



**Digital Commons@**  
Loyola Marymount University  
LMU Loyola Law School

## Loyola of Los Angeles International and Comparative Law Review

---

Volume 10 | Number 1

Article 5

---

1-1-1988

### The Hague Convention on International Child Abduction: A Practical Application

Barbara Ullman Schwerin

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Barbara Ullman Schwerin, *The Hague Convention on International Child Abduction: A Practical Application*, 10 Loy. L.A. Int'l & Comp. L. Rev. 163 (1988).

Available at: <https://digitalcommons.lmu.edu/ilr/vol10/iss1/5>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# The Hague Convention on International Child Abduction: A Practical Application

## I. INTRODUCTION

The abduction of children to foreign countries by non-custodial parents is a problem of increasing concern in many countries. As of May 1, 1986, the United States State Department had 2,184 reported cases of child abduction.<sup>1</sup> There were an additional 169 cases reported by December 31, 1986.<sup>2</sup> The number of United States citizens seeking the return of abducted children abroad increased by approximately forty cases per month in the three year period from 1983 to 1986.<sup>3</sup> These figures are especially significant when one considers that this number has shown a consistent increase over the last few years.

One of the reasons international child abduction has become more serious is the escalating divorce rate in the United States and other Western countries.<sup>4</sup> The United States alone had 1,182,000 divorces in 1980.<sup>5</sup> This was a substantial increase from the number of United States divorces in 1975. A second reason for an increase in international child abduction has been the relative ease with which people can now engage in foreign travel.<sup>6</sup> These two factors have

---

1. *Hague Convention on the Civil Aspects of International Child Abduction Before the Senate Foreign Relations Comm.* at 7 (June 11, 1986) (written statement of Mary Mochary, Deputy Legal Adviser) [hereinafter Mochary]. "As of May 1, 1983 the Department of State had been informed of 677 cases of allegedly wrongfully removed or retained children normally resident in the United States." *Id.*

2. Letter from J. Edward Fox, Assistant Secretary, Legislative and Intergovernmental Affairs to George Bush, President, United States Senate (undated) [hereinafter "Letter"].

3. Mochary, *supra* note 1, at 7.

4. 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).

5. Comment, *American and International Responses to International Child Abductions*, 16 N.Y.U. INT'L L. & POL. 415, 416 n.4 (1984). Statistics from the Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1982-83 at 60 (103d ed. 1983), show that in 1970 the United States divorce rate was 708,000. That rate had risen to 1,036,000 in 1975 and in 1980 had reached 1,182,000. *Id.*

6. See Comment, *supra* note 5, at 416. Statistics from the Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1982-83 at 4 (103d ed. 1983), show that during the period from 1975 to 1980, 45.1% of the United States population moved at least once within the United States and 1.9% of the United States population in 1980 had moved to the United States from a foreign country. *Id.*

been major influences on the increase in the number of international child abductions seen in recent years.

"Child snatching"<sup>7</sup> occurs when a child has been removed or retained in breach of a parent's custody rights.<sup>8</sup> The breaching parent can either remove the child from the child's habitual residence and take the child to a second jurisdiction, or retain the child in the second jurisdiction after an authorized visitation period.<sup>9</sup>

In either event, the psychological effect on the child can be devastating. In addition to the trauma suffered from the divorce itself, the child now has the additional difficulty of being subjected to an international abduction. A child's strong need for stability and security is disrupted, often leaving the child with emotional problems.<sup>10</sup>

This Comment will first discuss the United States' responses to interstate abduction through legislation enacted at the state and federal levels. Second, this Comment will address the responses from the international community: the Council of Europe's Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Strasbourg Convention)<sup>11</sup> and the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention).<sup>12</sup> This Comment will also look at proposed federal legislation in the United States and examine how this legislation would facilitate implementation of the Hague Convention in the United States. Finally, this Comment will consider a practical application of the Hague Convention and its interaction with existing United States law.

## II. THE AMERICAN RESPONSE

### A. *The Historical Background Leading to the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Act.*

The United States' initial response to the problem of child abduc-

---

7. See generally, S. KATZ, CHILD SNATCHING (1981) [hereinafter KATZ].

8. *Id.* at 90.

9. See Comment, *supra* note 5, at 415.

10. *Hague Convention on the Civil Aspects of International Child Abduction Before the Senate Foreign Relations Comm.*, at 9 (June 11, 1986) (statement of Arthur W. Rovine, Chairman, Section of International Law and Practice, American Bar Association) [hereinafter Rovine].

11. *Reprinted in EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING CUSTODY OF CHILDREN AND ON RESTORATION OF CUSTODY OF CHILDREN* 23-36 (1980) [hereinafter Strasbourg Convention].

12. *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, I.L.M. 1506 [hereinafter Hague Convention] *reprinted in* 51 Fed. Reg. 58, 10498 (1986).

tions has been to enact legislation to handle interstate abductions. The Uniform Child Custody and Jurisdiction Act (UCCJA)<sup>13</sup> and Parental Kidnapping Prevention Act (PKPA)<sup>14</sup> were enacted in response to the lack of uniform enforcement of custody decrees from one state to another. The UCCJA has been adopted by all fifty states while the PKPA was enacted at the federal level.

Prior to enactment of the UCCJA, a custodial parent could receive a custody decree in one state. However, that decree did not prevent the non-custodial parent from then abducting the child to another state and relitigating the custody issue in that forum. Under the Restatement (Second) of Conflict of Laws section 79,<sup>15</sup> a state court had the power to assert jurisdiction over custody disputes on several grounds. These grounds were the physical presence of the child in the new forum, the domicile of the child, or personal jurisdiction over both parents.<sup>16</sup>

In addition, "it was unclear whether a custody decree made in one state was entitled to recognition and enforcement in other states."<sup>17</sup> Since custody decrees are modifiable based on changed circumstances,<sup>18</sup> it was relatively easy for a judge to find that changed circumstances made it appropriate to modify the decree from a sister state. Therefore, there was considerable uncertainty whether a custody decree granted in one state would be upheld in a sister state, leading to confusion in this area of the law.

A primary concern in awarding custody is stability for the child.<sup>19</sup> This could lead to the ironic situation where the non-custodial abducting parent is in a better situation after the abduction than the custodial parent with the custody decree. This occurs if the abducting parent has retained custody for any length of time. The judge would look to maintain the stability of the child, and this could be shown by prolonged physical custody.<sup>20</sup> Therefore, the abducting parent was rewarded for his actions.

---

13. UNIFORM CHILD CUSTODY JURISDICTION ACT AND COMMISSIONERS' PREFATORY NOTE, 9 U.L.A. 111 (1979) [hereinafter UCCJA].

14. Parental Kidnapping Prevention Act, 42 U.S.C. §§ 653-64 (1982 & Supp. III 1985), 18 U.S.C. § 1073 (1982), 28 U.S.C. § 1738A (1982) [hereinafter PKPA].

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

16. *Id.*

17. See Comment, *supra* note 5, at 419, citing S. KATZ, CHILD SNATCHING (1981).

18. See KATZ, *supra* note 7, at 56.

19. See UCCJA, *supra* note 13, Commissioner's Prefatory Note at 112.

20. *Id.* at 113.

In *May v. Anderson*,<sup>21</sup> the Supreme Court in a plurality decision held that an Ohio court did not need to give full faith and credit to a Wisconsin custody decree. In that case, the father obtained the decree in an *ex parte* action in Wisconsin where the Wisconsin court had no personal jurisdiction over the mother. The Court declined to answer the question of when full faith and credit would or should be given to a sister state's custody decree.<sup>22</sup> This decision had the result of encouraging parents to use a self-help remedy.<sup>23</sup> In later cases, the Court further limited granting full faith and credit to a custody decree by holding that for a custody decree to receive full faith and credit in a second state: (1) the first state had to be able to properly assert jurisdiction and, (2) there could be no change in circumstances after the decree that would warrant a change in custody.<sup>24</sup>

Some states then turned to the legal principal of comity to resolve some of the resulting inconsistencies. Many of the states "have used comity as their primary means of avoiding interstate disputes and legal inconsistencies in child custody decrees."<sup>25</sup> However, prior to a state's enactment of the UCCJA, the decision of whether or not to apply comity was in the trial judge's discretion.<sup>26</sup>

A similar difficulty existed in the recognition of decrees from foreign sovereigns. Under the Restatement (Second) of Conflict of Laws, a court "should be free to disregard a decree when this is required by the best interests of the child."<sup>27</sup> In *Hilton v. Guyot*,<sup>28</sup> the Supreme

---

21. 345 U.S. 528 (1953).

