***provided this is allowed under state law.***

Patricia M. Hoff, *Hague Child Abduction Convention Issue Briefs; Obstacles to the Recovery and Return of Parentally Abducted Children Project* (American Bar Association Center on Children and the Law, under grant from the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 1997) (emphasis added).

Accordingly, it is to the permissibility of ordering the requested "provisional remedy" (the requested pick-up order) under _____ law that we next turn.

. . . .

[Here, insert the provisions of state or local law that would justify an emergency or temporary custody order pending other proceedings.]

. . . .

The provisions of the UCCJA are not in conflict; they provide that "reasonable notice and an opportunity to be heard" must be give to any person who has physical custody of the child ***before entry of a final decree***. **[Insert local cite, or alter to refer to UCCJEA, if applicable]**. Of course, such notice will be given under our proposed order, since notice of the substantive hearing will be given at the same time as the child is placed into temporary protective custody.[72]

The warrant to obtain protective custody of the child, to be accomplished at the same time as notice of the substantive hearing, is necessary to avoid the child being further hidden or kidnaped. The pick-up order secures ***temporary*** relief – it is just to guarantee that the child is not removed from this Court's jurisdiction before a hearing can be held on the *Petition for Return of Child*.

It is respectfully suggested that no further notice is required for the warrant in lieu of a writ of habeas corpus than was required by the earlier writ practice. State law specifically permits the issuance of ex parte custody orders in a variety of situations, including this one, and a temporary placement of the child into protective custody is necessary to serve the ends set out in the Convention and in

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[72] In prior practice, a writ of habeas corpus would have been sought. Under statutes and their interpretations going back over a hundred years, no prior notice to a Respondent of a writ ***application*** is required; the statutes mainly speak to the requirements of service of the writ ***after*** it is obtained. *See* [local law regarding writs of habeas corpus].

ICARA, as well as the state law purposes of serving the child's best interest by protecting the child during the very short time during the pendency of proceedings until a noticed hearing can be held.

The Convention, and ICARA, require courts to do whatever is necessary to "secure the safe return of the child." In this case, there is a reasonable basis to believe that Respondent would flee and go into further hiding with the child to thwart the efforts of this Court to comply with the Convention, if notice in advance of a temporary protective custody order was given.

Both statutory law, and accepted practice and procedure in _____, provide for the protection of endangered children by placing them in the temporary custody of _____. That protective detention would be only for the brief time until this Court has had the opportunity to hold a noticed hearing on the Petitioner's request for the return of the child, and has made its determination.

E. Hearing on the Petition for Return

Neither the Hague Convention, nor ICARA, has any particular requirement for a formal hearing prior to issuance of an Order Directing Return of Child. In practice, however, judges are loathe to issue any such orders without convening at least one hearing on the question of whether such an order should issue.

Generally, these are law-and-motion type hearings, but judges vary considerably in their handling of the matters. Some conduct spontaneous trials at the initial hearing, allowing presentation of evidence, witness testimony, etc. Some prefer to directly question the petitioner and respondent. Some insist on setting a second hearing, and giving both sides time to prepare and present the case like a normal trial, with abbreviated time schedules. Counsel's familiarity with the preferences and peccadilloes of particular jurists is believed more important in this regard than any precedential history under Hague Convention practice.

F. Follow-Up Orders

Depending upon the factual history and context of the particular case, it might be necessary to seek and secure additional orders from the judge hearing the Hague Convention case, either to allow the hearing to proceed at all, or to allow return of the child to the country of the left-behind parent.

For example, in one case in which the left-behind parent had once entered the U.S. unlawfully, and did not have a valid passport, we had to obtain from a federal judge an order directing the Border Patrol and immigration officers to permit the petitioner entrance into the United States, and specifically to the place of the Hague Convention hearing, and safe exit from the United States, without detention, thereafter. In another case, we were required to seek an order releasing the passports of the affected children, which had been impounded by a state court judge during custody proceedings filed by one of the parents prior to the Hague Convention case.

If the court finds in the petitioner's favor, it should issue an order with findings that the child's habitual residence (prior to the wrongful removal or retention) was the place the child was located just prior to the respondent's removal or retention, that the respondent's removal or retention was ***wrongful*** in accordance with the Convention, that the removal or retention was in violation of the petitioner's custody rights, and that the child is ordered returned to the country of the left-behind parent, in order for that country to determine custody.

