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This issue is devoted to:

INTERNATIONAL ISSUES IN FAMILY LAW

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About This Issue

With the increase in globalization, many family law attorneys find themselves addressing international issues. This volume of the journal is devoted to those frequently arising challenges. We have several articles on procedural issues, such as discovery, service of process, and strategic planning in international divorce cases. The enforcement of child custody support orders is a focus of two additional articles. We also feature two articles concerning the Hague Abduction Convention, one that addresses issues when there are competing claims under the Convention and conventions offering protection under asylum claims and another that concerns custody disputes between the United States and India, a country that has not adopted the Convention. There are excellent articles on diplomatic immunity, mediation and family law matters in Hong Kong. Student editors have also contributed thought provoking pieces on inter-country adoption, gender- affirming care and international adoption.

Our Issue Editors are Anne L. Berger and Helen Davis. Anne L. Berger has been practicing law in Massachusetts for over 50 years. She is a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Family Lawyers and has served in multiple positions on the governing board of both organizations. Ms. Berger is also a former Chair of the International Commission on Couples and Family Relations. Her practice concentrates on complex matrimonial matters with international components. Ms. Davis has been practicing family law for over 20 years and focuses on complex divorce and custody litigation. She is the former President and Chair of the Cavanagh Law firm in Phoenix, Arizona. She is also an adjunct professor at Arizona State University’s Sandra Day O’Connor College of Law. She is certified as a family law specialist by the Arizona state Bar and a fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers.

Our first article is entitled, *Obtaining International Discovery in Family Law Matters*, by Anne L. Berger and Patricia A. Cooper. This article is intended to provide practical assistance to family lawyers in the various U.S. jurisdictions who either need to obtain discovery from non-U.S. sources for use in pending U.S. jurisdiction cases or who are assisting practitioners in non-U.S. jurisdictions to obtain discovery from U.S. sources for use in foreign cases. Part I of this article addresses discovery requests from foreign jurisdictions. Part II explores the reverse: discovery requests from cases originating in the United States directed to entities in foreign jurisdictions. Anne L. Berger, as mentioned above, practices in Massachusetts and is a fellow of both the American Academy of Matrimonial Lawyers and the International Academy of
Family Lawyers. She has served on the JAAML Editorial Board for many years. Her practice concentrates on complex international family law matters. Trish Cooper has been representing family law clients throughout the state of Colorado for more than 20 years. She obtained her law degree from the University of Virginia and her undergraduate degree in Psychology, magna cum laude, from Bryn Mawr College. Trish’s practice emphasizes complex financial matters, often involving business valuation, trust interest analysis and valuation, premarital agreements, and asset tracing issues. Trish has been an AAML Fellow since 2011 and is a Past President of the Colorado Chapter. She is also a past Chair of the Family Law Section of the Colorado Bar Association and remains active on the Section’s legislative and education committees.

Joseph Booth contributes Enforcement of International Support Orders Under UIFSA which discusses how the Act facilitates enforcing international child support orders. He explains that foreign countries can be considered “states” under UIFSA if they have similar laws for issuing and enforcing support orders. When discussing the process for registering a foreign support order in a U.S. state it highlights the circumstances in which the order is treated as if it was issued in that state. It further discusses the limited grounds for contesting registration, such as lack of jurisdiction. The effect of the 2008 amendments which implemented the Hague Convention on the International Recovery of Child Support are explained. This article also details the process for enforcing international orders, which involves translation, currency conversion, and registration and notice procedures. Finally, the article discusses the mechanics of direct access, defenses to registration, and grounds for refusal to recognize and enforce a registered Convention support order while outlining the process for recognizing and enforcing a foreign support agreement. Joseph Booth M. Div., JD, a fellow of the AAML was on the drafting committee for UIFSA 2001 and 2008 as an advisor from the ABA. He has a practice in family law and appellate law in Kansas. www.boothfamilylaw.com. He has chaired the ABA Family Law Section Publications Board since 2017 and has been an adjunct professor in family law for Washburn School of Law since 2008. He has been designated as a Super Lawyer from 2010 to present. Mr. Booth frequently writes and lectures on the unique jurisdictional challenges found in family law.

In Recognition and Enforcement of Foreign Child Custody Orders, Michael S. Coffee focuses on the many benefits to the recognition and enforcement of foreign judgments along with the potential risks. He opines that whether a child custody judgment will be recognized or enforced cannot be answered definitively in advance of an attempt to do so. Therefore, his article focuses on the practical steps that can be taken to increase the likelihood that a child custody judgement issued in one State will be recognized or enforced in a foreign State. In Part I, the article discusses rules applied by foreign States to the recognition
and enforcement of child custody judgments from other States. It then addresses steps that can be taken when litigating child custody in a court in the United States to increase the chance that the resulting judgment might be recognized or enforced in a foreign State. Finally, he focuses on steps that can be taken when litigating child custody in a foreign State to increase the chance that the resulting judgment might be recognized or enforced in a U.S. state. Michael Coffee is Professorial Lecturer in Law at the George Washington University Law School. He has taught courses in international family law and international law. Mr. Coffee has served as an attorney in federal government agencies for nearly thirty years. He currently serves as a Trial Attorney in the Office of Foreign Litigation at the U.S. Department of Justice. Mr. Coffee served over twenty years as an attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State, where he worked in the Office of Private International Law and the Office of Treaty Affairs, amongst other offices. Mr. Coffee has served on and headed numerous U.S. delegations to meetings of the Hague Conference on Private International Law, including on governance matters as well as Special Commissions reviewing the operation of the Abduction Convention, Child Protection Convention, Child Support Convention, Adoption Convention, Service Convention, and Evidence Convention. He has also served on and headed U.S. delegations to meetings of the United Nations Commission on International Trade Law and the International Institute for the Unification of Private Law. He is a member of the American Law Institute and an Associate Fellow of the International Academy of Family Lawyers.

Because judgments and orders entered by a court against a party who was not properly served are void, when the party to be served is in a foreign country, family law practitioners must understand whether service must proceed pursuant to international treaty governing service of process or some other process, such as letters rogatory. To assist family law practitioners, our next article entitled International Service of Process in Family Law Matters by Trish Cooper discusses the treaties governing international service of process and the requirements for effective service of process under these treaties, and if no treaty applies, the steps that must be taken to accomplish proper service in the foreign country. The article describes the role of state procedural rules when a party to be served resides in a foreign country. It also discusses the two international treaties to which the United States is party which govern service abroad and the procedures to be followed when effecting service under those treaties. Finally, the letters rogatory process that must be undertaken when a party to be served resides in a country that is not a party to an international treaty governing service of process are put forward. Trish, whose biography is outlined above as a co-author with Ann Berger, developed her interest in service of process abroad from
her research and work on a challenging case that required service in a
country that is not a signatory to an international service treaty.

Our next article is entitled, *Navigating Diplomatic Immunities in
Family Law: Finding an Appropriate Forum for Families Covered by
Diplomatic Immunity* and is authored by Frances Goldsmith and Inès
Amar. The article details in which cases immunity rules will predomin-
ate over certain fundamental rights and then analyzes where immu-
nity rules stand in the hierarchy of rights in the realm of family law.
It focuses on who is covered by such immunity and then on whether
such immunity includes civil, jurisdictional and/or immunity to enforce-
ment of a judgment. Frances Goldsmith is a partner of Libra Avocats in
Paris, France and is specialized in resolving complex international cases
whether in the context of litigation or amicably. She regularly advises
clients on pre- and post-nuptial agreements with various international
elements. Her experience—particularly on important transnational lit-
igation cases—has allowed her to develop an expertise in international
family and estate law. She has regularly been appointed an expert before
foreign courts in litigation relating to matrimonial regimes and complex
issues of dividing property and estate disputes, as well as for matters
relating to children and parental authority. Ines Amar is an Associate
at Libra Avocats in Paris, France. She is licensed to practice in the state
of New York after pursuing an LLM at the University of Chicago as
well as in France where she practices in international family law. This
involves divorce and child custody and parental authority cases, as well
as the drafting of prenuptial agreements which include international
elements. She also deals with the enforcement in France of divorce or
parental agreements or judgments issued abroad, and more generally
with child-relating issues such as relocation cases, parental rights in
adoption or assisted reproduction cases as well as child abduction.

*To Return or Not to Return – That Is The Question: Tensions
Between Non-Refoulement and Orders Of Return Under the Hague
Abduction Convention* by Melissa A. Kucinski and Richard Min focuses on
asylum-seekers – specifically parents who cross an international border,
enter the United States with their child, and then apply for asylum sta-
tus on behalf of themselves and/or their child. Asylum-seekers who are
physically present in the United States and are granted asylum status
typically cannot be removed under the principle of non-refoulement,
established in several international agreements explained in the article.
On the other hand, the Hague Abduction Convention, ratified by the
United States in 1988, is an international treaty that establishes a civil
mechanism for the prompt return of children under the age of sixteen
when they have been removed from or retained outside of their habitual
residence in violation of custodial rights. The article explores existing
U.S. asylum jurisprudence and examine how U.S. courts have addressed
the tension between non-refoulement of an asylum-seeker and returning
an abducted child. It further highlights some prospective legal issues,
such as ameliorative measures or returns to a third country that may arise out of this tension in future Hague Abduction Convention cases in the United States. Melissa A. Kucinski is an attorney and mediator focusing exclusively on international family law matters. She is a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers and current or past chair of the international family law committees in the American Bar Association and New York State Bar Association. She has attended three consecutive Special Commission Meetings at the Hague Conference related to the Hague Abduction Convention and is a long-standing member of both the Uniform Law Commission’s Joint Editorial Board on Uniform Family Law and the U.S. Secretary of State’s Advisory Committee on Private International Law. Richard Min is a partner at Green Kaminer Min & Rockmore, LLP in New York City. His practice focuses exclusively on international family law, child abduction, high conflict custody, and cross-border custody issues. He has extensive experience in 1980 Hague Child Abduction Convention cases having been involved in approximately 100 cross border child abduction or custody cases and having acted as lead trial counsel in over 40 Hague abduction cases across more than a dozen states. He has argued several appeals and in 2022 argued only the fifth Hague case before the U.S. Supreme Court, Golan v. Saada, 142 S. Ct. 1880 (2022). He has also taught numerous legal education courses and authored articles on the topic of child abduction. He holds leadership positions in the New York State Bar Association and the American Bar Association and is a Fellow of the International Academy of Family Lawyers.

The purpose of our next article, Strategic Planning for International Divorces written by Jeremy D. Morley is to discuss the lawyer’s role in working appropriately with clients to plan strategically for a potential divorce that has significant international elements. This article first focuses on the premarital issues that family lawyers handling international clients may face and then on the situations that arise after the marriage when an internationally connected client seeks advice about a potential or actual separation or divorce. Jeremy Morley is a New York attorney who concentrates on international family law, collaborates with family lawyers throughout the U.S. and globally, and often serves as an expert witness on international child custody and international divorce matters in jurisdictions throughout the United States and in other countries. He is the author of INTERNATIONAL FAMILY LAW PRACTICE (2020), a leading treatise on international family law in the United States, which is updated regularly, and of THE HAGUE ABDUCTION CONVENTION: PRACTICAL ISSUES AND PROCEDURES FOR FAMILY LAWYERS, published by the American Bar Association and now in its 3rd edition. His website is www.international-divorce.com. He frequently appears as an expert witness on international child abduction prevention and recovery issues in courts throughout the world, regularly lectures on
international family law topics to the judiciary and bar associations and is often a media guest on international child abduction matters.

Stutee Nag contributes our next article entitled *International Child Custody Disputes Between India and the United States: No Hague, So Vague!* The article extensively compares the applicable laws and standards in international child custody disputes in India and the United States, specifically focusing on Indian child custody law. It centers on the typical issues that arise when one parent (the “taking parent”) removes the child from the United States to India (or vice versa) without the consent of the other parent (the “left-behind parent”). Part II provides the statistical facts concerning the presence of a large Indian population in the United States. Part III discusses international parental child removal from the United States to India and vice versa. Part III.A. in particular, discusses the cases of child removal from the United States to India. It differentiates the writ (habeas corpus) jurisdiction of an Indian court from the temporary emergency jurisdiction of a U.S. court. This Part further discusses the applicable standard for a writ of habeas corpus and the various governing factors for such a writ, in particular, the existence (and the weight) of a foreign custody order. It then lists the potential challenges for a left-behind parent in the United States. Part III.B. sheds light on the issues that may emerge for a left behind parent in the relatively limited (yet growing) number of cases where the child is removed from India to the United States. It discusses the need of the left-behind parent to secure a custody order from the appropriate Indian court. It then discusses the provisions related to the enforcement of a foreign custody order in the United States. This Part further addresses the various potential issues with securing a temporary emergency custody order in the United States and concludes with a discussion of the various challenges faced by a left-behind parent in India. Part IV provides a brief overview of the Hague Convention, addresses the reasons for Indian’s refusal to sign the Convention, and then discusses the efforts of the U.S. government to encourage India to sign the Convention. Part V enumerates and discusses various reasons why India must sign the Hague Convention. Part VI concludes with a suggestion that India must sign the Convention to address the rampant confusion regarding international child custody disputes involving India. Stutee Nag is a dual-qualified attorney. She is licensed to practice law in the courts of India and the State of New York. Her primary practice area is international family law, particularly international child custody and divorce matters involving India and the U.S. She has researched and written extensively on international family law issues concerning India and the U.S. She has testified as an international family law expert before U.S. courts.

Our next article, *Family Mediation: The International Context* is written by Dr. Róisín O’Shea and Dr. Sinéad Conneely. The article examines the trend towards national legal regulation as a support for
mediation growth, with particular emphasis on the European position, as well as the current international legal framework and developments in the facilitation of family mediation for cross border family disputes. It examines national legal frameworks for mediation within Europe and North America, and then provides an overview of international and supra-national legal frameworks that aim to facilitate the resolution of cross border disputes using mediation. It also looks at the work of International Social Service (ISS) between 2010 and 2018 where they conducted a global program focusing on international family mediation and includes a case study of a cross border family mediation. Finally, it highlights the need for an internationally agreed framework for family mediations that traverse legal borders to assist international families and their lawyers in navigating the complexities of dealing with more than one jurisdiction. Dr Róisín O’Shea BL is a Partner in ARC Mediation, Chair of the Irish Professional Mediators’ Organisation CLG Ireland, is an IMI certified mediator, mediation trainer, legal academic, qualified barrister and Artist. She has significant experience as a mediator completing almost 600 cases since 2009 including Family (national and international cases), Work-place, Commercial disputes, Succession/Probate disputes, Wards of Court and EPA (Enduring Power of Attorney) disputes and Personal Injury claims. She is a valued expert in the field of mediation and continues to carry out academic research with her research partner Dr Sinead Conneely in the field that is published in peer reviewed journals. In 2023 she and Dr Conneely completed research commissioned by the Sentencing Committee of the Judicial Council into Sentencing & Relationship Violence in the District Court (Ireland). She was an Irish Professional, appointee to the Child Maintenance Review Group Ireland 2020-2022. Dr Sinead Conneely BL is a senior lecturer in law at the South East Technological University (SETU), in Waterford, Ireland. She completed her PhD and published a book entitled FAMILY MEDIATION IN IRELAND in 2001, which was the first systematic examination of the mediation experience there. With her research partner, Dr O’Shea, she has been involved in many research projects related to this field, including an innovative pilot project offering low cost family mediation through community centers, with an innovative and changing model, as well as a substantial study of family law disputes in the District Court.