22. See Comment, *supra* note 5, at 420. See also Comment, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L L. 669, 673-77 (1980).

The Full Faith and Credit Clause of the U.S. Constitution mandates enforcement of the valid judicial determinations of one state by other states. This constitutional doctrine, however, has never been deemed to apply to custody decrees. The U.S. Supreme Court repeatedly has excluded child custody decrees from the ambit of the full faith and credit mandate . . . . The basic rationale for exempting child custody decrees from full faith and credit is that such decrees are never final judgments because they can be modified at any time, based on either changed circumstances or the best interests of the child.

*Id.*

23. Comment, *supra* note 5, at 420.

24. See KATZ, *supra* note 7, at 56. See also, *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); *Kovacs v. Brewer*, 356 U.S. 604 (1957). The Court stated "that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." *Halvey*, 330 U.S. at 615. In *Kovacs*, the Court stated that "a custody decree is not *res judicata* in [the new state] if changed circumstances call for a different arrangement to protect the child's health and welfare." *Kovacs*, 356 U.S. at 608.

25. See KATZ, *supra* note 7, at 69.

26. *Id.*

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 comment b (1971). Section

Court used that comity to recognize a foreign judgment where the foreign jurisdiction provided an opportunity for a full and fair trial with no prejudice or fraud. In those instances, the case should not be retried in the United States courts.

However, in reality, the United States courts tended to relitigate foreign custody decrees.<sup>29</sup> If a foreign parent attempted to enforce a prior foreign decree against the abducting parent in the United States, the foreign parent generally had to relitigate the entire custody suit on its merits.<sup>30</sup> Also, the United States courts were reluctant to enforce foreign decrees decided on principles different from the "best interests of the child" standard adhered to in most United States jurisdictions.<sup>31</sup> In those instances, the court would want to relitigate based on the United States standard. Furthermore, this need to relitigate applied to cases where a United States child was abducted to a foreign

---

79, comment b, reiterates the rationale that decrees remain subject to modification because of changed circumstances.

28. 59 U.S. 113 (1895).

29. In *State ex rel. Domico v. Domico*, 153 W. Va. 695, 172 S.E.2d 805 (1970), the court refused to enforce a West German decree awarding custody of the children to the mother after the father took the children to the United States. The father had notice of the hearings. The West Virginia court decided to relitigate, putting the West German mother, in the ironic position of having to show "changed circumstances" to regain custody of her children. The end result was that the father received custody of the children.

In *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431 (D.C. 1972), a Polish father moved to the United States and kept his son when he came for a visit. A Polish court awarded custody to the mother. The District of Columbia court then granted the father a divorce and custody. On appeal, the court held that the Polish decree was not controlling because the Polish court did not have *in personam* jurisdiction over both parties (custody granted in *ex parte* proceeding). Therefore, the standards of the Polish court did not meet the jurisdictional standards of the District of Columbia court.

In *Baranshamaje v. Baranshamaje*, 7 Fam. L. Rep. (BNA) 2134 (D.C. Super. Ct. Nov. 26, 1980), the District of Columbia exercised its jurisdiction in relitigating a foreign custody decree after claiming to have *in personam* jurisdiction over both parties. While the parents were citizens of Burundi and had married there, they had spent their marriage domiciled in Virginia. However, a foreign court had already made a custody determination. In addition, the child was not physically present in the District of Columbia's jurisdiction and was in fact living in Burundi. Therefore, in this case, the court should have declined to accept jurisdiction. This case illustrates the difficulty parents have had in having a foreign custody decree enforced in the United States.

A minority of United States jurisdictions have chosen to enforce a foreign nation's custody decree. In the case of *In re Lang*, 9 A.D.2d 401, 193 N.Y.S.2d 763 (1959), the court enforced a Swiss decree where the father had been awarded custody of the children in Switzerland. The mother abducted the children to the United States. The court held that the principle of comity provided a more rational way to determine custody.

30. See Comment, *supra* note 5, at 422.

31. *Id.* at 423.

country.<sup>32</sup>

As the foregoing discussion indicates, a parent whose child was abducted to a foreign country from the United States, or to the United States from a foreign country, would be in the position of relitigating in the country where the child was now present. The parent might face less sympathetic courts, a possible language barrier and the additional expenses of traveling to a foreign forum and hiring local counsel. In addition, the abducting parent could establish that the child had been physically present in the new forum for a certain period of time. Since an important factor for the child is stability, this physical presence alone could satisfy the criteria for a "change in circumstances."

The end result was that the abducting parent had a strong motivation to take a child and "forum shop" for a more sympathetic forum. The victimized parent would then have the burden of showing that the child should be returned pursuant to a custody decree from a sister state or a foreign nation. The various legislatures have responded to this dilemma at the state, national and international level, and an attempt has been made to provide uniformity and stability in the law on which parents can rely.

### 1. The Uniform Child Custody Jurisdiction Act

The National Conference of Commissioners on Uniform State Laws approved the UCCJA in 1968.<sup>33</sup> All fifty states have enacted the UCCJA, along with the District of Columbia and the Virgin Islands.<sup>34</sup>

The UCCJA was designed to eliminate the advantages that abducting parents received by resorting to self-help.

Physical presence of the child in the jurisdiction opens the doors of many courts to the petitioners and often assures him or her of a decision in his or her favor. It is not surprising then that custody claimants tend to take the law into their own hands. They resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child.<sup>35</sup>

Another goal of the UCCJA was to provide greater certainty in

---

32. *Id.*

33. See UCCJA, *supra* note 13, at 111.

34. See Comment, *supra* note 5, at 429.

35. See UCCJA, *supra* note 13, at 113.

child custody awards.<sup>36</sup> Section 1 provides that the purposes of the UCCJA are (1) to avoid jurisdictional conflicts between courts of different states and (2) to promote cooperation so that a custody decree is rendered in the state which can best make a decision in the best interests of the child.<sup>37</sup> Other purposes include deterring abductions, avoiding relitigation and facilitating the enforcement of custody decrees from other states.<sup>38</sup>

Jurisdiction is predicated on a "home state" basis.<sup>39</sup> The first court has jurisdiction to render a custody determination if the state is the home state, or if the state has a significant connection with the child. Additionally, a court may exercise jurisdiction if there is an emergency, or if no other state appears to have jurisdiction.<sup>40</sup> Only an emergency situation or the probability that no other state has jurisdiction permits the state to assert jurisdiction based solely on the child's physical presence in the state, or on the physical presence of the child and one of the contestants.<sup>41</sup> Moreover, the physical presence of the child in the state, while desirable, is not a prerequisite for the court to make a custody determination.<sup>42</sup> This allows a victimized parent to bring suit in the home state even if the child is no longer there.

Under sections 4 and 5 of the UCCJA notice must be given to the contestants.<sup>43</sup> Notice of the action to a contestant outside the state may be by personal service, by mail, or as ordered by the court.<sup>44</sup>

Section 6 disallows concurrent proceedings. The second state shall not exercise its jurisdiction if there is a pending proceeding in the first state, unless the first state issues a stay because the second state is the more appropriate forum.<sup>45</sup> Additionally, a court has the duty to consult the child custody registry, established under section 16, to determine if there are pending hearings in another state.<sup>46</sup> "Courts are expected to take an active part . . . in seeking out information about custody proceedings concerning the same child pending

---

36. *Id.*

37. *Id.* §§ 1(a)(1), (2).

38. *Id.* §§ 1(a)(5)-(7).

39. *See infra* note 126, PKPA definition of home state. The UCCJA and the PKPA use the identical definition for home state.

40. *See UCCJA, supra* note 13, § 3(a)(1)-(4).

41. *Id.* § 3(b).

42. *Id.* § 3(c).

43. *Id.* §§ 4-5.

44. *Id.* § 4.

45. *Id.* § 6(a).

46. *Id.* § 6(b).



in other states. In a proper case, jurisdiction is yielded to the other state either under this section or under section 7. Both sections must be read together."<sup>47</sup>

In addition, a court may decline to exercise its proper jurisdiction if it determines that another court is the more appropriate forum.<sup>48</sup> The court may look at factors such as whether another state was recently the child's home state, has a closer connection with the child, his family or the contestants, if substantial evidence concerning the child is more available in another state, and, generally, if the exercise of jurisdiction would go against the purposes of the UCCJA.<sup>49</sup> Section 7 follows the terminology used in the Restatement (Second) of Conflict of Laws section 84,<sup>50</sup> and is designed, like section 6, to promote judicial communication and cooperation.<sup>51</sup>

The "clean hands" principle is extended to cases where a custody decree has not yet been issued under section 8(a).<sup>52</sup> Under this section, the court may decline to exercise its jurisdiction for an initial decree if the petitioner has wrongfully taken the child from another state.<sup>53</sup> Additionally, a second court shall not exercise its jurisdiction to modify a custody decree if the petitioner has wrongfully removed the child from another state or improperly retained the child.<sup>54</sup> If the petitioner has violated any other provision of a custody decree, the court may decline to exercise jurisdiction.<sup>55</sup>

Section 12 provides that a custody decree rendered by a court which had jurisdiction under section 3 is binding on all parties who had service or notice:<sup>56</sup> "[s]ince a custody decree is normally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment."<sup>57</sup>

Section 13 provides that custody decrees of sister states will be

---

47. *Id.* at Commissioner's Note to UCCJA § 6 at 134-35.