Additionally, the child must somehow be returned to the country in question, or to the custody of the petitioner. Occasionally, the respondent will be ordered to travel with the child back to the left-behind parent's country and deliver the child to the petitioner. More often, however, the child is removed from the respondent's custody and entrusted to the petitioner or a representative for the petitioner.

To get the child home, counsel must get the Order Directing Return of Minor Child executed and filed; we make it a universal practice to give the petitioner a certified copy, and to keep another one in the file. The person returning the child should be specified on the face of the order as permitted to leave the country with the child.[73] Most often this person will be the petitioner, but sometimes it will be a designated third party.

That only leaves questions relating to fees, which are addressed in the following section of this article.

The point is that counsel should think through the aftermath of the Hague Convention case, ensuring that there are no obstacles to the safe return of the left-behind parent, and child, to the other country, and removing the ones found to exist.

IV. Making the Bad Guys Pay – How to Make the Left-behind Parent (And Counsel) Whole

A. Applications for Fees During the Hague Proceeding

It is advisable to request fees at the onset of litigation. Our sample Petition for Return includes a summary request for attorney's fees. However, it is not uncommon for the court hearing the Hague Convention case to defer the question of fees, or to even request a separate briefing or hearing on the question of fees.

These materials therefore include points and authorities that may be of use to practitioners in either a paid case, or in a *pro bono* case. It is suggested that, in either case, counsel file a copy of a billing summary showing the actual time and effort put into the matter.

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[73] This eliminates any problems at the border or airports relating to passports, holds placed because of pending legal cases or kidnaping reports, etc.

1. Legal Authority For Use in Requesting Fees in a Paid Case

Pursuant to Article 26 of the Convention, and 42 U.S.C. § 11607, counsel for Petitioner should be granted an award of fees and costs incurred by Petitioner as a result of the wrongful removal of the child by Respondent. Authority to grant an award to Petitioner for her attorney's fees, costs, and necessary expenses is provided in both the Convention and ICARA.

The Convention's Article 26 provides, in relevant part:

> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Thus, the Convention envisions the person who wrongfully removed a child be required to bear the costs of the child's return, and provides the deciding courts (this Court) with the ability to place the burden on the Respondent.

While the Convention uses permissive language, ICARA goes a step further, making the award mandatory in the absence of express findings otherwise. Section 11607(b)(3) of ICARA ***mandates*** any court ordering the return of a child under the Convention to award fees and costs to the Petitioner:

> Any court ordering the return of a child pursuant to an action brought under section 4 ***shall*** order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

(Emphasis added.) *See also Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995). Thus, the Convention states that a court ***may*** make an award when appropriate, and ICARA ***compels*** the court to make an award to the Petitioner, unless the Respondent can demonstrate the "inappropriateness" of such an award.

The purpose behind the award is twofold: to place the parties in the condition in which they were prior to the wrongful removal (or retention), and to provide deterrence against future similar conduct by the wrongdoing party. *See* Text & Legal Analysis, 51 Fed. Reg. 10494, 10511 (1986); *Roszkowski v. Roszkowska*, 644 A.2d 1150, 1160 (N.J. Super. 1993) (provisions of ICARA relating to fees referred to as a "sanction").

The types of fees and costs that have been awarded include fees for counsel in the place from which the children were taken, the place they were taken to, and where the recovery action is heard, and travel expenses and living expenses while in the requested state, and court costs. There are no guidelines set forth in either the Convention or the ICARA as to the "appropriateness" of an award

of fees, and most courts have routinely made or authorized awards of the fees and costs actually incurred, without any substantial discussion regarding the manner in which the awards should be calculated. *See Wanninger v. Wanninger*, 850 F. Supp. 78, 83 (D. Mass 1994); *Caro v. Sher*, 687 A.2d 354, 362 (N.J. Super. 1996).