Our final article is entitled, The Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) by Catherine Por and Calvin Lo. The Hong Kong Special Administrative Region (“Hong Kong”) was established as a special administrative region of the People’s Republic of China (“PRC”) on July 1, 1997, pursuant to the Constitution of the PRC. Pursuant to the Constitution, the National People’s Congress enacted the Basic Law of Hong Kong. The Basic Law is the constitutional document of Hong Kong, stipulating the basic principles and policies of Hong Kong. Notwithstanding its derivation from
the Constitution of the PRC, the Basic Law maintains Hong Kong’s previous capitalist system and way of life which are to remain unchanged for fifty years, specifically confirming that the socialist system and its policies shall not be practiced in Hong Kong. The often-cited principle — “One Country Two Systems” is the most prominent feature of the Basic Law, putting Hong Kong in a unique position as the only territory in the PRC in which the common law system is practiced and constitutionally guaranteed. This article addresses an aspect of the relationship between Hong Kong and the PRC set out is a new agreement that provides relief to families by recognizing and enforcing matrimonial and family orders made in the two jurisdictions. It investigates the provisions and procedures in relation to divorces in marriages between residents of Hong Kong and the PRC then discusses the history of this relationship to understand the need for such reciprocal recognition and enforcement in divorces. Finally, it sets out the arrangement’s aims. Catherine Por was admitted to practice as a solicitor in England and Wales in 1983 and in Hong Kong in 1991. She became a partner in the firm, Messrs Stevenson, Wong & Co in Hong Kong in 2001, heading the Family Department from 2003 to 2022, then becoming a senior consultant in 2023. Catherine specializes in all aspects of family law disputes and was part of a committee involved in the consultation of relevant stakeholders leading up to the passing of the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and enforcement) Ordinance and Rules into legislation in 2022. Calvin Lo was admitted as a solicitor in Hong Kong in 2014, becoming a partner in Messrs Stevenson, Wong & Co in 2022. Calvin handles a wide range of private client work, including family and matrimonial matters with Hong Kong-China cross border elements. He has had the experience of applying for a Certificate, certifying that a Hong Kong judgment was effective in Hong Kong prior to handing the case to Mainland China lawyers for enforcement.

We also feature three student Comments related to international family law. They are Approaches to U.S. Intercountry Adoption Policy: A Brief History by Saba Deutschmann, Gender-Affirming Care for Transgender Adolescents: A Comparison of Approaches Among Countries by Megan Tiede and Across Oceans, Across Hearts: International Family Reunification by Ashley Segnibo.

As usual our issue concludes with an excellent extensive bibliography of articles on international family law by Allen Rostron, Associate Dean for Students and the William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri-Kansas City School of Law.

Mary Kay Kisthardt
Executive Editor
Kansas City, Missouri
Obtaining International
Discovery in Family Law Matters

by
Anne L. Berger and Patricia A. Cooper*

Introduction
This article is intended to provide practical assistance to family lawyers in the various U.S. jurisdictions who either need to obtain discovery from non-U.S. sources for use in pending U.S. jurisdiction cases or who are assisting practitioners in non-U.S. jurisdictions to obtain discovery from U.S. sources for use in foreign cases.

There exists a striking difference between what assistance U.S. courts are able give to foreign litigants and what assistance non-U.S. courts will give to U.S. litigants in furtherance of discovery requests. In both cases, the availability of international treaties, federal statutes, state and interstate statutes, and in some cases available rules of domestic relations procedure will be examined and discussed. Part I of this article addresses discovery requests from foreign jurisdictions. Part II explores the reverse: discovery requests from cases originating in the United States directed to entities in foreign jurisdictions.

I. Incoming Discovery Requests from Non-U.S. Jurisdictions

There are three possible avenues to assist the parties litigating in foreign jurisdictions to obtain discovery from

* Ms. Berger is an attorney whose practice concentrates in family law in Woburn, Massachusetts. Ms. Cooper is a Principal of Cooper Ramp Cage Bucar Lewis, LLC, a boutique domestic relations firm in Denver, Colorado.
persons and entities located in the United States and its Territories and Possessions:

1. Use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention")\(^1\);
2. Application of 28 U.S.C. § 1782\(^2\); and
3. Application of various state statutes where they exist.

A. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

On March 18, 1970 at the Hague, Netherlands, the Eleventh Session of the Hague Conference on Private International Law adopted a new convention which replaced portions of two earlier Conventions on civil procedure.\(^3\) The “new” convention allows a judicial authority (judge or court or administrative agency) to send a letter of request to the authority of a responding State to facilitate the procurement of evidence or to facilitate the performance of a judicial act for a proceeding taking place in the requesting jurisdiction.\(^4\)

Parties to a judicial action in any of the countries signatory to the Convention may ask the judicial authority (tribunal) handling their case to send the letter of request, specifying what documents or evidence it wants to adjudicate the matter before it. Every signatory has to designate a Central Authority to emit and to receive letters of request and all outgoing and incoming Letters of Request may only go through and between those two Central Authorities.\(^5\)


\(^4\) However, “[a] Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. The expression ‘other judicial act’ does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.” Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, supra note 1, ch. 1, art. 1.

\(^5\) Id. art 2.
B. **U.S. Federal Statutes**

Under 28 U.S.C § 1782 litigants with a matter pending in a non-U.S. jurisdiction may pursue discovery from a witness located in the United States by petitioning the federal district court where a witness located in the United States resides through a letter of request for issuance of an appointment to take testimony and obtain documents for use in a proceeding in a foreign country.\(^6\)

Section 1782 is the product of congressional efforts, over the span of nearly one hundred and fifty years, to provide federal court assistance to gathering evidence for use in foreign tribunals.\(^7\)

The goals of the statute, which dates back to 1855, are to provide equitable and efficacious discovery procedures in United States Courts for the benefit of tribunals and litigants involved in litigation with international aspects and to encourage foreign countries by example to provide similar means of assistance to our courts.\(^8\)

The general trend over many years has been to increasingly broaden the application of the statute. A 1996 amendment, for example, added “criminal investigations conducted before formal accusations” to the large range of civil actions and proceedings previously covered.\(^9\)

The determination whether to grant a request under § 1782 requires an examination of four discretionary factors:

1. Whether the material sought is within the foreign tribunal’s jurisdictional reach;
2. The nature of the foreign tribunal, the character of the proceedings abroad, and the receptivity of the foreign court to U.S. federal-court jurisdictional assistance;
3. Whether the § 1782 (a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies; and
4. Whether the request is unduly intrusive or burdensome.\(^10\)

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\(^10\) *Intel Corp.*, 542 U.S. at 264-65.
Moreover, a foreign litigant may proceed under § 1782, or the Hague Convention, or both.\textsuperscript{11} The decision of how to seek discovery lies with the party seeking the discovery and § 1782 has no exhaustion requirement.\textsuperscript{12}

The procedure employed in federal district courts is the filing of an Ex Parte Application for an Order to Conduct Discovery for Use in a Foreign Proceeding Pursuant to U.S.C. § 1782. Once the court enters an order, the applicant may then serve subpoenas and notice depositions as in domestic litigation and the Federal Rules of Civil Procedure apply. If a subpoena is served, either for the production of documents or for testimony at a deposition or hearing, Federal Rule 45(d)(2)(B) requires a party objecting to a subpoena to serve objections “before the earlier of the time specified for compliance or 14 days after the subpoena is served.”\textsuperscript{13} If no objection is served, any objection is generally deemed waived.

The evidence sought through § 1782 discovery need not necessarily be admissible in the foreign proceeding.\textsuperscript{14} And it need not necessarily have to be discoverable under the foreign law of the jurisdiction in which the case is pending.\textsuperscript{15} In a Norwegian paternity case, for example, the court determined that it would not inquire into whether Norwegian laws would permit the ordering of blood samples in order to enter a U.S. order for discovery.\textsuperscript{16} Moreover, federal discovery rules and precepts will generally preempt individual state rules regarding issues such as the right to privacy set forth in state constitutions.\textsuperscript{17}

Since alternative dispute resolution, which takes many forms, has become ubiquitous in family law cases, and is often actively

\textsuperscript{12} See In re Martin & Harris, Civil Action No. 20-17070, 2021 WL 2434069, at *5 (D. N.J. June 14, 2021).
\textsuperscript{14} In re Barnwell Enter. Ltd., 265 F. Supp. 3d 1, 10-11(D.D.C. 2017). The burden appears to be on the party resisting discovery to point to authoritative proof that the foreign tribunal would reject the evidence sought. In re Veiga, 746 F. Supp. 2d 8, 23-24 (D.D.C. 2010).
\textsuperscript{15} Intel Corp., 542 U.S. at 264.
\textsuperscript{17} In re Letter of Request for Judicial Assistance from Tribunal Civil de Port au Prince, Republic of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987).
encouraged by family law courts, two recent consolidated Supreme Court cases should be noted as a caution: ZF Automotive US, Inc. v. Luxshare Ltd., and Alixpartners, LLP v. Fund for the Protection of Investors’ Rights in Foreign States. In these two consolidated cases decided in 2022, a unanimous Supreme Court held that only a governmental or intergovernmental adjudicative body constitutes a “foreign or international tribunal” under § 1782. Both cases involved forms of arbitration and the petitioners argued that the language of § 1782 permitting a district court to order discovery “for use in a proceeding in a foreign or international tribunal” allowed a definition of “tribunal” to include administrative and quasi-judicial proceedings. The court disagreed and adopted a firm definition of tribunal to mean only “an adjudicative body that exercises governmental authority.” So § 1782 may only be used if there is an actual proceeding in a court or in a governmental administrative proceeding.

Older cases had permitted the inclusion of arbitration proceedings, such as one involving the Canadian Government under NAFTA (the North Atlantic Treaty Organization) and one involving the Republic of Kazakhstan. However, those discovery requests were upheld on the bases that Canada is a governmental entity and Kazakhstan is a sovereign nation and thus these cases involved non-private (governmental) applicants exercising governmental authority. It should be noted that notwithstanding ZF Automotive, where a court proceeding is actually pending and the parties also agree to private arbitration while the action in court is still pending, the statute can be employed.

There are limitations on the use of § 1782, and district courts have discretion to permit or deny requests for judicial assistance.

18 142 S. Ct. 2078 (2022).
19 Id. at 2089.
20 Id. at 2083.
21 Id. at 2086.
23 In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP, 110 F. Supp. 3d 512 (S.D.N.Y. 2015).
24 142 S. Ct. 2078.
even if the statutory requirements have been met.\textsuperscript{26} The Second Circuit Court of Appeals determined it was an abuse of discretion to grant a subpoena for documents from a law firm that the firm had obtained under a confidentiality order, because allowing such discovery would undermine confidence in protective orders generally.\textsuperscript{27} And a U.S. court also refused to allow discovery that would have circumvented protective orders to access confidential corporate documents in an Israeli case.\textsuperscript{28}

In a case where both German and Irish courts had previously rejected the petitioner’s claims, the court determined that the petitioner was trying to circumvent foreign proof-gathering restrictions and denied relief.\textsuperscript{29} In a French case, the court, although concerned that the documents produced might not be used in a court in France and might be barred by French evidence rules, held that the trial court could order as a condition that the applicant turn over all of the documents obtained to the French court, whether or not they were helpful or harmful to the applicant’s case, and could also order reciprocal discovery for the respondent.\textsuperscript{30}

A court proceeding does not actually have to be pending for discovery to be requested; however the contemplated court action has to be more than speculative to satisfy the statutory language “for use in a foreign proceeding or tribunal.”\textsuperscript{31} In other words, there must be a concrete basis for a contemplated civil proceeding.\textsuperscript{32} And the filing itself must be “within reasonable contemplation.”\textsuperscript{33}

Where a litigant has deliberately failed, refused, or neglected to disclose assets or has concealed assets, the court can order relief even though a foreign court has denied a request to re-open discovery. In \textit{Pons v. AMKE Registered Agents, LLC}, the Eleventh Circuit Court of Appeals granted an ex-wife’s application for the discovery of foreign marital assets that she claimed her ex-husband

\begin{thebibliography}{9}
\item \textsuperscript{26} Republic of Ecuador v. Bjorkman, 801 F. Supp. 2d 1121 (D. Colo. 2011);
\item \textsuperscript{27} Kiobel v. Cravath, Swaine & Moore LLP, 895 F. 3d 238 (2d Cir. 2018).
\item \textsuperscript{28} \textit{In re} Discovery from Glasstech, Inc., 539 F. Supp. 3d 330 (D. Del. 2021).
\item \textsuperscript{30} Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995).
\item \textsuperscript{31} \textit{In re} Newbrook Shipping Corp., 498 F. Supp. 3d 807,808 (D. Md. 2020).
\item \textsuperscript{32} \textit{In re} Application of Shervin Pishevar, 439 F. Supp. 3d 290, 302 (S.D.N.Y. 2020).
\item \textsuperscript{33} \textit{Mesa Power Group}, 878 F. Supp. 2d at 1303.
\end{thebibliography}
had concealed on the grounds that those U.S. assets were previously not known to her.\textsuperscript{34}

The definition of “participant” in a pending proceeding is quite liberal. In the case of \textit{In re Request for Judicial Assistance from the District Court in Svitavy, Czech Republic}, the federal district court for the Eastern District of Virginia held that a putative father was a “participant” in a paternity action even though he had absolutely no connection to the Czech Republic other than the paternity dispute.\textsuperscript{35} Thus, the court allowed discovery to proceed.

C. U.S. State Statutes and Rules

In 1962 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Interstate and International Procedure Act.\textsuperscript{36} Versions of the uniform act were initially adopted by six jurisdictions: Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the U.S. Virgin Islands. The Massachusetts version of the Act is representative and is still in full force and effect. It was amended to exempt only the discovery of protected health care information. Massachusetts General Laws chapter 223A states, in part:

\begin{quote}
A court of this commonwealth may order a person who is domiciled or is found within this commonwealth to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this commonwealth. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this commonwealth, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this commonwealth issuing the order.\textsuperscript{37}
\end{quote}

Protected health information is excluded from discovery.

But by 1977, the Uniform Interstate and International Procedure Act was withdrawn by the Commissioners as “obsolete.”\textsuperscript{38}

\begin{flushleft}
\textsuperscript{34} 835 Fed. Appx. 465 (11th Cir. 2020).
\textsuperscript{35} 748 F. Supp. 2d 522 (E.D. Va. 2010).
\textsuperscript{38} Preamble to the adoption of the \textit{Unif. Interstate Depositions & Discovery Act} preamble (Unif. L. Comm’n 1977).
\end{flushleft}
The only United States jurisdictions that have not\(^\text{39}\) either adopted versions of the Uniform Interstate Depositions and Discovery Act (UIDDA) or do not have legislation pending to adopt it are New Hampshire and Puerto Rico.\(^\text{40}\) But that act does not directly address the ability of a state to order discovery for cases in foreign (non-U.S.) jurisdictions. One of the 1997 UIDDA’s core requirements is that the “foreign state” issue a subpoena that the U.S. state court is then asked to enforce. And all of that receiving state’s rules of practice and procedure then apply.\(^\text{41}\) Therefore, optimally, use of either the Hague Convention or 28 U.S.C. § 1782 is safest and provides the broadest remedies in all but the few jurisdictions that have retained the earlier (1962) version.