48. *See* UCCJA, *supra* note 13, § 7(a).

49. *Id.* § 7(c).

50. *Id.* at Commissioner's Note to UCCJA § 7 at 139.

51. *Id.*

52. *See* UCCJA, *supra* note 13, § 8(a).

53. *Id.*

54. *Id.* § 8(b).

55. *Id.* For example, this can occur if the custodial parent removes the child from the state to frustrate the non-custodial parent's visitation rights. *See* Commissioner's Notes to § 8 at 143.

56. *Id.* § 12.

57. *Id.* at Commissioner's Note to § 12 at 150.

recognized and enforced.<sup>58</sup> Section 14 only allows a subsequent state to modify a custody decree from a prior state if it appears that the first state no longer has jurisdiction under the UCCJA, or has declined to exercise jurisdiction.<sup>59</sup> If a state has jurisdiction to modify, it must give consideration to records of the prior proceedings.<sup>60</sup> Section 14(a) mandates that a court must give recognition to a previous court's ongoing jurisdiction.<sup>61</sup> Under section 15, a certified copy of the custody decree from the first state may be filed in another state, and it will be treated as if it had been rendered by that state.<sup>62</sup>

Pursuant to section 22, a subsequent state is required to take a more active role in its exercise of jurisdiction.<sup>63</sup> The court shall request the transcripts of court records and documents from the previous state in order to use as much prior evidence as is available in a subsequent custody modification.<sup>64</sup>

Section 23 extends the UCCJA to the international arena. If reasonable notice and an opportunity to be heard is given to the affected parties, the UCCJA will apply to "custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations . . . ."<sup>65</sup> This section is an application of the *Lang* case,<sup>66</sup> where a minority of jurisdictions have enforced foreign custody decrees.

Further, section 23 provides that when a child is brought into a state:

the UCCJA may serve as the basis for enforcing a foreign court order. However, when children are removed from the United States, it is less likely that a state order from an American court will be recognized and enforced abroad. Attorneys are left to discover the laws and procedures applicable to the recognition and enforcement of foreign custody orders in effect in the foreign nation and to proceed accordingly.<sup>67</sup>

Several United States state and federal courts have had the opportu-

---

58. *Id.* § 13.

59. *Id.* § 14(a).

60. *Id.* § 14(b).

61. *Id.* § 14(a).

62. *Id.* § 15(a).

63. *Id.* § 22.

64. *Id.*

65. *Id.* § 23.

66. See *supra* note 29.

67. P. HOFF, INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES 13 (1981).

nity to construe the international provision of the UCCJA.<sup>68</sup> As the following cases indicate, the general response has been to uphold a custody decree issued by a foreign nation.

In *Taylor v. Taylor*,<sup>69</sup> a Pennsylvania Superior Court held that a child custody decree from a court in Ontario, Canada was valid and entitled to recognition and enforcement under the international provision of the UCCJA. The parents were both Canadian citizens, married in Canada, and the children were born in the United States. The mother initiated divorce and custody proceedings in Ontario, Canada and the father, who lived in Canada at the time, was personally served, appeared and defended the action. The mother received a temporary custody order in 1975 and a final decree in March of 1977. During this period, the parents physically moved the children between the United States and Canada. When the mother received the final custody decree in 1977, the children were living with the father in Pennsylvania. The mother began an action in the Pennsylvania courts, where her Ontario court decree was held to be entitled to recognition and enforcement. The children were then returned to their mother in July of 1978.<sup>70</sup> In August of 1978, the father filed for custody of the children on the grounds that changed circumstances had occurred in the year following the entry of the Pennsylvania order.<sup>71</sup>

The *Taylor* court cited a case that the Pennsylvania Supreme Court had decided a few months earlier, *Commonwealth ex rel. Zaubi v. Zaubi*.<sup>72</sup> In *Zaubi*, the court held that:

[t]he UCCJA compels that Pennsylvania courts not only recognize proper custody decrees from foreign nations, as the lower court admits, but also that they decline to accept jurisdiction to modify custody decrees in the absence of the showing of conditions in the custodial household that are physically or emotionally harmful to the children. Where, as here, the only changed condition is that the children have been abducted from the jurisdiction issuing a valid custody decree, the UCCJA clearly intends that our courts enforce the foreign decree.<sup>73</sup>

In an instance where an abducting parent takes a child from a forum that issues a valid custody decree, under the international provisions

---

68. See UCCJA, *supra* note 13, § 23.

69. *Taylor v. Taylor*, 278 Pa. Super. 339, 420 A.2d 570 (1980).

70. *Id.* at 341, 420 A.2d at 571.

71. *Id.*

72. 492 Pa. 183, 423 A.2d 333 (1980).

73. *Taylor*, 278 Pa. Super. at 341, 420 A.2d at 571.

of the UCCJA, that parent will have a heavy burden to prove that "the court issuing the original decree was not acting in the child's best interest."<sup>74</sup> Therefore, in this case, Pennsylvania was an inconvenient forum. The Court of Ontario had jurisdiction and its custody decree was *res judicata* and had binding force in Pennsylvania.

A similar result occurred in the previously quoted case of *Commonwealth ex rel. Zaubi v. Zaubi*.<sup>75</sup> In that case, the mother, a Danish citizen, was granted custody of her children in Denmark on June 16, 1977. The father was present at all times and was represented by counsel. The father filed a final appeal in Denmark which was to be heard on November 17, 1977. While the father had visitation rights in August of 1977, he abducted the children to the United States. The father concealed the children's whereabouts until May of 1978.

At that time, the mother filed suit in the Court of Common Pleas of Greene County, Pennsylvania to obtain enforcement of the Danish custody decree.<sup>76</sup> The father again fled with the children, returning only after a contempt citation was issued against his parents.<sup>77</sup> The Court of Common Pleas held that the father had shown sufficient changed circumstances to require a change of custody.<sup>78</sup> However, the Superior Court held that the Court of Common Pleas had erred in refusing to defer to the Danish courts, where the factual issues had been previously litigated and resolved against the father.<sup>79</sup> This holding was affirmed by the Supreme Court of Pennsylvania.<sup>80</sup>

The court stated that a prime purpose of the UCCJA was to deter "abductions and other unilateral removals of children undertaken to obtain custody awards."<sup>81</sup> As codified in Pennsylvania,<sup>82</sup> the UCCJA provides that, as a general rule, a court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner has wrongfully removed or improperly retained a child after a visit.<sup>83</sup> However, the court may exercise jurisdiction if it is in the best interests of the child. To avail himself of this section, a petitioner would have to show that conditions in the custodial household were

---

74. *Id.*

75. *Zaubi*, 492 Pa. 183, 423 A.2d 333 (1980).

76. *Id.*

77. *Id.*

78. *Id.* at 188, 423 A.2d at 336.

79. *Id.* at 188-89, 423 A.2d at 336.

80. *Id.* at 189, 423 A.2d at 337.

81. *Id.* at 187, 423 A.2d at 335.

82. 42 PA. CONS. STAT. ANN. § 5349(b) (Purdon 1981).