2. Legal Authority For Use in Requesting Fees in a *Pro Bono* Case

In many cases, the petitioners in Hague Convention cases are impecunious, or at least unable to raise the kinds of sums required to properly compensate counsel (sometimes in multiple countries) for the recovery of internationally-abducted children, along with the costs of participating in litigation, and transporting the children back to their countries. In circumstances where some or all of the case has been attended to by counsel *pro bono*, respondents sometimes make the claim that since payment was not made, there is no justification for a fee award to "compensate" the petitioner. In such circumstances, the following points and authorities might be useful.

We represented Petitioner as a *pro bono* client, and performed all work on her behalf since we were first contacted by the National Center for Missing and Exploited Children with no compensation of any kind. In fact, we are out of pocket for the incidental expenses related to this case.

While _____ law seems silent on the issue of whether an attorney for a pro bono litigant is permitted to seek attorney's fees, other states have explicitly visited the issue and confirmed that attorney's fees may be awarded in *pro bono* cases. *See Arnold v. Arizona Dept. of Health Services*, 775 P.2d 521 (Ariz. 1989) (upholding trial court determination that attorney's fees could be awarded to a pro bono litigant); *Benavides v. Benavides*, 526 A.2d 536 (Conn. Ct. App. 1987) (reviewing and reciting large number of cases and other authorities verifying that fees can be awarded to attorneys for *pro bono* legal services).

In *Arnold*, the court ruled:

> We agree with the trial court. The plaintiffs are entitled to attorney's fees pursuant to A.R.S. 12-348. Attorney's fees should not be limited by the fact that the plaintiffs are indigent and that their attorneys accepted the case on a pro bono basis. It would be a paradox to hold that litigants who are able to pay will have their attorney's fees reimbursed while attorneys who represent litigants unable to pay will be forced to remain unpaid. Such a result would be contrary to the legislative intent in enacting A.R.S. 12-348.

The same considerations, and logic, apply in _____; the Court may in its discretion award fees in *pro bono* cases. We think such an award is merited, and leave to the Court's discretion the sum that should be awarded for attorney's fees in this case. The actual value of the services rendered is reflected on the billing summary attached to this submission.

B. Independent Suit for Tort Damages After the Hague Proceeding

Discovery conducted in some Hague Convention cases reveals a number of actionable tort claims against the kidnaper, going to the kidnap itself (and any torts committed during its accomplishment, such as assault), the resulting deprivation of companionship of a child, infliction of emotional distress, etc. In the experience of the author, circumstances amounting to independently compensable wrongs are the exception, but a simple fee award in a kidnap may fall far short of actually compensating the left-behind parent for all of the economic and other damages suffered, even when such an award can actually be collected.

If the kidnaper misused court processes in the preparation for or commission of the kidnap, counts for abuse of process and fraud upon the court are possible.

Where the kidnaper did not act alone, but had accomplices, there may also be facts justifying suit against all of them for general civil conspiracy, and even violation of state or federal RICO laws. If any of the wrongful actors were lawyers, who went beyond the role of simply representing a bad person, to the point of actively lying to a court, or facilitating a kidnap, or participating in the conspiracy to commit it, then allegations of negligence and ethical violations resulting in harm to third parties can be added, naming the attorneys, as well.[74]

If the actions of any or all of the participants in the kidnaping were sufficiently outrageous, then additional claims seeking not just compensatory, but punitive and special damages, should also be brought.

Attached to these materials as Appendix 2 is a sample complaint containing causes of action for all of these allegations (altered from an actual filing). As with all such matters, the facts of the case drive the claims that might appropriately be brought, but it is hoped that the sample complaint may be of use to practitioners trying to construct independent tort claims against kidnapers and their accomplices. Below is a discussion of a few of the considerations that might appropriately be thought through before such an action is filed.

1. Is There a Pocket?

While the facts are as varied as the number of cases, it has been our experience that many international abductors are truly miserable people, who rationalize their misbehavior by recourse to arrogant belief in personal, or even divinely-inspired, authority to defy rules, courts, orders, and borders because they "just know" that they are right and everyone else is wrong. In that respect, the filing of a tort suit against the kidnaper might be the first time in the parties' relationship that the aggressor is on the defensive, and a traditional victim in a relationship is empowered.

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[74] There is authority for the proposition that an attorney found to have counseled a parent to remove a child without a valid legal right to do so is liable for assisting in the abduction. *See McEvoy v. Helikson,*, 562 P.2d 540 (Or. 1977).