### II. Outgoing Discovery Requests from U.S. Jurisdictions to Non-U.S. Jurisdictions

Conducting discovery abroad in a matrimonial matter can be a complex, time-consuming, and costly proposition. Yet, when

\(^{39}\) Enactment of versions of the UIDDA are currently pending in the legislatures of Massachusetts (MA H. 4327 and MA S. 939) and Missouri (MO H.B. 1886 and MO S.B. 897). Texas. On May 26, 2023 the Texas legislature enacted H.B. 3929 which took effect on September 1, 2023 allowing the Texas Supreme Court to implement a version of the UIDDA within the next 2 years. [Unif. Interstate Depositions & Discovery Act (Unif. L. Comm’n 2007), https://my.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35.](https://my.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35).

\(^{40}\) Id.

\(^{41}\) In the older UIIPA the procedure may be “wholly or in part the practice and procedure of the tribunal outside this commonwealth” at the discretion of the U.S. court. UIIPA Section 3.02(a) of the act provides: [A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath. 1962 UIIPA promulgated by the National Council of Commissioners on Uniform State Laws.
evidence critical to a client’s matter lies abroad, practitioners must understand and navigate the labyrinth of treaties and local rules that govern seeking evidence in a foreign country. In a typical domestic relations matter, state and local rules prescribe the form and content of permissible discovery, the required manner of service, and the timing of discovery. When discovery is sought in a foreign country, however, the law governing such discovery depends on the facts and circumstances of the case and involves considerations of international comity. Family law practitioners are challenged with the task of determining whether familiar state discovery procedures or the Hague Evidence Convention apply and the extent to which the law of the foreign jurisdiction will impede or facilitate the discovery process.

As a practical matter, evidence that is readily discoverable within the United States might be impossible or impractical to obtain abroad, and practitioners are advised to weigh the importance of the evidence sought against the time and costs involved. The time necessary to conduct international discovery varies, but generally, practitioners should expect the process to take much longer than the typical timeline for intra-state discovery. The U.S. State Department’s foreign affairs manual estimates that processing and service of letters rogatory for obtaining evidence abroad may take six months to a year or more. Family law practitioners must account for this additional time when conducting discovery involving a person or entity in a foreign country and should manage the scheduling of the case accordingly. When the need for foreign discovery becomes known, practitioners should consider promptly filing a motion or other request that discovery deadlines be extended to accommodate the time necessary to prepare, serve, and effectuate gathering evidence abroad. Many states’ rules afford the trial court discretion to extend discovery deadlines for “good cause.”

42 Comity is the concept that “the courts of one sovereign state should not, as a matter of sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified.” Volkswagenwerk Aktiengesellschaft v. Super. Ct., 176 Cal. Rptr. 874, 884 (Cal. Ct. App. 1981).

43 See, e.g., Abdollahi, supra note 8.

44 U.S. Dep’t. of State, 7 Foreign Affairs Manual § 931.1c (2021).

Arguably, the inherent and unavoidable delay resulting from the complex procedural requirements for conducting discovery abroad constitutes good cause for an extension of applicable deadlines.46

A. International Discovery and the Hague Evidence Convention

The Hague Evidence Convention47 is a bilateral treaty based on the principle of comity. It was designed to reconcile the substantially different discovery procedures in common law countries and civil law countries48 and to provide a uniform procedure for obtaining evidence located in a foreign country.49 As discussed above in Part I, the Convention may be used by a civil litigant in a foreign country to obtain evidence located in the United States. Similarly, the Convention is an available method by which a divorce litigant in the United States may conduct discovery in a foreign signatory country.50 Sixty-six countries are signatories to the Hague Evidence Convention.51 When discovery is sought in a country that is not a signatory to the Convention, or when discovery under the procedures of the Convention is deemed inappropriate, discovery will normally proceed via letters rogatory, as discussed below in Part II.B.2.

Societe Nationale Industrielle Aerospatiale v. U.S. District Court52 is the seminal U.S. Supreme Court opinion interpreting

46 Cf. Arison v. Offer et al., 669 So.2d 1128, 1129 (Fla. Dist. Ct. App. 1996) (finding that dismissal was not required because the plaintiff showed good cause for failure to serve the defendant within the standard deadline because the defendant was served in a foreign country under a service treaty).

47 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, supra note 1.

48 See Geoffrey C. Hazard, Jr., Discovery and the Role of the Judge in Civil Law Jurisdictions, 73 Notre Dame L. Rev. 1017 (1998), for an in-depth discussion of the differences between common law and civil law systems in the conduct of discovery.


50 See Ved P. Nanda et al., 3 Litigation of International Disputes in U.S. Courts § 17:18 (2d ed. 2023), for a discussion of the mechanics of the Convention.


the Hague Evidence Convention and its application in domestic litigation involving international discovery. In *Aerospatiale*, the Supreme Court held that the Hague Evidence Convention is a permissible, but not exclusive or mandatory, mechanism for discovery abroad\(^53\) in domestic litigation and that litigants need not first resort to the Convention before pursuing other methods of discovery.\(^54\) The optional Hague Evidence Convention procedures are available when the foreign country in question is a signatory and use of the Convention "will facilitate the gathering of evidence by means authorized by the Convention."\(^55\)

State and federal appellate courts have repeatedly recognized that the Hague Evidence Convention does not deprive the presiding court of its authority to permit and enforce discovery pursuant to domestic civil procedure rules when such discovery is propounded to a party over whom the court has personal jurisdiction.\(^56\) Thus, when a trial court in a divorce matter has personal jurisdiction over a spouse located in a foreign country, the spouse who wishes

\(^{53}\) *Id.* at 538.

\(^{54}\) *Id.* at 542.

\(^{55}\) *Id.* at 541.

\(^{56}\) *Id.* at 539-40 (noting that the Convention did not deprive a district court of jurisdiction to order a foreign national party to produce evidence physically located within the signatory nation); Daimler-Benz Aktiengesellschaft v. U.S. Dist. Ct. W. Dist. Okla., 805 F.2d 340, 341 (10th Cir. 1986) (stating that the Convention has no application to the production of evidence in the United States by a party subject to the court's jurisdiction); Belmont Textile Mach. Co. v. Superba, S.A., 48 F. Supp. 2d 521, 524 (W.D.N.C. 1999) (finding that the Convention does not deprive a trial court of jurisdiction to order a foreign party to produce evidence under the federal rules); Lowrance v. Michael Weinig, GmbH & Co., 107 F.R.D. 536, 388-89 (W.D. Tenn. 1985) (providing that the Convention does not apply to discovery directed to a foreign national party over whom the court has personal jurisdiction); *In re Activision Blizzard*, Inc., 86 A.3d 531, 543 (Del. Ch. 2014), citing *Aerospatiale*, 482 U.S. at 543-46 (stating that a state court has power to require foreign litigants to respond to discovery conducted under state court rules); American Home Assurance Co. v. Societe Commerciale Toutelectric, 128 Cal. Rptr. 2d 430, 446-47 (Cal. Ct. App. 2002) (noting that corporate defendants under a court's jurisdiction are subject to the same legal constraints and burdens of American judicial procedures as American competitors); Bank of Tokyo-Mitsubishi Ltd., N.Y. Branch v. Kvaerner, a.s., 671 N.Y.S.2d 902, 904-05 (N.Y. Sup. Ct. 1998) (holding that a party subject to the court's *in personam* jurisdiction is obligated to produce all appropriate discovery documents under control of its agent, wherever located, without resort to Convention procedures); See also *Restatement (Third) of Foreign Relations Law of the United States* § 442(1)(a)(1987).
to conduct discovery of the abroad spouse is generally free to proceed under traditional state discovery rules. However, if the abroad spouse fails to cooperate in discovery, then the discovering party may choose to proceed under the Convention to obtain judicial assistance in the foreign country.

While *Aerospatiale* makes clear that discovery under the Hague Evidence Convention is neither mandatory nor the default method of discovery when a signatory country is involved, trial courts must exercise “special vigilance” to protect foreign litigants from discovery abuses and must also, as comity demands, “demonstrate due respect” for sovereign interests and the special problems that foreign litigants might face in the discovery process because of their nationality. In practice, this means that when a party in a family law matter propounds discovery on a foreign opposing party located in a signatory country using discovery methods provided by state law, and the foreign party objects to discovery by means other than the Convention, the trial court must consider: 1) the particular facts of the case, 2) the sovereign interests involved, and 3) the likelihood that procedures under the

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58 Article 10 of the Convention provides that: “In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.” Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, ch. 1, art. 10.

Convention will be effective\textsuperscript{60} to determine the reasonableness of various methods of discovery and whether Convention procedures should be followed.\textsuperscript{61} Factors to be considered in the presiding court’s analysis include, but are not limited to, the importance of the evidence sought to the litigation, the availability of alternative means of securing the information, and whether compliance with the request would undermine important interests of the United States or the foreign country.\textsuperscript{62} The court undertakes the same analysis when determining, in the exercise of its authority to manage discovery, whether a party who wishes to conduct discovery pursuant to the Convention may do so, or if state discovery procedures are superior and should be utilized.\textsuperscript{63} The burden of demonstrating the applicability of the Convention is on the party seeking discovery under the Convention or on the party seeking protection under the Convention, as the case may be.\textsuperscript{64}

At least one state court has held that a party can waive its right to insist on discovery under the Hague Evidence Convention. In \textit{American Home Assurance Co. v. Societe Commerciale Toutelectic},\textsuperscript{65} the California Court of Appeals held that a French defendant company waived its right to insist on adherence to Convention procedures, finding that its tactics in prior responses to discovery were inconsistent with Hague Convention procedures.\textsuperscript{66} A party’s neglect of its right to request application of the Convention must be substantial to support a finding of waiver as described in \textit{American Home Assurance}.\textsuperscript{67}

\footnotesize
\textsuperscript{60} When considering the likely effectiveness of the Convention as a discovery tool, practitioners must consider whether the country in question has issued a declaration under Article 23 of the Convention, which provides that: “A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.” Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, supra note 1, art. 23.

\textsuperscript{61} \textit{Aerospatiale}, 482 U.S. at 544-45.

\textsuperscript{62} \textit{Id.} at 544, n.28 (citing \textsc{Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986)} (approved May 14, 1986)).

\textsuperscript{63} \textit{See} Abdollahi, \textit{supra} note 8, at 782-83.

\textsuperscript{64} \textit{Id.} at 782.

\textsuperscript{65} 128 Cal. Rptr. 2d 430 (Cal. Ct. App. 2002).

\textsuperscript{66} \textit{Id.} at 434-35.

\textsuperscript{67} \textit{Id.} at 430.
A limited number of state court appellate opinions have addressed the *Aerospatiale* factors and whether discovery may proceed under traditional state discovery rules or must proceed under the Hague Evidence Convention, and they do not involve evidence gathering in domestic relations. Rather, these cases primarily involve commercial litigation and efforts to obtain evidence abroad from a non-party. Subject matter differences aside, these opinions recognize the fundamental distinction between discovery directed to a party in the case over whom the court has personal jurisdiction and discovery directed to a third party over whom the court lacks jurisdiction. Discovery of a party typically need not proceed under the Convention, while use of Convention procedures is “virtually compulsory” when discovery is sought from a foreign third party over whom the court does not have personal jurisdiction.

Several countries have exercised the right, under Article 23 of the Convention, to refuse to execute Letters of Request for pre-trial discovery of documents, which makes obtaining documentary evidence from a non-party witness in a Convention country nearly impossible. A party involved in a family law matter in the United States who resides in a foreign country might hope to benefit unfairly from that country’s restrictive policy on pre-trial discovery from third parties such as employers or financial institutions. However, as courts of equity, divorce courts have broad authority to enter orders and grant remedies designed to prevent injustice to the aggrieved spouse.

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69 *Orlich*, 560 N.Y.S.2d at 14.

70 Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.
B. Beyond the Hague Evidence Convention

1. State Discovery Rules

Some domestic relations matters involving discovery of a foreign party or witness do not implicate the Hague Evidence Convention, such as when the foreign country is not a signatory to the Convention or when the court has determined that discovery may proceed outside of the Convention. In that event, when requests for production of documents or interrogatories are sought from a party in a foreign country over whom the court has personal jurisdiction, then state rules govern discovery as they would domestically, and the discovery may be propounded in the customary manner. Similarly, when the Convention does not apply, and a divorcing party wishes to depose the other spouse, state law often provides for taking the deposition on notice, without requiring personal service of a subpoena.\(^71\)

2. Letters Rogatory

Many states have specific rules addressing depositions in a foreign country. They are often modeled on the federal rules and commonly provide that a deposition may be conducted on notice before an authorized person, by commission, or pursuant to letters rogatory.\(^72\) Letters rogatory are the usual method for obtaining judicial assistance with discovery abroad when an international treaty does not apply. Letters rogatory are requests from courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country’s sovereignty.\(^73\) The letters rogatory process is complex and time-consuming, in part because letters

\(^71\) See, e.g., Colo. R. Civ. P. 30.


rogatory must be transmitted through diplomatic channels in most circumstances.\textsuperscript{74}

When a party wishes to depose someone over whom the court does not have personal jurisdiction, and the witness is located in a country that is not a signatory to the Hague Evidence Convention, then the deposition must be sought via letters rogatory, unless the witness voluntarily submits to the deposition. Even if a witness seems cooperative, it is prudent to utilize letters rogatory to secure the deposition if there is a chance that the witness might later become uncooperative, necessitating judicial assistance in the foreign country.

The U.S. Department of State offers useful guidance on the preparation and transmission of letters rogatory, including sample letters rogatory and information about fees associated with the letters rogatory process.\textsuperscript{75} Importantly, the State Department also maintains country-specific information detailing whether a particular country is party to the Hague Evidence Convention and, if not, whether certain types of discovery are possible in that country via letters rogatory or whether discovery may not be had at all, even via letters rogatory.\textsuperscript{76}

When a country is not party to the Hague Evidence Convention, before proceeding with letters rogatory, practitioners should thoroughly research that country and consult with local counsel as necessary to determine whether the anticipated letters rogatory are likely to be honored, and, if not, whether there are any other means by which desired evidence might be discoverable within that country. For example, Chile is not party to the Convention and reportedly will not execute on letters rogatory for a deposition, even if the witness to be deposed is willing to submit

\textsuperscript{74} See, e.g., T. Andrew Keating, Transmitting Rule 4(d)(2)'s Cost-Shifting Provisions Abroad, \textit{67} Wayne L. Rev. 401, 410 (2022) (“The U.S. State Department also advises against using letters rogatory, describing the procedure as a ‘time consuming, cumbersome process’ that ‘need not be utilized unless there are no other options available.’”).

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} U.S. Dep’t of State, Legal Resources, Judicial Assistance Country Information, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information.html (last visited Sept. 26, 2023). The State Department cautions that the country information that it provides might not be entirely accurate and encourages counsel to consult with an attorney who practices in the foreign country.
to the deposition voluntarily. In contrast, Canada is not party to the Convention, yet parties in a private civil case in the United States may arrange to depose a willing witness in Canada without prior consultation with or permission from Canadian authorities and may seek assistance from a Canadian court with compelling deposition testimony or the production of documents.