83. *Zaubi*, 492 Pa. at 187, 423 A.2d at 335.

physically or emotionally harmful to the child.<sup>84</sup> The Supreme Court of Pennsylvania held that the father had not met this burden.<sup>85</sup>

In a dissenting opinion, Justice Nix relied on pre-UCCJA cases which limited the full faith and credit clause in child custody matters.<sup>86</sup> In a concurring opinion, Justice Larsen reiterated that the majority opinion recognized the legislative judgment that "greater finality in custody decrees *is in the best interest of the child.*"<sup>87</sup>

The Third District Court of Appeals of Florida has had two occasions to construe the international provisions of the UCCJA.<sup>88</sup> In *Brown v. Tan*, the minor child was a resident and citizen of the Republic of Singapore, where he had continuously resided with his father from birth. The child's mother had left Singapore in 1974, and the father had retained custody of the child in Singapore. The mother received a final judgment for dissolution of the marriage in Florida. In December of 1980, the mother and her new father wrongfully retained the child while he was visiting them in Florida.<sup>89</sup>

The court held that there was no reason to exercise its emergency jurisdiction as there was simply no evidence of abuse or neglect by the father.<sup>90</sup> There was also no showing that a Singapore court lacked or had declined to exercise its jurisdiction.<sup>91</sup> In addition, the mother produced no proof that a change in the living arrangements would be in the best interests of the child.<sup>92</sup>

Moreover, no "significant connection" existed with Florida, because "physical presence in the state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination."<sup>93</sup> Furthermore, the court held that they may decline jurisdiction by reason of the parent's wrongful conduct.<sup>94</sup> The final result was that the trial court was without jurisdiction to determine the child's custody, and by a writ of habeas corpus, ordered the child returned to the father to

---

84. *Id.* at 188, 423 A.2d at 336.

85. *Id.*

86. *Id.* at 204-05, 423 A.2d at 344-45.

87. *Id.* at 191, 423 A.2d at 337 (emphasis in the original).

88. *Brown v. Tan*, 395 So. 2d 1249 (3d Dist. 1981) and *Al-Fassi v. Al-Fassi*, 433 So. 2d 664 (3d Dist. 1983).

89. *Brown*, 395 So. 2d at 1251.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1252.

94. *Id.*

restore the status quo.<sup>95</sup>

A contrary result occurred in *Al-Fassi v. Al-Fassi*,<sup>96</sup> where a Florida court held that they were not required to recognize a Bahamian custody decree. The court also held that they had the jurisdiction to modify that decree.<sup>97</sup> On February 24, 1982, the mother received a temporary custody order in California. One day later, the father took the children to the Bahamas. On March 1, 1982, the Supreme Court of the Commonwealth heard the mother's petition for enforcement of the California decree.<sup>98</sup> The court awarded custody to the father on the grounds that the mother had misled the California court on the issue of whether California was the home of the parties.<sup>99</sup> Additionally, the court held that the "natural surroundings of these minors is [sic] at the Royal Palace at Jeddah, or in an enclave when outside of Saudi Arabia."<sup>100</sup>

The father left the Bahamas for Florida almost immediately after the Bahamian decree was entered, and he never returned.<sup>101</sup> Subsequently, the California courts declined to exercise jurisdiction because Florida would be a more convenient forum.<sup>102</sup> The mother then filed in Dade County, Florida for an amended petition to set aside or modify the Bahamian decree.<sup>103</sup> The trial court upheld the Bahamian decree.

In reversing the trial court, the Court of Appeal relied on several factors. Under Florida law, the UCCJA does not require that a foreign nation custody decree be recognized.<sup>104</sup> However, if reasonable notice and an opportunity to be heard have been given by the foreign tribunal, the provisions of the UCCJA can be applied to a foreign nation's decree.<sup>105</sup>

The Bahamian court's inquiry did not provide that "reasonable notice and an opportunity to be heard" be given since the father and children never appeared in court.<sup>106</sup> Though the mother appeared,

---

95. *Id.*

96. *Al-Fassi v. Al-Fassi*, 433 So. 2d 664 (3d Dist. 1983).

97. *Id.* at 668.

98. *Id.* at 665.

99. *Id.*

100. *Id.*

101. *Id.* at 666.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

she was never examined. Since the only pleading before the court was the mother's petition for enforcement of the California temporary order, no full hearing took place. Therefore, the court held that there was no reasonable notice or opportunity to be heard.<sup>107</sup>

In addition, the Bahamian court rested its jurisdiction solely on the children's physical presence in the Bahamas; the physical presence was temporary, and solely for the purpose of obtaining a favorable custody ruling.<sup>108</sup> There was no showing of any of the exceptions allowing a court to exercise its jurisdiction, such as abuse of the child, no other state having jurisdiction, or another state declining to exercise its jurisdiction.<sup>109</sup>

The court held that, under Florida law, a court cannot exercise its jurisdiction to modify a custody decree if the non-custodial parent has improperly removed the child from the custodial parent unless it is in the best interests of the child.<sup>110</sup> Therefore, the court could not exercise jurisdiction because the children were wrongfully removed under a valid California temporary custody order. Finally, the court found that "the principles of comity do not require recognition since the decree is offensive to a public policy of our state, *i.e.*, that a custody decision be based upon the best interests and welfare of the minor children."<sup>111</sup>

In the end, however, the court declined to resolve the issue on the challenge to the Florida court order which recognized the Bahamian judgment. Instead, the court resolved the issue on the ground that even if the Bahamian decree was entitled to recognition, the Florida court had jurisdiction to modify the decree because the Bahamian court had no jurisdiction over the parties or subject matter pursuant to the UCCJA standard.<sup>112</sup> Therefore, the Florida court was able to properly exercise its jurisdiction.

Virginia has subsequently construed two international child custody disputes. In *Middleton v. Middleton*,<sup>113</sup> the parents were married in England and moved to Virginia where the children were born. In 1974, the mother returned to England with the children and, in 1977, the father was granted a divorce. Custody was granted to the mother

---

107. *Id.*

108. *Id.* at 667.

109. *Id.*

110. *Id.*

111. *Id.* at 668.

112. *Id.*

113. 314 S.E.2d 362 (1984).

in England, subject to reasonable visitation by the father. In 1981, the father, while exercising his visitation rights, instituted change of custody proceedings unbeknownst to the mother. After the mother received notice, she came to Virginia and took the children back to England.

The Supreme Court of Virginia held that it was proper for the trial court to decline to exercise jurisdiction, using the best interests of the child standard, and found that England was the children's home state.<sup>114</sup> The court also held that "we are not reluctant to endorse an international deferral to the courts of England because 'Virginia's jurisprudence is deeply rooted in the ancient precedents, procedures, and practices of the English system of justice.'"<sup>115</sup>

In *Middleton v. Middleton*,<sup>116</sup> the court concurrently decided a second international case. The Lyon couple married in Virginia. The mother, an English citizen, later took the child to England without the father's knowledge. The mother received interim care and custody of the child in England. The father filed in Virginia for the return of the child, but the court, on August 30, granted comity to the English order. The trial court entered the order on September 23. On December 20, the English High Court granted the mother custody.<sup>117</sup>

The Supreme Court of Virginia held that Virginia had been the home state of the minor child. The court held that if the trial court had exercised its jurisdiction on September 23, the English court might have deferred to the Virginia court and not adjudicated the custody issue in March. The court reversed the September 23 order denying jurisdiction, instructing the trial court upon remand to exercise jurisdiction and to enter orders that would enable it to adjudicate the custody dispute.<sup>118</sup>

The court held that:

at least two important purposes of the UCCJA [are] applicable here: to deter unilateral removal of children to obtain foreign custody awards, and to assure that litigation over the child's custody occurs in the forum where the child and his family have the closest connection . . . . [T]he child had no conceivable connection with England on April 30 except for his forced physical presence there . . . . His present and future custody should be decided in

---

114. *Id.* at 368.

115. *Id.* (quoting *Oehl v. Oehl*, 221 Va. 618, 623, 272 S.E.2d 441, 444 (1980)).

116. 227 Va. 82, 314 S.E.2d 362 (1984).

117. *Id.* at 366.

118. *Id.* at 371.



Virginia.<sup>119</sup>

The foregoing line of cases indicates that the courts will construe foreign custody decrees in order to uphold the stated goals of the UCCJA. Foreign custody decrees decided under the United States standard, best interests of the child, will generally be enforced in the United States. Therefore, a parent whose child is abducted to the United States from abroad will have the protection of section 23 in attempting to enforce a foreign custody decree. In addition, the UCCJA provides a measure of protection for custodial parents in the United States. The wrongdoing parent will not be rewarded for his or her actions, as a custody decree will generally be upheld in another state in the United States.

When the United States courts have construed foreign custody decrees, the decrees have generally been enforced if they were decided with reasonable notice and an opportunity to be heard and based on a standard approximating the best interests of the child. Therefore, children abducted to the United States from a foreign country where a valid custody decree is in effect have a good chance of being returned to that country. However, this result only emphasizes the need for the adoption of the Hague Convention. The Hague Convention would dictate this result even in the absence of a valid foreign custody decree, and would provide a similar result for an American child abducted abroad.

## 2. The Parental Kidnapping Prevention Act

The Parental Kidnapping Prevention Act (PKPA)<sup>120</sup> was adopted in 1980 to provide a uniform federal response to child abduction. At that time, not all of the states had adopted the UCCJA; haven states remained available for child abductors, where it was still possible that a prior custody decree would not be enforced.