On the other hand, Steve Dallas, a lawyer character from the comic strip "Bloom County," was once depicted as stating: "Never, never, ***never*** sue poor people!" While this over-dramatizes the question, the sobering reality is that mounting a tort case against a number of defendants, often located in several states (or countries), is an extraordinarily complex, and expensive process.[75] Without some good faith belief that someone in the reasonable chain of liability might actually be able to be compelled to pay a resulting judgment, counsel should hesitate before filing such an action, even when evidence of liability seems clear.

The ability of an abductor to travel internationally – and to seize a child in doing so – implies a command of at least some resources, but our experience is that a sizeable number of abductors are, to a substantial degree, "judgment proof." Even those who are not tend to be reasonably versed in the vagaries of international travel, and currency conversion and disguise, so that enforcing judgments against them is extraordinarily difficult.

2. Where to File

Again, the vagaries of the facts presented (and the realities concerning local courts) will drive the determination, but international child abduction cases are likely, by their nature, to give rise to both diversity of jurisdiction and to satisfy amount-in-controversy limitations. Counsel should give serious consideration to filing in federal court.

3. Litigation

The litigation of such a tort suit can be very far-ranging, bringing up a wide variety of procedural and evidentiary issues not often seen by domestic relations counsel. Again, the issues presented are as varied as the cases giving rise to them.

One recurrent question, however, is the preclusive effect, if any, of the various custodial and other orders entered by courts, often in different countries, and the factual findings embodied in those decisions. For example, what would a court hearing a tort suit do with custody orders from two countries, each of which found that the parent in the other country had acted wrongfully?

Even on economic issues, it is virtually a given that the full range of damages to a left-behind parent, and to the child, is not known at the time of the child's recovery and return. Especially as to health effects, post-traumatic stress, and other fall-out from the experience, the left-behind parent and the child might not even have ***suffered*** the worst of their damages at the moment the child is returned.

What, then, should be the issue-preclusion accorded to the attorney's fee award (if any) in the underlying action for return of the child, in the later tort suit? Theoretically, at least, all costs incurred could have been recovered in that action, and attorney's fees are frequently a large

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[75] In one such matter, our out-of-pocket costs for an impecunious client greatly exceeded $10,000.00, and the billable value of time expended, ***before trial***, was greatly in excess of ten times that sum.

component of the damage claim asserted. Can the amount reduced to judgment by the court hearing the Hague Convention suit be used to limit the damages sought by the petitioner? Must the petitioner re-assert and re-prove all components to whatever award ***was*** made in the Hague Convention case?

There is very little published precedent on these or other practical questions encountered in the litigation of tort suits against international abductors, which suits are, themselves, exceedingly rare.

V. Conclusion

If the facts establish that the State from which the child was removed or retained was the child's habitual residence, that the left-behind parent had a right of custody under the law of that State, and that the alleged abducting parent's continuing retention of the child violated those rights, the child's return can be requested under the Hague Convention, in order to re-establish the "*status quo ante*," and put the parties back into the state of affairs prior to the time of the wrongful retention.

Actual litigation of these cases requires satisfaction of assorted jurisdictional grounds, and then the resolution of a small number of substantive issues, which may look like, but are not to be confused with, questions relating to custody of the child.

The documents that have to be filed are relatively straightforward, and the Hague Convention and ICARA eliminate many of the technicalities regarding authentication, etc., that might otherwise be asserted. The statutory framework is intended to allow as fast a resolution of the issues involved as possible, although anecdotal experience and the published cases make it clear that such a case still can take from a matter of days, to several years, to complete.

The statute allows recovery of all fees and costs incurred as a result of an international abduction. Further, in an appropriate case, the kidnaper – and perhaps accomplices – can be made subject to an independent suit in tort, although actual collection and enforcement of either fee awards or tort damages remain difficult and uncertain.

Generally, the Hague Convention provides an excellent framework for the prompt recovery and return of internationally-abducted children. It is necessary, however, for practitioners to learn the details, tools, and limitations peculiar to the statutory and case law governing this subject to best serve the interests of the parents – and the children – involved.