3. 28 U.S.C. § 1783(a)

In certain circumstances, domestic relations litigants may be able to conduct discovery of a U.S. citizen or permanent resident located in a foreign country utilizing 28 U.S.C. § 1783(a). The statute provides as follows:

A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

To pursue issuance of a subpoena under 28 U.S.C. § 1783(a), a state court litigant must commence a miscellaneous action in federal court. This is a costly and daunting proposition, particularly for domestic relations practitioners who do not practice in federal court. Nonetheless, in high stakes divorce litigation, it might be necessary to pursue evidence abroad using all available means. If a state court litigant obtains a subpoena from a federal court, and the country in which the deponent resides is party to a service treaty to which the United States is also a party, then service of the subpoena must be perfected in accordance with that treaty.

A person who fails to comply with a subpoena issued under 28 U.S.C. § 1783(a) is punishable for contempt. Sanctions for non-compliance include financial penalties and levy upon property located in the United States. Nonetheless, these sanctions are unlikely to be effective in forcing compliance with the subpoena unless the person to whom the subpoena was directed has property in the United States.

C. Service Considerations

State law often requires that a subpoena to produce documents or to appear for a deposition be personally served. When service is made on a foreign person or entity and an international service treaty to which the United States is party applies, by virtue of the Supremacy Clause of the U.S. Constitution, service must be made as provided by the treaty, state service rules notwithstanding. The two international service treaties to which the United States is a party are the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention") and the Inter-American Convention on Letters Rogatory ("IACLR") and Additional Protocol to the Inter-American Convention on Letters Rogatory ("Additional Protocol").

This does not mean, however, that state methods for service of discovery are never permitted in family law cases involving a foreign party, witness, or entity in possession of critical evidence. For example, when the address of the person or entity to be served is unknown and cannot reasonably be ascertained, the Hague Service Convention is not implicated, and service may

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82 Id.
83 U.S. Const. art. VI, cl. 2.
proceed as provided by state law.\textsuperscript{87} Similarly, when the foreign country is not a party to an international treaty, then service may be accomplished in any manner that comports with state law for service abroad and the law of the country in which service is made.\textsuperscript{88} Prudence warrants consulting with local counsel in the country where service is sought to confirm whether a contemplated manner of service is acceptable in the foreign country. If the foreign country where service is sought is not party to a service treaty, and a form of service permissible under state law, such as personal service by a private citizen, is not available because it does not constitute valid service under the laws of the foreign country, then service must be accomplished by issuance of letters rogatory.\textsuperscript{89}

\section*{III. Conclusion}

Family law practitioners in the United States who are accustomed to transparency, voluntary financial disclosure, and broad access to records and information through pre-trial discovery, must accept the limits of international discovery and devise a path forward to an equitable outcome for the client despite these limitations. For outgoing requests, careful, closely tailored, specific requests for discovery to foreign courts are essential to the success of the discovery process. Vague and/or overbroad requests are usually doomed to failure.

As this article demonstrates by contrast, the very liberal discovery philosophy and approach of U.S. courts, even when

\begin{itemize}
  \item \textsuperscript{87} Hague Service Convention, art. 1.; \textit{See}, e.g., \textit{People v. Mendocino County Assessor’s Parcel No. 056-500-09}, 68 Cal. Rptr. 2d 51, 53 (Cal. Ct. App. 1997); \textit{See also Willhite v. Rodriguez-Cera}, 274 P.3d 1233, 1237 (Colo. 2012) (ruling that substituted service within Colorado under Colorado service rules constituted valid service on a Mexico defendant because service did not require the transmittal of documents abroad to effectuate service; thus, the Hague Service Convention was not implicated).
\end{itemize}
dealing with non-U.S. discovery requests, is an almost exclusively American concept which does not have foreign counterparts. As a result, we are able to assist our non-U.S. counterparts a great deal more than they are able to assist us.
Enforcement of International Support Orders Under UIFSA

by
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Introduction

The article discusses the Uniform Interstate Family Support Act (UIFSA) and how it facilitates enforcing international child support orders. It explains that foreign countries can be considered “states” under UIFSA if they have similar laws for issuing and enforcing support orders. Section II describes enforcement under UIFSA and Section III gives an overview of international enforcement. When discussing the process for registering a foreign support order in a U.S. state in Section IV below, subsection A. discusses the circumstances in which the order is treated as if it was issued in that state. It also discusses the limited grounds for contesting registration, such as lack of jurisdiction. Section IV. B. addresses the 2008 UIFSA amendments, which implemented the Hague Convention on the International Recovery of Child Support. These amendments require the United States to refuse to enforce “child-based” jurisdiction used by other countries but offer several alternatives to preserve the child support obligation, as outlined in UIFSA 2008. This article also details the process for enforcing international orders, which involves translation, currency conversion, and registration and notice procedures. Finally, the article discusses the mechanics of direct access, defenses to registration, and grounds for refusal to recognize and enforce a registered Convention support order while outlining the process for recognizing and enforcing a foreign support agreement. This

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article will aid the practitioner in determining which pathway to follow for foreign agreements within and outside the Convention.

I. Background: How an International Convention Became State Law

Before 2008, the Uniform Interstate Child Support Act (UIFSA) had provisions for enforcing foreign support orders, primarily limited to agreements with the Secretary of State, individual states, or comity. Those foreign entities’ orders with agreements are treated as any U.S. state order. An impediment to enforcing foreign orders is the fact that in the international scheme, the United States is unique in that under its Constitution, the issuing tribunal must have personal jurisdiction over the obligor. In other countries, jurisdiction may be based on the obligee, or the subject child who is under the jurisdiction of the issuing tribunal, often termed “child-based jurisdiction.” Unless the obligor submits to that jurisdiction or other constitutionally permissible long-arm jurisdiction, enforcement violates the obligor’s due process rights under U.S. law.

In 2007, the United States signed the Convention on the International Recovery of Child Support and Other Forms of

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3 Section 459A of the Social Security Act (42 U.S.C. § 659A) authorizes the Secretary of State, with the concurrence of the Secretary of Health and Human Services, to declare foreign countries, or their political subdivisions, to be reciprocating countries for the purpose of the enforcement of family support obligations. The notice can be found in Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 79 Fed. Reg. 49368 (Aug. 20, 2014), http://www.gpo.gov/fdsys/pkg/FR-2014-08-20/pdf/2014-19794.pdf, which includes a chart listing those countries.

4 Unif. Interstate Fam. Support Act, supra note 2, § 105, at 19.

5 Id. at 2; see also id. at 14 (strikeout from earlier legislation); In re Marriage of Beeson and Van der Weg, No. 92,673, 2005 WL 2347788 (Kan. Ct. App. Sept. 23, 2005).


8 Unif. Interstate Fam. Support Act, supra note 2, at 6.
Family Maintenance.\textsuperscript{9} There are several interesting aspects of this Convention, the first being that the Convention is modeled after UIFSA.\textsuperscript{10} This Convention was not self-executing; in other words, it did not become federal law upon signing nor enjoy the preemption doctrine.\textsuperscript{11} The legislation necessary to implement the Convention could have been federal; instead the Convention is implemented under state law. The reason for using state law was based on the following factors: the similarity between the Convention and UIFSA, the Uniform Law Commission’s (ULC’s) extensive expertise, and history, how prior versions of UIFSA were mandated under federal law to be adopted by all U.S. states.\textsuperscript{12} The Senate gave advice and consent, formally ratifying the treaty in 2010.\textsuperscript{13}

In 2008, the 2001 version of UIFSA was amended, with a careful eye trained to avoid expanding or changing the UIFSA currently in effect but to implement the Convention into the existing statutory scheme.\textsuperscript{14}

Federal legislation requiring all states to implement the 2008 version of UIFSA was signed into law on September 29, 2014.\textsuperscript{15}

\section*{II. How UIFSA Enforces International Support Orders}

A review of the case law shows that the UIFSA provides a mechanism for establishing and enforcing interstate child support orders, including those issued by foreign countries. Under the

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.} at 7, 97.
  \item \textsuperscript{11} For a discussion on self-executing treaties, see \textit{Medellin v. Texas}, 128 S. Ct. 1346 (2008).
  \item \textsuperscript{12} Battle Rankin Robinson, \textit{Integrating an International Convention into State Law: The UIFSA Experience}, 45 Fam. L.Q. 61, 64-66 (Spring 2009).
  \item \textsuperscript{13} Hague Convention, \textit{supra} note 9, at 97.
  \item \textsuperscript{14} \textit{Id.} at 6.
  \item \textsuperscript{15} Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014). This law amends 42 U.S.C. § 466(f) of the Social Security Act, requiring all states to enact any amendments to the Uniform Interstate Family Support Act “officially adopted as of September 30, 2008, by the National Conference of Commissioners on Uniform State Laws” (referred to as UIFSA 2008).
\end{itemize}
UIFSA, a foreign country is considered a “state” if it has enacted laws or procedures substantially like the UIFSA for issuing and enforcing support orders.\textsuperscript{16} Once a foreign support order is registered in a U.S. state, it can be enforced as if it were an order issued in that state.\textsuperscript{17} However, the non-registering party can contest the registration of a foreign support order on limited grounds, including lack of personal jurisdiction over the obligor in the foreign proceeding.\textsuperscript{18} The obligor bears the burden of proving a defense against registration and enforcement.\textsuperscript{19} Courts have found that an obligor submitting to genetic testing, engaging in discovery, or otherwise affirmatively seeking relief from the court on issues related to child support waives a personal jurisdiction challenge.\textsuperscript{20} When modifying a foreign child support order, courts must apply the substantive law of the issuing country regarding the availability of relief and duration of the support obligation.\textsuperscript{21} This includes determining if the issuing country permits modifying the specific aspect of child support.\textsuperscript{22} The UIFSA aims to prevent the imposition of new support obligations that could conflict with the issuing order.\textsuperscript{23} In summary, the UIFSA provides a pathway for enforcing foreign child support orders in the United States through registration while protecting obligors’ due process rights. The U.S. tribunal will use the issuing country’s laws governing modifications, and affirmative participation by the obligor can waive jurisdictional defenses.

III. Step-by-Step View of UIFSA 2008 for International Enforcement

The ULC’s final version of UIFSA is an excellent resource for understanding international enforcement; again, this is because

\textsuperscript{17} \textit{Ex parte} Reynolds 209 So. 3d 1122 (Ala. Civ. App. 2016); \textit{In re} EH, 450 S.W.3d 166 (Tex. App. 2014).
\textsuperscript{18} \textit{E.H.}, 450 S.W. 3d at 169.
\textsuperscript{19} \textit{Id}.
\textsuperscript{22} \textit{Id}.
\textsuperscript{23} \textit{Id}.
this amendment was carefully crafted to avoid changes to the existing UIFSA 2001, only to the extent needed to implement the Convention.\textsuperscript{24} This version provides a copy of the Act applicable to all states, and the strikeouts track what needed to be amended to implement the Convention.

As with all Uniform Acts, the definitions section is the most important in interpreting the statute generally. Many terms, like “child,” “Convention,” and “state,” are terms of art.\textsuperscript{25}

Under UIFSA 2001, the definition of “state” included foreign countries with a reciprocal agreement federally or with an individual state, or laws establishing support substantially similar to UIFSA. This provision was struck, and, in its place, a new definition for “foreign country” was set; this included reciprocal agreements by federal or state origin, substantially similar statutory schemes, or under the Convention.\textsuperscript{26}

A “support order” was broadened from child and spousal support, health care, arrearages, and attorney’s fees to include a foreign order, retroactive support, reimbursement provided in place of financial support, and automatic adjustment of reasonable attorney’s fees.\textsuperscript{27}

\textbf{IV. How to Analyze UIFSA When Confronted with a Foreign Order}

While UIFSA provides the framework for support enforcement agencies to manage inter-jurisdictional support enforcement, UIFSA allows a party to employ private counsel in pleadings under the Act.\textsuperscript{28}

Recall a support order could be either a temporary or final order providing traditional child support or spousal maintenance, orders to provide health insurance, in-kind considerations in place of support, related attorney’s fees, etc.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{24} Unif. Interstate Fam. Support Act, supra note 2, at 6.
\item \textsuperscript{25} Id. § 102.
\item \textsuperscript{26} Id. § 102.23, 102.5.
\item \textsuperscript{27} Id. § 102.28.
\item \textsuperscript{28} Id. §§ 309, 705.
\item \textsuperscript{29} Id. § 102.28; see also id. § 102.25 (regarding spousal support orders); § 102.2 (regarding child-support orders).
\end{itemize}
The first step is that the foreign order must be translated, if it is not in English, and the money ordered converted to dollars. The translation is a practical and necessary first step unless the practitioner is fluent in the order’s language. Orders under the Convention take the process further and require the original order and an English translation. While that requirement is not black letter law in non-Convention instances, providing both language versions is good practice. A foreign order must be converted into U.S. dollars.

In considering enforcement of an international order, UIFSA offers two pathways: 1) those who were applying under the Convention, which looks to Article 7 of UIFSA 2008, and 2) the remainder who are bound by reciprocity agreements, comity, and the like. The latter pathway follows the UIFSA 2008 Articles 1 through 6. The foreign order, not subject to the Convention, is treated like a sister-state’s order or as potentially enforceable under comity.

A. **Enforcing Foreign Orders That Are Not Under the Convention**

Under Article 5 of the UIFSA, an order from another state can be enforced without registration, essentially using income withholding orders. For support orders outside the Convention, Article 6 controls both sister-states’ and foreign orders. The procedure to register an order may be for enforcement, modification, or both. Article 6 requires a packet to be filed with the new tribunal; it must include a letter to the tribunal requesting registration and enforcement; two copies, one certified, of the order to be registered, and any modifications to that order; a sworn statement attesting to the current arrearages, if any; the name, address, and Social Security number of the obligor; name and address of the obligor’s employer, along with any other stream of income; and a description of non-exempt property.

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30 Id. § 713.
31 Id. § 205(f).
32 Id. § 105.
33 Id. § 105(b).
34 Id. art. 6, introductory cmt.
35 Id. § 602.
The packet is then filed as “an order of a tribunal of another state or a foreign support order.” 36 With the open file, the registering party may then file a motion under the laws of the state of this new tribunal requesting modification, enforcement, and a determination of validity. 37 If there is more than one order in effect, the party registering these orders must designate the controlling order and the consolidated arrearages. 38 A registered order has the same effect as though the registering tribunal issued it ab initio. 39

UIFSA’s choice of law uses both the tribunal of origin and the registering tribunal. The law of the issuing state controls the nature, extent, amount, and duration of current payments; any computation and payment of arrearages and accrual of interest under the support order; and the existence and satisfaction of other obligations under that order. 40 The longest statute of limitation is used to avoid an obligor choosing a state with a shorter statute of limitation. 41 The registering tribunal will use its state law for enforcement. 42 When modifying a child support order issued by another state, i.e., when all parties and the subject child no longer reside in the issuing state, the registering tribunal will use local support law and guidelines to set the new amount. 43

Due process is preserved through notice of the registration or order. The non-registering party is given notice and a copy of the registered documents. The notice must include the fact that the registered order is enforceable as though issued in the registering state; that a hearing must be set within 20 days after notice (not applicable in Convention orders); failure to contest the validity or enforcement of the registered order will be a waiver of enforcement and arrearage calculations set out in the registration packet; and, the notice must state the amount of the alleged arrearages. 44

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36 Id. § 602(b).
37 Id. § 602(c).
38 Id. § 602(d).
39 Id. § 603.
40 Id. § 604(a).
41 Id. § 604(b).
42 Id. § 604(d).
43 Id. § 611(b).
44 Id. § 605(a, b).
The contest of a registered order is narrow and generally attacks the validity of the order. The defenses to registration are: the issuing tribunal did not have jurisdiction over the contesting party; fraud; the order has been vacated, suspended, stayed, or modified by a latter order; some defense under the laws of the registering tribunal is applicable; full or partial payment was made; the statute of limitations under § 604 precludes enforcement; and the alleged controlling order is not the controlling order. Non-parentage after another tribunal has found parentage is not a defense. If a party provides a *prima facie* defense, those aspects of the order are stayed pending a full hearing; those aspects that were not objected to would still be enforceable (e.g., if the arrearages were contested but the monthly support amount was not, the tribunal would enforce the order for current support).