The congressional findings<sup>121</sup> showed a large and growing number of custody and visitation disputes in different states with often inconsistent and conflicting results.<sup>122</sup> This led to a:

tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of

---

119. *Id.*

120. *See* PKPA, *supra* note 14.

121. *Id.* at 28 U.S.C. § 1738A, Congressional Findings and Declaration of Purposes for Parental Kidnapping Prevention Act of 1980.

122. *Id.* § 7(a)(1), (2).

children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities.<sup>123</sup>

Congress found that states frequently failed to give full faith and credit to the findings of other jurisdictions.<sup>124</sup>

The PKPA is a mandate to state courts to give full faith and credit to a prior court's custody decree if the first court has made the determination consistently with the provisions of the statute.<sup>125</sup> To fall within the parameters of this statute, the first court has to have jurisdiction and meet one of the following conditions: the state has been the child's home state<sup>126</sup> for six months preceding the action, or the child was only absent from the home state because of the wrongful removal or retention by one of the contestants.<sup>127</sup>

A second state has jurisdiction if no other state appears to have jurisdiction and the second state has a significant connection with at least one of the contestants.<sup>128</sup> There must be substantial evidence in the second state concerning the child's needs.<sup>129</sup> Other conditions that give a second state jurisdiction are where: (1) the child has been abandoned or is in danger of abuse,<sup>130</sup> (2) no other state has jurisdiction or that state has declined to exercise it on the grounds that the subsequent state is a more appropriate forum,<sup>131</sup> or (3) the court has continuing jurisdiction.<sup>132</sup>

Therefore, the first court is able to make a valid custody decree if one of the above conditions is met. A subsequent court can modify the decree only if it has jurisdiction and the first state no longer has

---

123. *Id.* § 7(a)(3).

124. *Id.* § 7(a)(4).

125. *See* PKPA, *supra* note 14, § 1738A(a).

126. "Home State" is defined as:

the State in which, immediately preceding the time involved, the child lived with his parents, a parent or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.

PKPA, *supra* note 14, § 1738A(b)(4).

127. *See* PKPA, *supra* note 14, § 1738A(c)(2)(A)(ii).

128. *Id.* § 1738A(c)(2)(B).

129. *Id.*

130. *Id.* § 1738A(c)(2)(C).

131. *Id.* § 1738A(c)(2)(D).

132. *Id.* § 1738A(c)(2)(E).

jurisdiction or has declined to exercise jurisdiction.<sup>133</sup> The subsequent court may not exercise jurisdiction if a previous court has jurisdiction consistent with the provisions of this Act.<sup>134</sup>

Although no express statement gives full faith and credit to foreign decrees, the PKPA does not conflict with section 23, the international provision of the UCCJA.<sup>135</sup> Therefore, court decisions construing section 23 of the UCCJA should be valid and not subject to preemption by the PKPA.

A second major provision of the PKPA established the Parent Locator Service.<sup>136</sup> The law authorizes the Federal Parent Locator Service (FPLS) "to locate children, or individuals who have taken children in violation of a court custody order, or for the purpose of enforcing any State or Federal law related to the illegal taking or restraint of a child."<sup>137</sup> States which choose to participate must enter into an agreement with the Secretary of Health and Human Services.<sup>138</sup> This service is then able to access the records of Social Security, the Internal Revenue Service, and the Department of Defense to track down the child or the abductor.

A third provision states that the unlawful flight statute<sup>139</sup> applies to cases of interstate and/or international flight in parental kidnapping cases.<sup>140</sup> This gives the Federal Bureau of Investigation (FBI) jurisdiction to assist state law enforcement agencies in locating and apprehending fugitives from state justice.<sup>141</sup> A state law enforcement agency must request FBI involvement. Prior to December 23, 1983, the Criminal Division of the Department of Justice had invoked a standard that there must be "independent, credible information that the victim child was in physical danger or was then in a condition of abuse or neglect."<sup>142</sup> However, this guideline was eliminated on De-

---

133. *Id.* § 1738A(f)(1)-(2).

134. *Id.* § 1738A(g).

135. See Comment, *supra* note 5, at 433-34.

136. 42 U.S.C. § 653 (1982 & Supp. III 1985).

137. *Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary to Examine Available and Proposed Means to Resolve the Cases of Interstate and International Parental Kidnapping*, 98th Cong., 1st Sess. 31 (1983) (statement of Fred Schutzman, Deputy Director, Office of Child Support Enforcement, U.S. Department of Health and Human Services) [hereinafter *Juvenile Justice*].

138. *Id.*

139. 18 U.S.C. § 1073 (1982).

140. See *Juvenile Justice*, *supra* note 137, at 9 (Prepared Statement of Lawrence Lippe, Chief, General Litigation Section, Crim. Division, U.S. Dep't of Just.).

141. *Id.*

142. *Id.* at 11-13.

ember 23, 1983 and parental kidnapping felonies are now handled the same as other fugitive felonies.<sup>143</sup>

*B. The State Department's Bureau of Consular Affairs*

The Bureau of Consular Affairs is often approached in an attempt to resolve international child abductions.<sup>144</sup> Between the period of April 1982 and January 1983, 333 new child custody cases came to the attention of the State Department, making a total of 677 open child custody cases.<sup>145</sup> As of December 31, 1986, the State Department knew of 2,353 cases of unresolved child abductions from the United States.<sup>146</sup> However, the Department is limited in the assistance it can render to United States citizens. The Department cannot: (1) provide legal advice; (2) take custody of a child; (3) force a child to return to the United States; or (4) influence child custody proceedings in a foreign state.<sup>147</sup>

Despite these limitations, the State Department is able to provide some aid to victimized parents in locating their children. The Department can: (1) assist parents in locating children abroad; (2) report on the child's welfare; (3) provide lists of foreign attorneys; (4) furnish general information on laws and procedures which might aid in the return of the child; (5) alert foreign authorities if it appears that the child is being abused or neglected; and (6) impose passport controls in appropriate cases.<sup>148</sup>

The State Department's Office of Passport Services is also limited in resolving child custody disputes. No assistance can be given by United States authorities to a child with dual nationality if the child has a passport from the country of its other nationality and the child is located in that country.<sup>149</sup> In addition, once a child has been issued a passport and is then taken abroad, the case will often have to be litigated in the foreign country where the abducting parent's custody is recognized.<sup>150</sup>

As the UCCJA and PKPA show, recourse is often available to

---

143. *Id.* at 13.

144. See *Juvenile Justice*, *supra* note 137, at 40 (Prepared Statement of James G. Hergen, Assistant Legal Advisor for Consular Affairs, Off. of the Legal Advisor, U.S. Dep't of State).

145. *Id.* at 41.

146. Letter, *supra* note 2.

147. See *Juvenile Justice*, *supra* note 137, at 42 (Prepared Statement of James G. Hergen, Assistant Legal Advisor for Consular Affairs, Off. of the Legal Advisor, U.S. Dep't of State).

148. *Id.*

149. *Id.* at 44.

150. *Id.*

parents whose children have been abducted to the United States. The law mandates that in instances where a decree was issued pursuant to the best interest of the child standard, the child will usually be returned pursuant to this custody decree. When children are taken abroad from the United States, however, the victimized parent will generally be forced to litigate in the foreign forum. These concerns have led to a response at the international level.

### III. INTERNATIONAL RESPONSES

#### A. *The Strasbourg Convention*

The Strasbourg Convention<sup>151</sup> was opened for signature on May 20, 1980.<sup>152</sup> As of 1982, the Strasbourg Convention had been signed by fifteen nations, but had been ratified only by France.<sup>153</sup> The Strasbourg Convention is open only to members of the Council of Europe, which is composed of twenty-one European nations.<sup>154</sup> The goals of the Convention are the "welfare of the child . . . in reaching decisions concerning his custody"<sup>155</sup> and to "ensure that decisions concerning the custody of a child can be more widely recognized and enforced."<sup>156</sup> The Convention was written to provide recourse for a person with an enforceable custody decree when a child is wrongfully removed or retained across an international border.<sup>157</sup>

The Convention provides for the appointment of a Central Authority to carry out the Convention's functions and to provide for cooperation between the Contracting States.<sup>158</sup> The Central Authority shall take necessary steps to locate the child and to "secure the delivery of the child to the applicant where enforcement is granted."<sup>159</sup> Article 7 provides that an enforceable custody decision in a Contracting State shall be enforceable in every other Contracting State.<sup>160</sup>

---

151. See Strasbourg Convention, *supra* note 11.

152. *Id.*

153. See Comment, *supra* note 5, at 436-37. Under Art. 22(1) of the Strasbourg Convention, it becomes effective after three members of the Council of Europe ratify it.