Suppose all the parties under the international order reside in the new state. In that case, that tribunal has jurisdiction to modify the child support order, using local law for enforcement and modification of the amount, and who is the obligor. If all parties and children have left the issuing “state” but reside in different jurisdictions, then the “away game rule” applies, and the movant must file in the nonmovant’s state or country. Again, on its statutory basis, the modification is limited to the amount and who is obligated, but the original jurisdiction that made the order sets the duration under their law.

The issuing state has exclusive jurisdiction to modify the spousal support.

The second pathway for support under the Convention is established by Article 7, which operationalizes the treaty’s language since the treaty is not substantive law. Article 7 governs proceedings under the Convention for enforcing support orders, taking precedence over Articles 1-6 if there is a conflict. It defines terms to align with the Convention and provides mechanisms for enforcing support orders, even if jurisdictional issues arise.

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45 *Id.* § 607(a).
46 *Id.* § 315.
47 *Id.* § 607(b).
48 *Id.* §§ 613, 604.
49 *Id.* § 611(a).
50 *Id.* § 611(d).
51 *Id.* § 211.
States designate central authorities to implement the Convention. Uniquely, individuals can directly access U.S. courts for matters like child support and recognition of foreign support agreements without relying on central authorities.\(^52\) Registration of foreign support orders in states is pivotal, with Article 7 detailing the process and potential grounds for refusal. Similarly, foreign support agreements, distinct from foreign support orders, have specific criteria for recognition and enforcement. The statute emphasizes both international cooperation and domestic public policy safeguards.

**B. Enforcing a Foreign Order Where the Convention Applies**

Orders under the Convention and Article 7 were where the ULC implemented the treaty’s language. Since the treaty is not substantive law, the ULC was directed to amend UIFSA.\(^53\) Article 7 applies only to proceedings under the Convention when enforcing a support order under the Convention; if Article 7 conflicts with Articles 1-6, Article 7 controls.\(^54\) The article has no application for orders of non-convention foreign countries.\(^55\)

Each state’s statute will direct which state entity will act as the central authority to implement the Convention functions.\(^56\)

While it is unusual for a Uniform Act to have multiple definition sections, Article 7 defines specific terms to sync with the Convention.\(^57\) The definitions in Article 7 tie the language from the Convention to the UIFSA and supports a continuity between the Convention and UIFSA. While one would want to review the statute, a brief summary of the additional terms of art are: “Application” is a request under the Convention made through the central authority from another central authority; “central authority” is the governmental entity designated under § 102(5)(D) to perform the functions under the Convention; “Convention support order” is a foreign support order under

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52 Id. § 705.
53 Id. at 96, § 702.
54 Id. § 702.
55 Id. at 99. The chart listing countries in the Convention is at Notice of Declaration of Foreign Countries as Reciprocating Countries, supra note 3, at 49369.
56 Unif. Interstate Fam. Support Act, supra note 2, at 96, § 703.
57 Id. § 701.
§ 102(5)(d); “direct request” is a petition filed by an individual in a state in a proceeding involving a party or child residing outside the U.S.; “foreign central authority” is the central authority of another country; “foreign support agreement” is an agreement to provide support that is an enforceable order in the country of origin that has been either formally drawn by a foreign tribunal, or authenticated by, concluded, registered or filed with a foreign tribunal and may be reviewed and modified by a foreign tribunal and includes a maintenance arrangement or authentic instrument under the Convention; and finally, “United States central authority is the Secretary of the U.S. Dept. of HHS.”

As mentioned, child-based jurisdiction requires the United States to take an exception to satisfy constitutional due process. Article 7 manages this in two ways. First, it references the UIFSA long-arm statute. The jurisdictional requirement is satisfied if the court can find any jurisdiction basis under § 201. The Act clarifies that grounds for refusal are narrow and tightly controlled by Article 7. If any portion of the order is enforceable, it will be. Second, if the court finds that no jurisdictional basis exists, then it should not dismiss the proceeding without allowing a request to establish a new Convention support order; and, if received under § 704, the Central Authority will take all appropriate steps to request a child support order under the Convention.

Because this is an enforcement action of an existing support order, the party called to the tribunal of this state is most likely the obligor. Regardless of the jurisdictional basis of the original order, even when the original tribunal based its order on child-based or child-centered orders, those orders will be enforced if any other constitutionally permissible route exists; failing that, the obligor is not off the hook. The registering party will be allowed time to work through the Central Authorities to establish a new order from this tribunal under this state’s law. This workaround will capture most obligors and get support flowing.

58 Id. § 701(7).
59 Id. § 708(b)(2).
60 Id. § 708(b).
61 Id. § 709.
62 Id. § 708(c).
Instead of involving the Central Authorities, Article 7 allows direct access to the courts.\textsuperscript{63} An individual, irrespective of citizenship or residency in a Convention country, can approach U.S. tribunals for many matters ranging from child and spousal support parentage to recognition of foreign support agreements. In certain instances, the tribunal may modify existing support orders. Notably, this freedom of approach does not dictate the nature of representation. As section 309 highlights, representation can be through \textit{pro se} or private counsel.\textsuperscript{64}

Registration of a support order under the Convention in the subject state is crucial.\textsuperscript{65} Except for any provisions that suggest otherwise within the same article, parties (individuals or support enforcement agencies) that seek the recognition of a Convention support order must register the order within the state under Article 6. Article 7 has a more specific registration process for orders under the Convention. The statute delves into particular requirements, effectively creating a checklist for applicants the submission must include:

- the complete the support order, alternatively, an abstract or extract crafted by the issuing foreign tribunal. The form recommended by the Hague Conference on Private International Law may be used;\textsuperscript{66}
- the record confirming the enforceability of the support order in its originating country is essential;\textsuperscript{67}
- the statute accommodates scenarios where respondents might not have appeared during the original proceedings. In such cases, the record must attest to the respondent’s receipt of proper notice and their opportunity to contest or appeal the order on factual or legal grounds;\textsuperscript{68}
- for outstanding support amounts, a detailed record is necessary, along with the date the calculation was made;\textsuperscript{69}

\textsuperscript{63} Id. § 705.
\textsuperscript{64} Id. § 309.
\textsuperscript{65} Id. § 706(a).
\textsuperscript{66} Id. § 706(b)(1).
\textsuperscript{67} Id. § 706(b)(2).
\textsuperscript{68} Id. § 706(b)(3).
\textsuperscript{69} Id. § 706(b)(4).
• if applicable, records indicating provisions for the automatic adjustment of the support amount and associated calculation information;\textsuperscript{70} and,

• in circumstances where the applicant availed free legal aid in the issuing country, a corresponding record must be submitted.\textsuperscript{71}

The statute acknowledges that parties might seek only partial enforcement of the Convention support order in certain instances. This provision offers flexibility in how recognition and enforcement can be approached.\textsuperscript{72}

While the statute promotes international cooperation, it does not lose sight of domestic public policy considerations. A tribunal within the state retains the discretion to \textit{sua sponte} vacate a registration. However, this is reserved for exceptional cases where recognition and enforcement starkly contravene public policy.\textsuperscript{73}

Finally, the tribunal must promptly notify parties of the registration or if the registration has been vacated.\textsuperscript{74}

The mechanics of direct access are as follows: By allowing an individual party to file proceedings directly, the Convention facilitates the voluntary submission of an individual to the tribunal’s jurisdiction and the respective state law.\textsuperscript{75} The acknowledgment that an individual can seek recognition and enforcement of support orders or agreements without intermediation by a central authority reflects a departure from bureaucratized legal processes. However, the Convention remains influential, as its specific sections govern proceedings.\textsuperscript{76} The Convention prohibits unnecessary financial burdens like guarantees for payment costs. More importantly, it fortifies the commitment to legal access by ensuring free legal assistance, subject to conditions.\textsuperscript{77} A nuanced distinction is made here. An individual filing directly regarding a Convention support order is not privy to governmental aid, specifically from the support enforcement agency. This provision underscores the importance of

\textsuperscript{70} \textit{Id.} § 706(b)(5).
\textsuperscript{71} \textit{Id.} § 706(b)(6).
\textsuperscript{72} \textit{Id.} § 706(c).
\textsuperscript{73} \textit{Id.} § 706(d).
\textsuperscript{74} \textit{Id.} § 706(e).
\textsuperscript{75} \textit{Id.} § 705(a).
\textsuperscript{76} \textit{Id.} § 705(b).
\textsuperscript{77} \textit{Id.} § 705(c).
personal agency and the boundaries of governmental intervention.\textsuperscript{78} Drawing inspiration from Article 52 of the Convention, this subsection embodies efficiency. It invites individuals to employ any simplified or expeditious procedures available, provided they respect the protections enshrined in Articles 23 and 24 of the Convention.\textsuperscript{79}

Defenses to registration are the same as Article 6, unless otherwise indicated in Article 7; the guidelines for contesting a registered Convention support order are outlined in sections 605 through 608.\textsuperscript{80}

A clear distinction is made based on the residence of the contesting party. While a party residing within the United States has a window of 30 days post-registration notice to contest, a non-resident has 60 days. This differentiation likely recognizes the logistical challenges faced by parties outside the United States.\textsuperscript{81}

The Act underscores the significance of the aforementioned timelines. If a party does not contest within the stipulated timeframe, the registered Convention support order automatically becomes enforceable, effectively ending challenges to its validity within the state.\textsuperscript{82} The burden of proof falls on the party initiating the contest. The scope of contestation is narrowly defined. Parties can only challenge the order based on the grounds mentioned in section 708.\textsuperscript{83}

The following are the \textit{only grounds} for refusal to recognize and enforce a registered Convention support order: The statute identifies a violation of public policy, especially a failure to uphold minimum due process standards such as providing notice and an opportunity to be heard, as a primary ground for refusing enforcement.\textsuperscript{84} If the issuing tribunal lacked the requisite personal jurisdiction under section 201, recognition could be denied.\textsuperscript{85} If the originating country does not enforce the support order itself.\textsuperscript{86} If a support order results from a procedural fraud;\textsuperscript{87} for an order to be enforced, the accompanying records must be genuine and

\begin{itemize}
  \item[\textsuperscript{78}] \textit{Id.} § 705(d).
  \item[\textsuperscript{79}] \textit{Id.} § 705(e).
  \item[\textsuperscript{80}] \textit{Id.} § 707(a).
  \item[\textsuperscript{81}] \textit{Id.} § 707(b).
  \item[\textsuperscript{82}] \textit{Id.} § 707(c).
  \item[\textsuperscript{83}] \textit{Id.} § 707(d).
  \item[\textsuperscript{84}] \textit{Id.} § 708(b)(1).
  \item[\textsuperscript{85}] \textit{Id.} § 708(b)(2).
  \item[\textsuperscript{86}] \textit{Id.} § 708(b)(3).
  \item[\textsuperscript{87}] \textit{Id.} § 708(b)(4).
\end{itemize}
unaltered. If there is doubt about their authenticity or integrity, the enforcement can be legitimately challenged.\textsuperscript{88} To avoid conflicting decisions, if there’s a similar ongoing proceeding in the state that predates the foreign order, it takes precedence.\textsuperscript{89} In cases of conflicting orders, the more recent order, if it merits recognition in the state, takes precedence.\textsuperscript{90} The alleged arrears have been settled either partially or in full.\textsuperscript{91} For those respondents who neither appeared nor had representation in the foreign proceedings, their right to proper notice and a chance to be heard is vital. Whether the foreign jurisdiction mandates prior notice of proceedings or not, the respondent’s right to contest the order is preserved.\textsuperscript{92} Finally, an order that modifies a Convention child support order is limited by section 711, which allows modification only if the obligee submits to the jurisdiction by defending on the merits or failing to object, or the foreign tribunal refuses to exercise modification jurisdiction.\textsuperscript{93}

The statute significantly restricts the scope of a state tribunal’s review. First, the tribunal must accept the foreign tribunal’s factual findings concerning its jurisdiction. Second, the original order’s merits are beyond the state tribunal’s purview.\textsuperscript{94} Once a state tribunal decides on a contest, the involved parties must be promptly informed.\textsuperscript{95} Last, the statute highlights that further challenges or appeals to a Convention support order do not inherently halt its enforcement. A stay would be granted only in exceptional circumstances, preserving the urgency and importance of support orders.\textsuperscript{96}

Finally, there is one more avenue under Article 7; this is the foreign support agreement. A foreign support agreement is an agreement for support that has been formally drawn up or registered as an authentic instrument by a foreign tribunal or authenticated by or concluded, registered, or filed with a foreign tribunal.

\textsuperscript{88} Id. § 708(b)(5).
\textsuperscript{89} Id. § 708(b)(6).
\textsuperscript{90} Id. § 708(b)(7).
\textsuperscript{91} Id. § 708(b)(8).
\textsuperscript{92} Id. § 708(b)(9).
\textsuperscript{93} Id. §§ 708(b)(10), 711.
\textsuperscript{94} Id. § 707(e).
\textsuperscript{95} Id. § 707(f).
\textsuperscript{96} Id. § 707(g).
tribunal, as opposed to a foreign support order issued by a tribunal of a foreign country.\textsuperscript{97}

By delineating specific criteria for refusal, the statute provides a clear roadmap for tribunals, ensuring that while foreign agreements are honored, they are not done so at the expense of justice and fairness.