154. See Crouch, *infra* note 172, at 594. Hungary, who was not a party to the Convention, has acceded to it. The United States will need to expressly accept Hungary's accession for it to become binding between the United States and Hungary. See *infra* note 179.

155. See Strasbourg Convention, *supra* note 11, at 23 (preamble).

156. *Id.*

157. *Id.* art. 1.

158. *Id.* arts. 2-3.

159. *Id.* art. 5(1)(a), (d).

160. *Id.* art. 7.

Under Article 8, the Central Authority shall restore the custody of the child if, when the custody order was issued, the child and his or her parents had sole nationality in that state and the child had his or her habitual residence there.<sup>161</sup> Therefore, the Convention does not apply to children of dual nationality. In addition, the request for restoration must be made within six months of the improper removal.<sup>162</sup>

Additionally, under Article 9, if an application has been made to the Central Authority within six months of the removal, recognition and enforcement may be refused if the defendant was not served, and failure of service was not based on the defendant's deliberate concealment of himself.<sup>163</sup> Refusal is also permitted if a decision was *ex parte* and the authority's jurisdiction was not founded on the habitual residence of the defendant or the child.<sup>164</sup> Finally, refusal is permissible if the decree is incompatible with the decisions of the requested State.<sup>165</sup>

Additional areas for refusal are provided in Article 10 where there has not been improper removal or application was made over six months after improper removal. These include the grounds that "the effects of the decision are manifestly incompatible with the fundamental principles of the law . . ." <sup>166</sup> or that the passage of time has created a change in circumstances such that the "effects of the original decision are . . . no longer in accordance with the welfare of the child."<sup>167</sup> Article 10 also provides that refusal can be based on a child having more significant connections with the requested State than with the State of origin.<sup>168</sup>

Under Article 17 a Contracting State may make a reservation that cases covered by Articles 8 and 9 may be refused on the grounds provided in Article 10.<sup>169</sup> Therefore, in addition to the discretion granted judges in Article 10, Article 17 potentially provides more discretion.

Where no custody decree exists, under Article 12, a parent can obtain a post-removal decree in the pre-removal state.<sup>170</sup> A Contracting State, however, can make a reservation not to be bound by

---

161. *Id.* art. 8(1)(a).

162. *Id.* art. 8(1)(b).

163. *Id.* art. 9(1)(a).

164. *Id.* art. 9(1)(b)(i), (iii).

165. *Id.* art. 9(1)(c).

166. *Id.* art. 10(1)(a).

167. *Id.* art. 10(1)(b).

168. *Id.* art. 10(1)(c).

169. *Id.* art. 17(1).

170. *Id.* art. 12.

Article 12.<sup>171</sup>

The Strasbourg Convention tries to provide "swift, summary and inexpensive return of children"<sup>172</sup> even though it bases this on recognition and enforcement of a court decree.<sup>173</sup> However, it is limited since it applies only to European Contracting States and potentially allows a judge to exercise discretion in numerous exceptions to the swift return of the child.

*B. The Hague Convention*

In January 1976, a suggestion was made at a Special Commission of the Hague Conference on Private International Law that the subject of child abduction be placed on the agenda at the Conference.<sup>174</sup> This led to a preliminary draft of a Convention to curb international child snatching, prepared by the Special Commission.<sup>175</sup> Twenty-three nations, including the United States, worked together to produce this draft.<sup>176</sup> This draft was presented at the Fourteenth Session of the Hague Conference in October 1980, and on October 25, 1980, four of the twenty-eight represented nations signed the Convention on the Civil Aspects of International Child Abduction.<sup>177</sup> The United States signed the Convention on December 23, 1981.<sup>178</sup> As of late June 1987, the Convention has been ratified by France, Portugal, Canada, Switzerland, the United Kingdom, Australia, Luxembourg, and Spain, and has been acceded to by Hungary.<sup>179</sup>

The Hague Convention is "designed to secure the prompt return of children who have been abducted from, or retained outside of, their country of habitual residence, and to facilitate the exercise of visitation across international borders."<sup>180</sup> There is no pre-condition of a custody decree in favor of the left-behind parent for the return of a

---

171. *Id.* art. 18.

172. Crouch, *Effective Measures Against International Child Snatching*, 131 NEW L.J. 592, 594 (1981) [hereinafter Crouch].

173. *Id.*

174. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 539 (1981) [hereinafter Anton].

175. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 4 FAM. L.Q. 99 (1980).

176. *Id.*

177. See Anton, *supra* note 174, at 539-40. The nations were France, Greece, Canada and Switzerland.

178. See Comment, *supra* note 5, at 440.

179. Telephone interview with Peter Pfund, Ass't Legal Adviser for Private Int'l Law, U.S. Dep't of State (June 24, 1987).

180. See Rovine, *supra* note 10, at 13.

child, nor does the Convention seek to settle disputes arising over legal custody rights.<sup>181</sup> The Convention would place the country where a child has been wrongfully removed or retained under a treaty obligation to return the child, provide a clear-cut procedure for the return and deter such conduct by a restoration of the legal and factual *status quo* in effect before the wrongful removal or retention.<sup>182</sup>

The objectives of the Convention are to secure the prompt return of the wrongfully removed or retained child and to ensure that custody and visitation rights are respected by Contracting States.<sup>183</sup> Removal or retention is wrongful when it is in breach of custody rights held by any person of the State where the child was habitually resident before the removal or retention. These rights may be awarded by judicial decision, be based on agreement, or arise by operation of law.<sup>184</sup> This is in contrast to the Strasbourg Convention, where wrongful removal is predicated on a custody decision which has been given in a Contracting State.<sup>185</sup>

Under the Convention, each Contracting State must designate a Central Authority to perform the procedural duties, with a goal of cooperation among the Contracting States.<sup>186</sup> Article 8 allows any person to apply to the Central Authority of the child's habitual residence or to any other Central Authority for assistance in seeking the return of the child.<sup>187</sup> Article 29 allows the applicant to petition judicial or administrative authorities directly for the return of the child.<sup>188</sup> These remedies are not mutually exclusive and the applicant may invoke either or both of them.<sup>189</sup> Pursuant to Article 10, the Central Authority of the state where the child is physically present has a duty to take appropriate measures to provide for the voluntary return of the child.<sup>190</sup> It is anticipated that the proceedings for return could be completed in six weeks.<sup>191</sup>

---

181. *Id.*

182. See Mochary, *supra* note 1, at 10.

183. See Hague Convention, *supra* note 12, art. 1.

184. *Id.* art. 3.

185. See Strasbourg Convention, *supra* note 11, art. 1(d).

186. *Id.* arts. 6, 7. In the United States, the Department of State has volunteered to act as the Central Authority. See Hergen, *supra* note 144, at 39.

187. See Hague Convention, *supra* note 12, art. 8.

188. *Id.* art. 29.

189. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 58, 10503, 10507 (1986) [hereinafter Legal Analysis].

190. See Hague Convention, *supra* note 12, art. 10.

191. *Id.* art. 11.



If proceedings have been commenced less than one year from the date of removal or retention (as defined in Article 3), the judicial or administrative authority of the Contracting State shall order the child's return.<sup>192</sup> This provision is mandatory. If proceedings commence over one year later, the child shall be returned unless it is demonstrated that the child has settled into his new environment.<sup>193</sup>

Article 13 sets forth the exceptions to the obligation to return the child.<sup>194</sup> These are: (1) the applicant was "not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention"; or (2) there is risk of grave physical or psychological harm to the child.<sup>195</sup> If the child is of sufficient age and maturity, the judicial or administrative authority has the discretion to adhere to the child's wishes.<sup>196</sup> The Convention only applies to children under the age of sixteen.<sup>197</sup>

In addition, Article 20 provides another exception to the immediate return of the child.<sup>198</sup> Return of the child "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."<sup>199</sup>

Article 16 expressly states that the authorities shall not decide the merits of the custody issue until it is determined that the child is not to be returned.<sup>200</sup> Article 18 empowers the judicial or administrative authority to order the return of the child at any time.<sup>201</sup>

As stated above, the applicability of the Strasbourg Convention is limited, as it only applies to European Contracting States. However, "it could be useful in securing return of a child through the Hague Convention if a child has been taken from, say, the United States to . . . Great Britain, which has membership in both Conventions, and thence to a Strasbourg-only country such as Italy or West Germany."<sup>202</sup> In a case such as the above, it appears that Great Britain

---

192. *Id.* art. 12.

193. *Id.*

194. *Id.* art. 13.

195. *Id.* art. 13(a)-(b).

196. *Id.* art. 13.

197. *Id.* art. 4.

198. *Id.* art. 20.

199. *Id.* These exceptions were basically seen as compromises to differing viewpoints among the delegates to the Convention. See Anton, *supra* note 174, at 550-51.

200. See Hague Convention, *supra* note 12, art. 16.

201. *Id.* art. 18.

202. See Crouch, *supra* note 172, at 594.

could act as an intermediary for the United States in the return of the child.

The Hague Convention presently provides the best remedy for the international abduction of children. The goal is to return children in the shortest time possible, with the merits of the custody dispute being litigated after the child returns home. In addition, there are relatively few exceptions to the mandatory return of the child, thereby helping to insure that the stated goals will be followed. While the potential for abuse exists with the stated exceptions, the drafters had to accommodate different social and legal systems and they appear to have fashioned these potential conflicts into a workable model. Also, as the Hague Convention follows the policies and goals of the UCCJA and PKPA, it would seem to be consistent with United States laws and precedent.

#### IV. THE AMERICAN RESPONSE TO THE HAGUE CONVENTION

The Convention was transmitted to the United States Senate by President Reagan on October 30, 1985.<sup>203</sup> The President described the Convention as "an important addition to the State and Federal laws currently in effect in the United States [and that it] would significantly improve the chances a parent . . . has of recovering a child from a foreign Contracting State."<sup>204</sup> The President recommended that the Senate give the Convention an early and favorable ratification, subject to the reservations described by the Secretary of State.<sup>205</sup>

Secretary of State George Shultz indicated several reservations. First, all documents sent to the United States Central Authority in a foreign language also should be accompanied by an English translation (referring to Article 24). Secondly, (referring to Article 26) the United States will not provide for court costs or legal counsel incurred with efforts to return children except as those costs are covered by a legal aid program.<sup>206</sup>

The Convention is supported by the American Bar Association, the Departments of Justice and Health and Human Services and many states.<sup>207</sup> In addition, the Department of State has taken a

---

203. Letter of Submittal, Message from the President of the United States, *reprinted in* 51 Fed. Reg. 10,495 (1986).

204. *Id.*

205. *Id.*

206. Letter of Transmittal, Secretary of State to the President, *reprinted in* 51 Fed. Reg. 58, 10,497 (1986).

207. *Id.*

favorable position on the Convention:

*International child abductions are a growing and intractable problem for the children, aggrieved parents, foreign ministries, consular officials, courts and attorneys involved. The . . . Convention represents the best foreseeable opportunity for the United States to participate in international legal and administrative arrangements to deal with international child abductions. It would reduce the Department's burden in dealing with aggrieved parents seeking the return of children abducted from the United States.*<sup>208</sup>

On October 9, 1986, the United States Senate gave advice and consent to United States ratification.<sup>209</sup> However, the State Department did not plan to have the United States ratify until federal legislation entitled the "International Child Abduction Act"<sup>210</sup> had been enacted by Congress.<sup>211</sup> After a final review of the draft federal bill by the Office of Management and Budget, it was expected that the bill would be introduced in both Houses of Congress by request, as an administrative bill, in late February or early March 1987.<sup>212</sup> The hope was that the bill would be enacted by both Houses of Congress before summer 1987 recess so that the Convention would enter into force for the United States in late summer or fall of 1987.<sup>213</sup>

This legislation was introduced into the Senate on June 9, 1987 under the sponsorship of Senator Simon.<sup>214</sup> It facilitates implementation of the Hague Convention by providing for the designation of a federal agency to serve as the Central Authority for the United States.<sup>215</sup> Additionally, the Central Authority is authorized to obtain information from the FPLS in its attempts to locate abducted children.<sup>216</sup> State and federal courts will have concurrent original jurisdiction to hear actions arising under the Convention and this Act.<sup>217</sup> The Act further establishes that United States courts shall grant full faith and credit to other courts in the United States which order the

---

208. See Hergen, *supra* note 144, at 48. (emphasis in the original).

209. Telephone interview with Peter Pfund, Ass't Legal Adviser for Private International Law, Dep't of State (Jan. 1987).

210. International Child Abduction Act, *reprinted in* CONG. REC. S7,885-89 (1987) [hereinafter Act].

211. Telephone interview with Peter Pfund, Ass't Legal Adviser for Private Int'l Law, U.S. Dep't of State (Feb. 10, 1987).

212. *Id.*

213. *Id.*

214. See Act, *supra* note 210.

215. *Id.* § 105(a).

216. *Id.* § 105(d).

217. *Id.* § 102(a).

return of children pursuant to the Convention and the Act.<sup>218</sup> Remedies under both the Convention and the Act are in addition to remedies available under state and other international agreements.<sup>219</sup> This proposed legislation will smooth the way for left-behind parents to contact the Central Authority and activate the mechanisms to have their child returned.

## V. ANALYSIS - A PRACTICAL APPLICATION

The following hypotheticals demonstrate how the Hague Convention and the UCCJA would interact in certain situations.

In the first hypothetical, a child is abducted to the United States from a Contracting State to the Hague Convention. Once the Hague Convention goes into effect in the United States, the victimized parent would have recourse under this treaty.

However, the victimized parent must first meet the threshold requirements necessary under the Convention.<sup>220</sup> First, the parent must hold rights protected by the Convention.<sup>221</sup> The person, institution or other body who actually had custody prior to the abduction has the responsibility of activating the return mechanisms.<sup>222</sup> Basically, this section applies to parents, but it could also apply to grandparents, foster parents or a legal guardian, depending on the situation in a given case. The term "institution" would also seem to encompass child care and adoption agencies.

Second, in addition to being the proper person to petition for return of a child, the victimized parent (or institution) must also show that the retention or removal was wrongful within the definition set forth by the Convention.<sup>223</sup> The Convention recognizes that there can be wrongful removal or retention even if the parents have joint custody of the child.<sup>224</sup> Wrongful removal or retention can be shown by a breach of the custody rights, such as the abducting parent's failure to return a child after the visitation period.

However, in the absence of a custody decree giving the petitioning parent legal rights, wrongful removal or retention would be determined according to the custody laws in effect in the country that was

---

218. *Id.* § 102(e).

219. *Id.* § 102(f).

220. See Hague Convention, *supra* note 12, art. 3.

221. See Legal Analysis, *supra* note 189, at 10,505.

222. See Hague Convention, *supra* note 12, art. 8.

223. See Legal Analysis, *supra* note 189, at 10,506.

224. See Hague Convention, *supra* note 12, art. 3.

the child's habitual residence just prior to the wrongful actions.<sup>225</sup> The United States' authorities would have to look to the laws of the country of the child's habitual residence to determine if the removal or retention was wrongful. If the foreign state had a presumption of joint custody between the parents, the victimized parent would meet the Convention's guidelines.<sup>226</sup> Moreover, if the wrongdoing parent prevented the victimized parent from seeing the child, this would also be wrongful removal or retention pursuant to the Convention.

If a custody decree already exists, the Convention's language does not mandate recognition and enforcement of that decree. Instead, the Convention simply seeks to return the parties to the factual situation that existed prior to the wrongful removal or retention.<sup>227</sup> Once the child is returned to his or her country of habitual residence, the parents are then free to litigate the custody order on its merits.

The Convention also applies to a private agreement between the parties, so long as the agreement has a legal effect under the law of the child's habitual residence.<sup>228</sup> Therefore, the victimized parent can petition for return of the child where there is a custody decree, a private agreement, or the parent would have custody under the laws of the foreign state.

Finally, the parent must show that he or she was actually exercising his or her custody rights at the time of the abduction.<sup>229</sup> According to the Perez-Vera Report, the Convention presumes that the person caring for the child has custody.<sup>230</sup> Therefore, this should be a relatively easy standard for the parent to meet.

Once the person has shown that he or she is an appropriate person to make a request for a child's return, he or she has recourse to two systems under the Convention. He or she can directly contact the Central Authority of the Contracting State of the child's habitual residence, or he or she can petition directly to the judicial authorities in the Contracting State where the child has been taken.<sup>231</sup> In the United States, the federal and state courts would have concurrent ju-

---

225. See Legal Analysis, *supra* note 189, at 10,506.

226. *Id.*

227. *Id.* at 10,505.

228. See Hague Convention, *supra* note 12, art. 3(b).

229. *Id.* art. 3(b).

230. Perez-Vera, *Explanatory Report* 426, 448 para. 73, reprinted in ACTES ET DOCUMENTS DE LA QUATORZIEME SESSION, TOME III, CHILD ABDUCTION (The Hague 1982) [hereinafter Perez-Vera].