A foreign support agreement will not be enforced if the following occurs: First, a state tribunal can unilaterally vacate the registration of a foreign support agreement if it believes that recognizing and enforcing the agreement would go starkly against public policy.\textsuperscript{98} The criteria under which a tribunal can decline recognition and enforcement are if it determines any of the following: the agreement’s enforcement starkly contravenes public policy; the agreement was procured through deceptive means like fraud or falsification; the agreement clashes with another support order (involving the same parties and objectives) from this state, another state, or a foreign jurisdiction; the conflicting order must also be recognizable and enforceable under this Act in this state; or, documentation provided is dubious or lacks veracity.\textsuperscript{99} Further, any ongoing procedure to recognize and enforce a foreign support agreement must be put on hold if there is an active challenge or appeal against the agreement in another state or foreign tribunal.\textsuperscript{100}

If none of the above findings are made, a state’s tribunal is generally obliged to recognize and enforce any foreign support agreement registered in the state.\textsuperscript{101}

For a foreign support agreement to be recognized and enforced, the application must be complemented by the complete text of the foreign support agreement, a record confirming the agreement’s enforceability as a support order in the originating country.\textsuperscript{102}

Any ongoing procedure to recognize and enforce a foreign support agreement must be put on hold if there is an active challenge or appeal against the agreement in another state or foreign tribunal.\textsuperscript{103}

\textsuperscript{97} Id. §§ 701(6), 102(28).
\textsuperscript{98} Id. § 710(c).
\textsuperscript{99} Id. § 710(d).
\textsuperscript{100} Id. § 710(e).
\textsuperscript{101} Id. § 710(e).
\textsuperscript{102} Id. § 710(a).
\textsuperscript{103} Id. § 710(b).
Conclusion

In the ever-evolving international child support enforcement landscape, the Uniform Interstate Family Support Act (UIFSA) is a vital legislative instrument. UIFSA delineates a precise mechanism for establishing and enforcing child support orders across state lines and international borders. However, it was not until the 2008 amendments to UIFSA that its provisions were expanded to sufficiently address foreign support orders, aligning with the Hague Convention on the International Recovery of Child Support. This alignment with international standards effectively positions certain foreign countries with parallel child support laws as “states” within the UIFSA framework. Thus, once a foreign order undergoes successful registration in a U.S. state, it gains the same enforceability as any domestically issued order.

Nevertheless, registration is not without its challenges. Parties can contest a foreign order on specific grounds, primarily centered around jurisdictional issues. Interestingly, certain actions, like an obligor’s consent to genetic testing, can waive these jurisdictional defenses. Furthermore, in the rare circumstance that a U.S. court finds itself tasked with modifying a foreign child support order, it is bound by the substantive laws of the issuing nation, particularly concerning the availability of relief and the order’s duration. Notably, the 2008 UIFSA amendments introduced a mandatory refusal to enforce the “child-based” jurisdiction, which is constitutionally unacceptable and commonly practiced by various countries. Yet, in the spirit of upholding support obligations, they also offered alternative avenues. Enforcing these international orders is complex, encompassing multiple stages, including translation, currency conversion, registration, and due notice. Yet, it is imperative to underscore that defenses against registration remain stringently limited. The amendments have also meticulously defined the reasons for a refusal to recognize and enforce registered Convention support orders while providing comprehensive guidance on the recognition and enforcement of foreign support agreements.
Recognition and Enforcement of Foreign Child Custody Orders

by
Michael S. Coffee*

There are many benefits to the recognition and enforcement of foreign judgments. Included among these benefits are a reduced burden on judiciaries that do not need to devote significant resources to a subsequent consideration of a matter that has already been litigated, costs savings on the parties who do not need to retain counsel to relitigate the matter, reduced stress on persons who will not be asked to provide evidence for a subsequent civil action, and the elimination or reduction of inconsistency resulting from the execution of multiple judgments.

Despite these benefits, there exist some potential risks associated with the recognition and enforcement of foreign judgments. For example, the judgment may order measures that are available in the State¹ in which the judgment is issued, but not in a State in which recognition or enforcement might be sought; the judgment might be based on cultural norms of the issuing State that do not match the norms of a State in which recognition or enforcement might be sought; the court issuing a judgment might show favor to one of the litigating parties for reasons unrelated to the merits of the matter before it (e.g., favoring local nationals over non-nationals); or there may have been some procedural flaw in the proceeding that resulted in the judgment.

These benefits and risks apply to all civil judgments, whether they relate to commercial disputes, family law issues, or other matters. This article addresses the recognition and enforcement of child custody judgments. It presumes that the parents, or at least one of the parents, would prefer to litigate child custody once and would like to have the resulting judgment recognized and enforced subsequently when any of the parents or the child

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¹ In this article, “State” has the same meaning as “country.” When modified by “U.S.,” a “U.S. state” is a state within the United States.
find themselves in a State other than the State in which the judgment was issued.

This article will not answer the question whether a child custody judgment will be recognized or enforced elsewhere. This question, unfortunately, cannot be answered definitively in advance of an attempt to have the judgment recognized or enforced. Instead, this article focuses on the pragmatic question – what steps can be taken to increase the likelihood that a child custody judgement issued in one State will be recognized or enforced in a foreign State.

This article focuses on family lawyers licensed to practice in the United States. It should, however, benefit foreign family lawyers considering whether a child custody determination might be recognized or enforced in a U.S. state. In Part I, this article discusses rules applied by foreign States to the recognition and enforcement of child custody judgments from other States. Part II addresses steps that can be taken when litigating child custody in a court in the United States to increase the chance that the resulting judgment might be recognized or enforced in a foreign State. Part III identifies steps that can be taken when litigating child custody in a foreign State to increase the chance that the resulting judgment might be recognized or enforced in a U.S. state.

To learn about the relevant law and practice in a foreign State, a prudent step would be to consult with an attorney who practices in that State. Similarly, should a foreign attorney wish to learn about the law and practice in a particular U.S. state relevant to the recognition or enforcement of a foreign child custody judgment, the foreign attorney should consider consulting with an attorney who practices in the that U.S. state. As discussed below, to benefit a future or pending custody action, this approach works best when the parties have a sense of the States in which the members of the family may find themselves in the future before a custody judgment is issued. However, given global movement, it is possible that a family member might end up in a State not contemplated at the time of the child custody proceeding. Thus, it is helpful to have a good understanding of general State practice as it relates to the recognition and enforcement of child custody determinations.
I. Rules Applied by Foreign States to the Recognition and Enforcement of Child Custody Judgments

The domestic law applied by each State relating to the recognition and enforcement of foreign child custody judgments varies. However, many States have entered into a treaty establishing certain rules in this area. This treaty is the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the “Child Protection Convention”). The Child Protection Convention is presently in force in 54 States. The United States signed the Child Protection Convention October 22, 2010, but has not deposited its instrument of ratification to bring the Convention into force for it.

One of the objects of the Child Protection Convention is “to provide for the recognition and enforcement of . . . measures of protection in all Contracting States.” The covered “measures of protection” include measures dealing with:

- rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child’s habitual residence.

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4 Id. The President has not transmitted the Child Protection Convention to the Senate for its advice and consent to ratification.

5 Child Protection Convention, supra note 2, art. 1(1)(d).

6 Id. art. 3(b).
The Child Protection Convention requires that “[t]he measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.” There are several elements to this requirement. First, the measure must be taken by the authorities of a State. Thus, this obligation would not extend to, for example, an agreement entered into by private parties without an associated measure taken by a State authority. Second, the provision applies only where the State that took the measure is a Contracting State. A Contracting State is a State that “has consented to be bound by the treaty, whether or not the treaty has entered into force.” Although a State may be considered to be a “Contracting State” after it has consented to be bound but before the Convention enters into force for that State, the Convention “appl[ies] to measures only if they are taken in a State after the Convention has entered into force for that State.” The obligation does not extend to a measure taken by an authority of a State that has not signed the Child Protection Convention or a State that has signed but not ratified the Child Protection Convention, even if that State is a member of the Hague Conference on Private International Law. Finally, the recognition

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7 Id. art. 23(1).
9 Child Protection Convention, supra note 2, art. 53(1). This article does not address the fascinating issue of the application of the Child Protection Convention between Contracting States that accede to the Convention and other Contracting States. For the benefit of the reader, first, thank you for reading the footnotes, and, second, please note that the Child Convention might not apply with respect to all Contracting States. See id. art. 58.
10 For matters involving Washington State, the Court of Appeals of Washington was mistaken in In re Long, 421 P.3d 989 (Wash. Ct. App. 2018). The United States is not a Contracting State to the Child Protection Convention merely as a result of its membership in the Hague Conference on Private International Law. (Similarly, the United States is not a party to the United Nations Convention on the Rights of the Child merely because the United States is a member of the United Nations.) As the Fourth Restatement of the Foreign Relations Law of the United States observes:

An international agreement enters into force as an international obligation for a state, including the United States, when: (a) the state has
is to occur “by operation of law.” Because recognition occurs as a matter of law, “it will not be necessary to resort to any proceeding in order to obtain such recognition.”

The process for enforcing a child custody judgment pursuant to the Child Protection Convention is slightly more complicated. Here, the Convention provides that “[i]f measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.” As with the recognition requirement, there are several elements to this obligation. First, the measure must be taken in a Contracting State. Although this provision does not state explicitly that the measure must be taken by an authority of a Contracting State, this would seem to be the proper reading of the provision. Second, the measure must be enforceable in the Contracting State in

expressed its consent to be bound by means consistent with the agreement; and (b) the other conditions established by the agreement, including consent by the requisite number of states, have been satisfied.

Restatement (Fourth) of U.S. Foreign Relations Law, supra note 8, at § 304(1) (Section 304 addresses the “Entry into Force of International Agreements”).


12 Child Protection Convention, supra note 2, art. 26(1).

13 It would not be logical to require that a measure be taken by an authority for purposes of recognition but not for enforcement. Moreover, the relevant part of Article 1(1) of the Child Protection Convention provides: “The objects of the present Convention are – a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child; . . . d) to provide for the recognition and enforcement of such measures of protection in all Contracting States.” Id. art. 1(1) (emphasis added).

Reading subparagraphs (a) and (d) of Article 1(1) together, the negotiators of the Convention appear to have intended that the provisions on recognition and enforcement apply to measures taken by authorities of States that have jurisdiction to take those measures.
which it was taken. In the case of a child custody judgment, that judgment must be enforceable in the Contracting State of the court that issued the judgment. Third, there must be a need for enforcement of the relevant measure in another Contracting State as the measure must “require enforcement.” Fourth, any person may request that the foreign measure be declared enforceable or registered for the purpose of enforcement. This person need only be “interested” and might be someone other than a parent. Finally, the process for declaring the measure enforceable or registering it for the purpose of enforcement is governed by the procedural rules of the State in which enforcement is sought.

The Child Protection Convention provides a list of reasons for which one Contracting State may refuse to recognize or enforce a measure taken by an authority in another Contracting State, to include a child custody judgment issued by a court of the latter State. The following bases for refusal to recognize or enforce are identified in the Child Protection Convention:

a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in [the Convention’s Chapter identifying jurisdictional rules for the taking of measures];

b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

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14 The Child Protection Convention does not define, or provide guidance in interpreting, the term “interested party.” Presumably, an interested party might be any party that would wish to have a measure enforced, including a government authority in the other Contracting State.

15 The list of bases upon which one Contracting State may refuse to recognize a measure taken by an authority of another Contracting State is provided in Article 23(2) of the Child Protection Convention. The same list provides the exclusive bases upon which one Contracting State may refuse to declare enforceable or register for the purpose of enforcement a measure taken by an authority of another Contracting State. Child Protection Convention, supra note 2, art. 26(3).
d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f) if the procedure provided in Article 33 [relating to the placement of a child in a foster family or institutional care, or the provision of care by kafala or an analogous institution] has not been complied with.\textsuperscript{16}

Many of these bases that permit a Contracting State to refuse to recognize or enforce a measure from another Contracting State can be identified and addressed, with some degree of comfort, before and during the initial child custody proceeding. In particular, jurisdictional rules and due process rights generally can be addressed at the outset. Other bases cannot be known until the recognition or enforcement stage. For example, the public policy or fundamental rules of procedure of a State cannot be known before the State is identified. Finally, one category does not involve actions that might be addressed leading to the issuance of the child custody judgment and involves a State other than a Contracting State to the Convention. This article will discuss each category of bases for the refusal of recognition or enforcement of a foreign child custody judgment.

A. Bases Relating to Actions That Can Foreseeably Be Addressed in the State Taking the Measure

The first reason for not recognizing or enforcing a foreign measure, as allowed by Article 23(2)(a) of the Child Protection Convention, is that the measure was taken by an authority not exercising jurisdiction pursuant to the relevant provisions of the Child Protection Convention. As a general matter, “[t]he judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child’s person or property.”\textsuperscript{17} The Child Protection Convention does not contain a definition for “habitual residence.” An interpretation

\textsuperscript{16} Id. art. 23(2).
\textsuperscript{17} Id. art. 5(1).
of the term should develop over time.\textsuperscript{18} The Child Protection Convention also includes jurisdictional rules applicable to refugee children and internationally displaced children;\textsuperscript{19} children who have been wrongfully removed or retained;\textsuperscript{20} situations in which a court might be better placed to address the matter than the court that might otherwise have jurisdiction;\textsuperscript{21} certain measures taken in the context of divorce or legal separation of parents;\textsuperscript{22} cases of urgency;\textsuperscript{23} and situations necessitating provisional measures.\textsuperscript{24}

In Article 23(2)(c), the Child Protection Convention permits a Contracting State to refuse to recognize or enforce a measure that restricts a person’s ability to exercise parental responsibility\textsuperscript{25}

\textsuperscript{18} According to the VCLT, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” VCLT, supra note 8, art. 31(1). The Convention on the Civil Aspects of International Child Abduction also uses the term without a definition. Convention on the Civil Aspects of International Child Abduction (hereinafter “Abduction Convention”), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. The context and the objects and purposes of the Conventions are different, thus the term might be interpreted differently in each. Although the term might be interpreted differently in each Convention, it is worth noting that many courts have attempted to interpret the term in the context of the Abduction Convention. See, e.g., Monasky v. Taglieri, 140 S. Ct. 719 (2020). These interpretations have considered a variety of factors and have shown that, in the context of the Abduction Convention, the term is much broader than “home state” as it appears in the Uniform Child-Custody Jurisdiction and Enforcement Act. Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter “UCCJEA”), 9(1A) U.L.A. 649, § 102(7) (UNIF. LAW COMM’N 1997).

\textsuperscript{19} Child Protection Convention, supra note 2, art. 6.

\textsuperscript{20} Id. art. 7.

\textsuperscript{21} Id. arts. 8, 9.

\textsuperscript{22} Id. art. 10.

\textsuperscript{23} Id. art 11.

\textsuperscript{24} Id. art. 12.

\textsuperscript{25} The Child Protection Convention does not define the term “parental responsibility.” The Lagarde Report provides the following guidance in interpreting the term: “It covers at the same time responsibility concerning the person of the child, responsibility concerning his or her property and, generally, the legal representation of the child, whatever be the name which is given to the legal institution in question: parental responsibility, parental authority, paternal authority, as well as guardianship, curatorship, legal administration, tutelle, curatelle. The rights and responsibilities to which reference is made are those which belong to the father and mother under the law with a view to raising their children and ensuring their development, whether the question involved
when the authority making the measure did not provide that person an opportunity to be heard. Several treaties negotiated at the Hague Conference on Private International Law permit a State to refuse to recognize or enforce a foreign order as a result of the lack of due process.  

The exception contained in Article 23(2)(f) is specific to measures taken relating to the placement of a child in a foster family or institutional care, or the provision of care by kafala or an analogous institution. These would not be expected to involve custody orders.

**B. Bases Relating to the State Requested to Recognize or Enforce a Foreign Measure**

Two of the bases depend on the policies of the State requested to recognize or enforce a measure. One, Article 23(2)(b), looks to the fundamental principles of procedure of the requested State. The second, Article 23(2)(d) considers the public policy of the requested State.

Articles 23(2)(b) and 26(3) allow a requested State to refuse to recognize and enforce, respectively, a measure taken in another Contracting State “if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State.” This provision recognizes that each Contracting State will have its own “principles of procedure.”
As a result, this ground for refusal is applied differently in each Contracting State.