231. See Legal Analysis, *supra* note 189, at 10,507.

risdiction to hear actions arising under the Convention.<sup>232</sup> The left-behind parent could go to federal or state court under the Convention. These remedies are not mutually exclusive, and an aggrieved parent can activate both mechanisms.<sup>233</sup> The decision regarding what action to take would depend upon the given situation, since the Central Authority may attempt to arrange for voluntary return of the child, whereas a judicial action would have more of an adversary approach. A judicial action might be more advantageous in that it may encourage the wrongful parent to return the child.

If a parent contacts the Central Authority, the Central Authority will activate administrative procedures to try to secure the voluntary return of the child.<sup>234</sup> The Central Authority will try to locate the child, prevent harm to the child and, if necessary, help to provide legal aid and institute judicial or administrative proceedings.<sup>235</sup> The petitioning parent should give the Central Authority information concerning the identity of the child, date of birth, name of alleged wrongdoer, the grounds on which the claim for return is based and any other relevant documents.<sup>236</sup>

In addition, the parent can petition the judicial and administrative authorities directly.<sup>237</sup> This can be done as a sole remedy, or in conjunction with petition to the Central Authority.<sup>238</sup> Under Article 11, the authorities of a Contracting State are required to act promptly in a proceeding to return a child.<sup>239</sup> The Convention states that if a decision concerning return is not reached within six weeks, the applicant or Central Authority is entitled to request a statement of reasons for the delay.<sup>240</sup>

If a parent is activating the Convention in the United States, the United States will not pay any costs arising from the need for legal advice or court costs, unless those costs are covered by legal aid foundations.<sup>241</sup> However, if return is ordered, the judicial authority may order the wrongdoing parent to pay expenses incurred by the

---

232. See Act, *supra* note 210, at § 102(A).

233. See Legal Analysis, *supra* note 189, at 10,507.

234. See Hague Convention, *supra* note 12, art. 10.

235. *Id.* art. 7.

236. *Id.* art. 8. Also see recommended form in Legal Analysis, *supra* note 189, at 10,515.

237. See Legal Analysis, *supra* note 189, at 10,507.

238. *Id.*

239. See Hague Convention, *supra* note 12, art. 11.

240. *Id.*

241. *Id.* art. 26.

applicant.<sup>242</sup>

When proceedings begin within one year of the wrongful removal or retention, the judicial authority shall order the child returned.<sup>243</sup> Under Article 17, the victimized parent is entitled to the child's return even if the alleged wrongdoing parent has received a new custody decree in the foreign state (i.e. United States) where the child is now located.<sup>244</sup> The Convention takes precedence over orders granted before the court had notice of the wrongful removal or retention.<sup>245</sup> Thus, Article 17 prevents a wrongdoing parent from insulating the child from a return order just by getting a custody order in the foreign state.

The above analysis applies unless the child is over sixteen (and then the Convention does not apply), the authority finds the applicant was not actually exercising custody at the time of the retention or removal, or the applicant had acquiesced in the removal or retention.<sup>246</sup> Another exception to return of the child is if there is a risk of grave physical or psychological harm to the child.<sup>247</sup> In addition, the judicial authority can consider the child's objection to return if the child is of sufficient age and maturity level.<sup>248</sup>

Under Article 20, the Contracting State can also decline to return the child if this would not be permitted under the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.<sup>249</sup> According to the Perez-Vera Report, "to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it."<sup>250</sup> Therefore, this is to be construed as a very narrow exception.

The exceptions, if abused, could potentially provide large areas for judicial discretion. However, based on the goals and purposes of the Convention, these are meant to be narrow exceptions to the immediate return of the child.<sup>251</sup>

---

242. *Id.*

243. *Id.* art. 12.

244. *Id.* art. 17.

245. *See Legal Analysis, supra* note 189, at 10,504.

246. *See Hague Convention, supra* note 12, arts. 4 and 13.

247. *Id.* art. 13(b).

248. *Id.*

249. *Id.* art. 20.

250. *See Perez-Vera, supra* note 230, at 462 para. 118.

251. *See Act, supra* note 210, at § 2(4).

In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention - to effect the prompt return of abducted children. Further, it was generally believed that 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.<sup>252</sup>

Therefore, pursuant to the direct intention of the Convention, the judicial authorities should follow the express intent of their individual countries and the spirit of the Convention. In a situation where a proceeding is activated within one year of the removal or retention, it should be clear that the child would be returned to the country of his or her habitual residence. The parents would then have the opportunity to litigate custody on the merits in that forum.

In a situation where an application is commenced over one year after the wrongful removal or retention, Article 12 provides that the child is to be returned unless it is determined that the child is now settled in his or her new environment.<sup>253</sup> It also appears, in this case, that the general exceptions in Articles 13 and 20 would still apply. A petitioner seeking return of a child has to establish by a preponderance of the evidence that the child was wrongfully removed.<sup>254</sup> The person opposing return of the child has to show that one of the exceptions applies by clear and convincing evidence.<sup>255</sup> Therefore, the wrongdoing parent would have to meet a stronger burden of proof to demonstrate that the child had settled into his or her new environment.

This area seems to provide for considerably more judicial discretion. A judge will be in the position of deciding if a child has settled into a new home situation. Factors such as stability for the child, meeting the standard of "best interests of the child", the child's age, and his or her adjustment to a new school and friends become of paramount importance. These factors must then be balanced against a presumed disinclination to reward the wrongdoing parent. This bal-

---

252. See Legal Analysis, *supra* note 189, at 10,509.

253. See Hague Convention, *supra* note 12, art. 12, at 10,499.

254. See Act, *supra* note 210, at § 102(d).

255. *Id.*



ancing of factors starts to take on the flavor of a decision on the merits of the case, an issue the Convention attempted to avoid. The courts should conform to the general spirit of the Convention and exercise their discretion to return a child even if the action is commenced over one year after the removal.

In addition, in the United States the victimized parent has recourse to the UCCJA. As discussed previously, the United States courts have recognized foreign nation custody decrees and have returned abducted children.<sup>256</sup> A major difference, however, is that the UCCJA provides for a return to the legal status quo which existed before the abduction, while the Hague Convention provides for a return to the factual status quo.<sup>257</sup> The Hague Convention does not require a custody decree, whereas the UCCJA enforces an existing decree, or one that is received by the victimized parent after the abduction.<sup>258</sup> Provided that the abducting parent has received opportunity and notice to be heard, the UCCJA will enforce a custody decree received subsequent to the abduction.

If a parent has a legal custody decree, he or she might want to proceed under the UCCJA since the Hague Convention exceptions, such as the consequences of the one year time lapse, do not apply to the UCCJA. However, the parent who has a custody decree can proceed under both the UCCJA and the Convention. In a situation where a child from the United States is abducted to a Contracting State abroad, the above discussion concerning the Convention would apply. The parent might also be able to proceed under the laws of that particular country.

However, in the second hypothetical, when a United States child is abducted to a foreign state which has not ratified the Convention, a different problem arises. A parent would be limited to remedies available through the courts in that country. The victimized parent would have no guarantee that the foreign state would recognize or enforce an existing custody decree from the United States. Absent a UCCJA-type system in the foreign country, the parent would have to litigate in the new country with all its attendant difficulties. There would be no Central Authority for the victimized parent to turn to, and no mechanism to activate for a return of the child to the factual status quo. Moreover, if the victimized parent had no custody order from

---

256. See *supra* text accompanying notes 68-124.

257. See Legal Analysis, *supra* note 189, at 10,505.

258. *Id.*

the United States, that parent would only have recourse to the courts in the foreign country.

This problem is arising with increasing frequency for United States servicemen stationed abroad.<sup>259</sup> Very often a serviceman will marry, have children and then return to the United States. The foreign wife might then return to her home country, taking the children with her. If that country has not ratified the Convention, the serviceman has a very limited list of remedies available to him. Therefore, foreign states with a high proportion of United States servicemen, such as West Germany, must be encouraged to ratify the Convention.

## VI. CONCLUSION

The Convention is a positive step forward in the protection of children and victimized parents. If ratified by enough countries, the Convention should provide a strong deterrent for the wrongful removal of children. The foreign states that were parties to the Convention should ratify it as soon as possible. As the number of children abducted to foreign countries continues to increase, it becomes imperative that the United States and other countries ratify the Convention and implement enabling legislation in their respective countries so that the Convention will go into full force and effect. The longer it takes for the Convention to be ratified, the more haven countries will exist for abducting parents. This situation must be eliminated so that a consistent and uniform system for the return of children abducted abroad will be established.

*Barbara Ullman Schwerin\**

---

259. See *supra* note 211.

\* The author is also a licensed Marriage, Family and Child Counselor in California.