Multiple Special Commissions,\textsuperscript{29} convened by the Hague Conference of Private International Law to review the practical operation of the Abduction Convention and the Child Protection Convention, have considered how authorities in States hear children. In June 2011, the Special Commission considered the child’s voice and opinions in return and other proceedings pursuant to both Conventions. In the Conclusions and Recommendations adopted by the June 2011 Special Commission,

\begin{quote}
[\textit{t}he Special Commission note[d] that States follow different approaches in their national law as to the way in which the child’s views may be obtained and introduced into the proceedings. At the same time the Special Commission emphasise[d] the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission recognize[d] the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child’s age and maturity.\textsuperscript{30}
\end{quote}

\textsuperscript{29} According to the website of the Hague Conference on Private International Law, “Special Commissions, composed by governmental experts, meet in between Plenary Sessions to prepare draft Conventions to be considered for adoption, as well as to review the practical operation of existing Conventions and recommend improvements in their implementation.” \textit{About the HCCH, Hague Conference on Private International Law}, https://www.hcch.net/en/about (last visited Oct. 25, 2023).


Lagarde Report, \textit{supra} note 11, at 585, ¶ 123.

This ground for refusal is directly inspired by Article 12, paragraph 2, of the United Nations Convention on the Rights of the Child. It does not imply that the child ought to be heard in every case. It was pointed out, with good reason, that it is not always in the interest of the child to have to give an opinion, in particular if the two parents are in agreement on the measure to be taken. It is only where the failure to hear the child is contrary to the fundamental principles of procedure of the requested State that this may justify a refusal of recognition.
A subsequent Special Commission considered the matter in October 2017. According to the Conclusions and Recommendations of that Special Commission,

[the Special Commission note[d] that, in order to facilitate the recognition and enforcement of an order for measures, where a competent authority decides to hear a child, there are a range of ways in which it may do so within the diversity of legal systems and approaches. The competent authority should incorporate into the order for measures a record of the way the child was heard, or if a decision is made not to hear the child, an indication that consideration was given to doing so and the reasons for the decision not to hear the child.\textsuperscript{31}

Although the experts at the Special Commissions concluded, correctly, that there is no single way to hear a child, it is for the courts of the Contracting States to the Child Protection Convention being asked to recognize or enforce a foreign child custody judgment to decide whether a child was heard in a manner that would not violate fundamental principles of procedure of that State. Because the reference is to “principles” and not to “rules,” they are not necessarily written anywhere. As a result, it is for each judge asked to recognize or enforce a measure to determine whether the child was properly heard. This might result in inconsistency globally as well as within each Contracting State, if judges within that State identify different fundamental principles or apply the same fundamental principles differently.

The Contracting States and the Permanent Bureau of the Hague Conference on Private International Law have recognized the varying practice in applying this provision of the Convention. As a result, the Permanent Bureau has included in recent questionnaires, circulated to Child Protection Convention Contracting States in preparation for Special Commission meetings, questions relating to the application of this provision of the Convention. Several Contracting States have responded to

this question, including Estonia,\textsuperscript{32} Finland,\textsuperscript{33} Germany,\textsuperscript{34} and the United Kingdom.\textsuperscript{35}

\textsuperscript{32} In response to a 2022 questionnaire question asking whether there have been any significant developments in your State regarding the legislation or procedural rules applicable in cases of international child protection, Estonia reported that “Changes according to the BIIB changes in our national legislation (Code of Civil Procedure), for example about the hearing of a child.” [sic] 


\textsuperscript{33} In response to a 2016 questionnaire, Finland reported:

Helsinki District Court is the competent court for trying the requests for recognition and enforcement under the 1996 Convention as the first instance court. When handling these requests, the court has considered e.g. whether the non-hearing of the child in the foreign custody proceedings affects the recognition and enforcement in the requested state (article 23(2) b).


\textsuperscript{34} Germany has provided responses to multiple questionnaires addressing this matter. In responding to the 2016 questionnaire, Germany observed “From the courts, point of view, difficulties have repeatedly arisen in determining whether the child has been provided the opportunity to be heard pursuant to Art. 23 (2) c) [sic] 1996 Hague Convention.” 

\textit{Questionnaire Concerning the Practical Operation of the 1996 Convention, 7, Hague Conference on Private International Law}, https://assets.hcch.net/docs/bad81b31-fedc-4522-870d-825450d7fca.pdf. In its response to a 2022 questionnaire, Germany noted that “Problems also very frequently arise in the context of recognition of foreign decisions under Article 23 para. 2 lit. b) in child custody proceedings because of the strict German standard applying to child hearings.”

\textit{Questionnaire Concerning the Practical Operation of the 1996 Convention, 9, Hague Conference on Private International Law}, https://assets.hcch.net/docs/9650768f-80c3-45d1-8d8a-f8cc9fbc8142.pdf. In response to the same 2022 questionnaire, Germany provided the following summary for case 12 UF 60/20 from OLG Hamburg, a court of second instance:

The child’s opportunity to be heard as stated in Art. 23 para. 2 b) of the 1996 Convention may be given in cases where the child has been heard by an authority that was competent for the hearing under national law and where a report of the hearing was submitted to the court.

\textit{Id.} at 5.

\textsuperscript{35} In response to a 2016 questionnaire, the United Kingdom provided the following information on two cases:

In NG v OG [2014] EWHC 4182, the English court declined to recognize a Russian custody order because the Russian court had not given the child an opportunity to be heard. In Re D (recognition of Foreign
The other basis for the refusal to recognize or enforce a foreign child custody judgment included in this category is that recognition and enforcement “is manifestly contrary to public policy of the requested State, taking into account the best interests of the child.”36 Many of the treaties negotiated at the Hague Conference on Private International Law that provide for recognition and enforcement of foreign judgments contain a public policy exception.37 The Child Protection Convention does not provide guidance in the determination of the public policy of a State. It does, however, provide two qualifications. First, recognition or enforcement of the foreign child custody judgment must be “manifestly” incompatible with the public policy of the State being asked to recognize or enforce the judgment. Second, the best interests of the child must be taken into account.38 In general, States are encouraged to limit their reliance on this provision as over-reliance could render meaningless the obligation to recognize or enforce measures.

C. Bases Involving States That Are Not Contracting States to the Child Protection Convention

Article 23(2)(e) applies to a situation that might not be foreseen at the time of the filing of a child custody action in a court,

Order) [2016] EWCA Civ 12, a decision under the BIIA Regulation not the 1996 convention, the English Court of Appeal upheld the decision not to recognize a Romanian custody order because it is a fundamental principle of procedure of English law that a child has a right to be heard.


36 Child Protection Convention, supra note 2, art. 23(2)(d).

37 See, e.g., Child Support Convention, supra note 27, art. 22(a); Judgments Convention, supra note 26, art. 7(1)(c); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167, Art. 24 (relating to the recognition of an adoption). Similarly, the Restatement, Third, Foreign Relations Law of the United States states that a court in the United States must not recognize a foreign judgment where “the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought.” Restatement (Third) Foreign Relations Law of the United States § 482(2)(d) (Am. L. Inst. 1987).

38 The Child Protection Convention does not indicate whether a consideration of the best interests of the child should serve to expand or limit the application of this ground for refusal to recognize or enforce a foreign judgment.
although it might be foreseeable that another parent might file an action in a court in a different State. In particular, this provision may be relied upon where the child custody judgment would be “incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State.” There are several requirements that would need to be satisfied. First, the child custody judgment sought to be recognized or enforced must be incompatible with a measure taken by another State. Second, the latter measure must have been taken by an authority of a State that is not a Contracting State to the Child Protection Convention. Third, the State in which the latter measure was taken must be the habitual residence of the child. Fourth, the latter measure must satisfy the requirements for recognition in the State being asked to recognize or enforce the earlier child custody judgment. Although many of these factors might not be known or considered at the time of the filing of the initial proceeding, they would need to be considered when requesting recognition or enforcement of any resulting child custody judgment.

The domestic law of Contracting States to the Child Protection Convention should be expected to reflect these provisions of that Convention. There might, however, be peculiarities specific to each domestic statute or code. Moreover, the domestic law of States that are not Contracting States to the Child Protection Convention might not resemble these provisions in any way. As a result, it might be prudent to consult with counsel practicing in the State where recognition or enforcement is being, or might be, sought.

II. Increasing the Chance that a U.S. Child Custody Judgment Might Be Recognized or Enforced in a Foreign State

If it is foreseeable that a party might seek to have a child custody judgment issued by a court in the United States recognized or enforced in a foreign State, it would be prudent to consult with

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39 Child Protection Convention, supra note 2, art. 23(2)(e).
40 See supra note 3 for websites that will assist in identifying Contracting States.
counsel practicing in that foreign State as early as possible.\footnote{Repetition of this point throughout this article should be taken to suggest its reasonableness, at least in the opinion of the author of this article.} Foreign counsel can help to identify matters that a court in the United States might helpfully consider and address in order to increase the chances for recognition and enforcement of the resulting judgment.

In the United States, child custody jurisdiction, recognition, and enforcement is generally addressed in the Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter “UCCJEA”).\footnote{In the United States the District of Columbia and all U.S. states other than Massachusetts have enacted versions of the UCCJEA. UCCJEA, supra note 18.} In anticipation of possible ratification of the Child Protection Convention by the United States, the Uniform Law Commission in the United States\footnote{The Uniform Law Commission is a U.S. state-supported organization that “provides [U.S.] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of [U.S.] state statutory law.” About Us, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/aboutulc/overview (last visited Oct. 26, 2023).} drafted amendments to the Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter “Amended UCCJEA”). The Uniform Law Commission has not recommended that any U.S. state enact the Amended UCCJEA, and no U.S. state has done so.\footnote{The text of the Amended UCCJEA can be obtained at Act Archive—Child Custody Jurisdiction and Enforcement Act, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&libraryentry=2f1bed91-5c3b-4a00-8438-73022aa94218&librarykey=25727ebd-ddee-4ed3-b875-855df8e8622d&pageindex=0&page=12&sort=most_recent&view-type=row (last visited Oct. 26, 2023). It should be noted that the Uniform Law Commission has “released [this text] for informational purposes only.” Id. Laws, or others, considering enactment of the Amended UCCJEA are encouraged first to “contact the Uniform Law Commission for further information.” Id.}

Section 211 of the Amended UCCJEA contains the following:

(a) If requested by a party, a court of this state that makes or modifies a child-custody determination or orders or modifies a decision . . . shall include in the determination or decision the court’s findings and conclusions on the following:

(1) the basis for the assumption of jurisdiction by the court;

(2) the manner in which notice and opportunity to be heard was given to each person entitled to notice of the proceeding;
(3) the opportunity for the child to be heard or the reasons why the child was not heard; and

(4) the country of the habitual residence of the child.

(b) A child-custody determination or a decision . . . may be supplemented at any time to include the findings and conclusions described in subsection (a) without the supplement being construed as a modification.45

As the drafters of the Amended UCCJEA stated, this provision “is meant to help those parents who contemplate possible foreign enforcement of a child custody determination, or measure of protection, under Article 4 [of the Amended UCCJEA], that, when entered, is a solely domestic United States proceeding.”46

Although a U.S. state court is not currently required to implement Section 211 of the Amended UCCJEA, because, as stated above, no U.S. state has enacted it, a litigant could now request that a court include the information identified in that provision. This might assist in efforts to seek to have the judgment recognized or enforced. While a U.S. state court would not presently be in a position to determine the habitual residence of a child pursuant to the Child Protection Convention,47 a treaty to which the United States is not presently a party, it could address the matters identified in subsections (a)(1), (a)(2), and (a)(3) of Section 211 of the Amended UCCJEA.

Separately, and independent of issues presented by the Child Protection Convention, the Uniform Law Commission established a Drafting Committee on Judicial Interview Procedures for Children.48 The Drafting Committee has been authorized to:

45 Id. § 211.
46 Id. cmt. ¶ 2.
47 It would be premature for a U.S. state court to attempt to interpret this treaty term. Should the United States become a party to the Child Protection Convention, courts would be expected to have the benefit of the interpretation(s) of relevant provisions of the Convention by the Executive and the Senate. Some of these interpretations might be shared, with some possibly included in the U.S. instrument of ratification or in any federal implementing legislation.
draft a uniform or model act addressing custody, visitation, parental age, and related proceedings in which other law permits or requires the child’s views to be heard. The act should address (1) the factors to be considered when the law accords judicial discretion as to whether a child’s views should be heard, and (2) the procedures to be used when either (a) the law requires or (b) a judge determines to permit a child’s views to be heard. The procedures should explicitly address due process rights of parents, including access to the results of the interview.49

If the Drafting Committee develops a uniform or a model act,50 this might facilitate recognition and enforcement of U.S. child custody judgments. First, with respect to those U.S. states that enact the act, such enactment would inform foreign courts of the procedures applied by U.S. state courts in hearing children prior to issuing child custody judgments.51 If a judge in a foreign State believes that the procedures contained in any act drafted by the Uniform Law Commission are sufficient, and that those procedures are followed, that judge might be more likely to recognize or enforce the judgment from the U.S. state court.52 Second, it might encourage U.S. state court judges to address in their opinions the manner in which they have heard the views of the child.

An additional benefit of the drafting of an act by the Uniform Law Commission relating to judicial consideration of the views of children, in child custody proceedings or otherwise, is that it might assist the United States as it participates in international discussions relating to the proper ways in which the views of children might be heard. Addressing the matter in U.S. state law could be beneficial in reflecting State practice.53 Moreover, it could be

49 Id.
50 This author has worked with at least one of the co-chairs and with the reporter of the Drafting Committee. Therefore, this author is optimistic that the Committee will develop a good and helpful product.
51 This presumes that U.S. state court judges will implement these procedures in a manner that will be satisfactory to the foreign judge.
52 Hopefully, the Drafting Committee will consider foreign practice in recognizing and enforcing child custody judgments as it develops any procedure(s) for hearing a child. See supra discussion in text at note 50.
53 This State practice by the United States might, or might not, be relevant in the development over time of customary international law. This author does not consider whether there exists sufficient State practice or opinio juris for the crystallization of a rule of customary international law on this topic.
helpful in assisting other States as they consider, or reconsider, their practices in this important area.

In an attempt to eliminate potential competition for recognition and enforcement of child custody judgments, a party might want to work with the opposing party to avoid the possibility of multiple, competing judgments. This might involve concessions on the part of one or both parties, although it might result in an agreement by the other party not to file, or not to proceed with, a claim in another State where the domestic law of that State provides its courts with jurisdiction over the matter.

III. Increasing the Chance that a Foreign Child Custody Judgment Might Be Recognized or Enforced in a U.S. State

If it is foreseeable that a party might seek to have a child custody judgment issued by a foreign court recognized or enforced in the United States, it would be prudent for foreign counsel to consult with counsel practicing in the relevant U.S. state as early as possible.54

Recognition and enforcement of foreign child custody orders in the United States is almost entirely governed by U.S. state enactments of the UCCJEA.55 Pursuant to Section 105(b) of the UCCJEA, “Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3.”56 Subsection (c) of Section 105 provides an exception to this requirement “if the child custody law of a foreign country violates fundamental principles of human rights.”57

54 See supra discussion in note 41.
55 See supra discussion in text at note 42.
56 UCCJEA, supra note 18, § 105(b).
57 Id. § 105(c). Several U.S. states have varied their enactment of this provision. For example, Connecticut creates an additional exception to the obligation to recognize and enforce where the foreign judgment “is repugnant to the public policy of this state.” CONN. GEN. STAT. § 46b-115ii (2020). New Jersey creates an additional exception where the foreign custody law “does not base custody decisions on evaluation of the best interests of the child.” N.J. STAT. ANN. § 2A:34-57 (2013). Washington State creates an additional exception for the application of
Thus, before requesting that a foreign child custody judgment be recognized or enforced, counsel should review the child custody law of the State that issued the judgment. It might be difficult to know whether a U.S. state court judge will determine that the child custody law of a foreign State violates fundamental principles of human rights. However, counsel should look to decisions within that U.S. state or from other U.S. state courts that have analyzed the matter. In addition, counsel might want to review any academic writing about the child custody law of that State.

Similarly, where a U.S. state has added to the exceptions included in Section 105(c) of the UCCJEA, counsel should consider how these additional exceptions might apply to any attempt to have a foreign child custody judgment recognized or enforced.

Additionally, counsel should review the bases upon which the foreign court exercised jurisdiction. Section 105(b) requires recognition and enforcement if the foreign court exercised its jurisdiction “under factual circumstances in substantial conformity with the jurisdictional standards.” 58 Here, counsel should look to the jurisdictional rules contained in the UCCJEA to determine whether a U.S. state court would have exercised jurisdiction to issue a child custody judgment had the same jurisdiction-related facts existed in the U.S. state.

Before a foreign child custody judgment may be recognized or enforced in the United States, the judgment must be registered in a U.S. state court. 59 Section 305 of the UCCJEA identifies the procedures for registration of a foreign child custody judgment. 60

Section 305(b)(2) requires service of notice upon, and an opportunity to contest registration by, “any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered.” 61 In practice,

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58 UCCJEA, supra note 18, § 105.
59 Id. § 305.
60 Id. § 308, for procedures applicable to the expedited enforcement of a foreign child custody judgment.
61 Id. § 305(b)(2), which refers to persons identified in § 305(a)(3).
this provision should apply to a person who otherwise has custody or visitation rights that would somehow be affected by the foreign child custody judgment. To apply any other practice might deny persons having custody or visitation rights an opportunity to contest any alteration of these rights. Such a person would have twenty days to contest registration. 62

Registration of a foreign child custody judgment may be contested on three grounds. First, the registration of the judgment may be contested if the court that issued the judgment would not have had jurisdiction, if it were a U.S. state court, based on one of the grounds identified in Article 2 of the UCCJEA. 63 Second, registration may be contested if the foreign judgment has been vacated, stayed, or modified by a court that has or would have jurisdiction based on the jurisdictional grounds identified in Article 2 of the UCCJEA. 64 Finally, registration may be contested by a person who was entitled to, but did not receive, notice in the foreign proceedings that resulted in the child custody judgment sought to be enforced. 65

If the request to register the foreign child custody judgment is not challenged within twenty days or the party contesting registration is unsuccessful in persuading the U.S. state court that one of the grounds for contesting registration has been satisfied, the request for registration of the foreign judgment will be confirmed. Once a foreign child custody judgment is confirmed, registration

62 Id. § 305(d).
63 Id. § 305(d)(1).
64 Id. § 305(d)(2).
65 Id. § 305(d)(3). Section 305(d)(3) states that notice must have been provided “in accordance with the standards of Section 108” of the UCCJEA. Section 108 applies to notice to persons outside of the U.S. state in which a child custody proceeding occurs. In particular, Section 108(a) provides “Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the State in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.” Id. § 108(a). Although Section 305(d)(3) does not explicitly address this limitation, it would seem that the better reading of Section 305(d)(3) is that it would only apply where the person challenging registration was outside of the foreign State if a court of that foreign State commenced a child custody proceeding resulting in the judgment sought to be registered.
of the judgment may no longer be contested “with respect to any matter that could have been asserted at the time of registration.”

Pursuant to Section 306 of the UCCJEA, a U.S. state court “may grant any relief normally available under the law of this State to enforce a registered child-custody determination made by a court of another State.”

The Amended UCCJEA would adjust the rules applicable to the recognition and enforcement of foreign child custody judgments. In particular, that Act would establish separate rules that would apply to foreign child custody judgments where the Child Protection Convention applies and where it does not. Because this is not presently the law in any U.S. state, this article does not address those rules.

Conclusion

When seeking a child custody judgment in one State, it is important to consider whether that judgment might need to be recognized or enforced in another State. The rules applied by each State may vary. For example, some foreign States might apply the recognition and enforcement rules contained in the Child Protection Convention, while other States that are not Contracting States to that Convention might apply different rules. Most U.S. states will apply the recognition and enforcement rules found in the UCCJEA, although some U.S. states have modified these rules. Even where the rules are identical, the practice of foreign States and U.S. states in implementing them may vary. Therefore, if it seems likely, or even possible, that recognition or enforcement might be sought in the future, counsel practicing in the foreign State should be consulted as early as possible.

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66 Id. § 305(f).
67 Id. § 306.
Introduction

Effective service of process is critical in family law matters, because judgments and orders entered by a court against a party who was not properly served are void. When the party to be served is in a foreign country, family law practitioners must understand whether service must proceed pursuant to international treaty governing service of process or some other process, such as letters rogatory. This article discusses the treaties governing international service of process and the requirements for effective service of process under these treaties, and if no treaty applies, the steps that must be taken to accomplish proper service in the foreign country. Part I of the article describes the role of state procedural rules when a party to be served resides in a foreign country. Part II discusses the two international treaties to which the United States is party which govern service abroad and the procedures to be followed when effecting service under those treaties. Finally, Part III addresses the letters rogatory process that must be undertaken when a party to be served resides in a country that is not a party to an international treaty governing service of process.

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1 See Classen v. Classen, 893 P.2d 478 (N.M. Ct. App. 1995) (ruling that a divorce judgment entered without proper service violated the husband’s due process rights and was void); Wayne County ex rel. Williams v. Whitley, 323 S.E.2d 458, 461 (N.C. Ct. App. 1984), citing Wynne v. Conrad, 220 N.C. 355 (N.C. 1941) (holding that a judgment or order rendered without an essential element such as proper service of process is void).
I. State Rules and International Service

Domestic relations cases infrequently require that the opposing party be served abroad. Consequently, family law practitioners might be unfamiliar with their state’s foreign service rules and how to apply them. As a starting point, practitioners seeking to serve process in a foreign country in a divorce or other domestic relations matter should consult state procedural rules and identify all service rules that specifically address service in a foreign country. State laws governing service of process do not control, however, when service is to be made on a foreign person or entity and an international service treaty to which the United States is party applies. In that event, by virtue of the Supremacy Clause of the U.S. Constitution, service must be made as provided by such treaty, state service rules notwithstanding.

This does not mean, however, that state methods for service of process are never permitted in family law cases involving a party in a foreign country. For example, when the address of the person or entity to be served is unknown and cannot reasonably be ascertained, the Hague Service Convention is not implicated; thus, service of process may proceed as provided by state law, including by mail, if authorized. The serving party must undertake reasonable efforts to ascertain the address of the person to be served and should be prepared to demonstrate that the address could not reasonably be determined, or service by mail

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2 See, e.g., 16 Ariz. R. Civ. P. 4.2(i); Ohio R. Civ. P. 4.5; Tex. R. Civ. P. 108(a) (Vernon’s).
4 U.S. Const. art. VI, cl.2.
6 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 1, 20 U.S.T. 361, 658 U.N.T.S. 163 (1965) (hereinafter Hague Service Convention); See also Willhite v. Rodriguez-Cera, 274 P.3d 1233, 1237 (Colo. 2012) (determining that substituted service within Colorado under Colorado service rules constituted valid service on a Mexico defendant because service did not require the transmittal of documents abroad to effectuate service, thus the Hague Service Convention was not implicated).
upon a party residing in a Hague Service Convention country will be improper.\footnote{Lebel v. Mai, 148 Cal. Rptr. 3d 892, 897-99 (Cal. Ct. App. 2011).}

Service by mail is not out of the question, even if the party to be served resides in a foreign country that is party to the Hague Service Convention and the party’s address is known. In that event, as the U.S. Supreme Court held in \textit{Water Splash Inc. v. Menon} that service may be properly accomplished by mail when two conditions are met: 1) the receiving Hague Service Convention country has not objected to service by mail, and 2) service by mail is authorized under otherwise-applicable state law.\footnote{Water Splash Inc. v. Menon, 581 U.S. 271, 284 (2017).}

Similarly, when the foreign country in which service is to be made is not party to an international treaty, then service may be accomplished in any matter that comports with state law for service abroad and the law of the country in which service is made.\footnote{Service of Process, U.S. Dep’t. of State, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-assistance/Service-of-Process.html (last visited Dec. 14, 2023).} Prudence warrants that, before service is undertaken, practitioners consult with local counsel in the country where service is sought to confirm whether a contemplated manner of service is acceptable in the foreign country. If the foreign country in question is not party to a service treaty, and a form of service permissible under state law, such as personal service by a private citizen, is not available because it does not constitute valid service under the laws of the foreign country, then service must be accomplished by issuance of letters rogatory.\footnote{Preparation of Letters Rogatory, U.S. Dep’t. of State, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-assistance/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited Dec. 14, 2023).} In some countries, service by letters rogatory is the only recognized method of service.\footnote{U.S. Dep’t. of State, 7 Foreign Affairs Manual § 953.1 (2021).} Letters rogatory are a request by a court in the United States for judicial assistance from the court of a foreign country and are based on the principle of comity.\footnote{Id.}
II. The Role Of International Agreements

The United States is party to two treaties governing service of process abroad. The first is the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Service Convention”).13

The second is the Inter American Convention on Letters Rogatory (“IACLR”) and Additional Protocol to the Inter American Convention on Letters Rogatory (“Additional Protocol”).14 There are far fewer contracting parties to the IACLR and Additional Protocol than the number of contracting parties to the Hague Service Convention;15 but together, these treaties provide standardized procedures for service of process in family law matters across a large number of countries.

The Hague Service Convention and the IACLR and Additional Protocol outline specific, streamlined procedures to be followed when transmitting judicial or extrajudicial documents from the United States to a contracting foreign country for service of process on a person located in the foreign country. In contrast, the procedures involved in the transmission of letters rogatory vary by country and tend to be more cumbersome than service pursuant to international treaty.

A. Hague Service Convention Procedures

The Hague Service Convention applies to judicial and extrajudicial documents originating from the United States that are to be served in a foreign country which is party to the Convention.

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There are two basic requirements: 1) the address of the person to be served is known, and 2) the document to be served relates to a civil or commercial matter. The main channel of transmission of outbound documents for service under the Hague Service Convention is by direct request to the designated Central Authority in the foreign country. Specifically, counsel for the party in the United States that wishes to serve documents abroad completes a model request form and then mails the request form and documents to be served to the Central Authority in the foreign country. The receiving Central Authority then causes the documents to be served as provided by the service laws of the foreign jurisdiction.

The Central Authority of the United States is the Office of International Judicial Assistance (“OIJA”) of the Civil Division of the U.S. Department of Justice; however, OIJA is not involved in the processing of outgoing requests for service of documents in a foreign country under the Hague Service Convention. Rather, an attorney seeking service abroad makes the request for service in the foreign country directly to the Central Authority of the foreign country. The request can specify that the Central Authority of the foreign country use a particular method of service, so long as that method of service is not incompatible with the law of the foreign country.

Although mailing a request for service to the Central Authority of a foreign country is the primary method of transmitting documents for service under the Hague Service Convention, the Convention is flexible and permits documents to be transmitted

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16 Hague Service Convention, art. 1, supra note 6.
17 Model Form Annexed to the Convention, https://www.hcch.net/en/publications-and-studies/details4/?pid=6560&dtid=65 (last visited Dec. 14, 2023). Detailed instructions for completing the form are also provided.
18 Contact information for the Central Authority of each country that is party to the Hague Service Convention may be found at https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17.
19 Hague Service Convention, art. 5(a), supra note 6.
21 Hague Service Convention, art. 5(b), supra note 6.
and served by other means, such as through diplomatic and consular channels and by mail. These alternate means of service are not authorized by all countries that are party to the Hague Service Convention, however. To determine if a particular method of transmission of documents for service other than submission of a form request to the Central Authority of a receiving country is permitted, practitioners must review the declarations for that country that are maintained by the Hague Conference on Private International Law (“HCCH”). HCCH publishes a status table of all countries that are party to the Hague Service Convention. The table contains links to the declarations made by each country regarding that country’s objections to certain forms of transmission under the Convention. For example, China opposes any method of service provided in Article 10 of the Convention. HCCH also maintains practical information for each country, including whether that country requires that translations be provided with the documents to be served. To avoid later claims of defective service, practitioners should err on the side of caution and include translations of all documents to be served, even if it is unclear whether the country in question requires that translations accompany the documents.

Once service has been achieved in the foreign country, the authority that executed service completes a certificate of service, the form of which is also annexed to the Convention as part of the model request for service, and returns it to the party that requested service. Although the Central Authority of the foreign country will not charge a fee for service, there might be some costs assessed if an alternate method of service is requested.

22 Id. art. 8.
23 Id. art. 9.
24 Id. art. 10(a).
27 Hague Service Convention, supra note 6.
28 Office of International Judicial Assistance, supra note 20, at 3, n.1.
30 Hague Service Convention, art. 12, supra note 6.
B. **IACLR and Additional Protocol Procedures**

Procedures for service of process in a foreign country under the IACLR and Additional Protocol are similar to those under the Hague Service Convention; however, there are some key distinctions. Most importantly, the IACLR and Additional Protocol require that all requests for service abroad be initiated from the Central Authority of the country from which the request for service originates.\(^{31}\) As with the Hague Service Convention, each country that is party to the IACLR and Additional Protocol must designate a Central Authority.\(^ {32}\) OIJA, the Central Authority of the United States, contracts with an outside service provider, ABC Legal, to process requests for service of process directed to a foreign country under IACLR and the Additional Protocol.\(^ {33}\)

To make a request for service under the IACLR and Additional Protocol, the requesting attorney uses a form annexed to the Additional Protocol to prepare and obtain signed letters rogatory, bearing the court’s seal, from the presiding judicial authority in the case.\(^ {34}\) The attorney compiles further documents and information that must accompany the request for service, which should also bear the court’s seal for authentication purposes.\(^ {35}\) The attorney then transmits the signed and sealed letters rogatory and additional required materials to ABC Legal, the contractor with OIJA. ABC Legal is responsible for transmitting the materials to the Central Authority of the recipient country.\(^ {36}\) Similar to service under the Hague Service Convention, the Central Authority in the recipient IACLR country serves the documents as provided by its own laws.\(^ {37}\) After service is made in the foreign country, the serving authority attests to service consistent with local law and transmits the attestation to the Central Authority of the foreign country.\(^ {38}\)

The Central Authority of the foreign country then completes a

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31 Service Requests, supra note 20.
34 Additional Protocol, art. 3, supra note 14.
35 Id.
36 Id.
37 Id. art. 4.
38 Id.
Certificate of Execution in the form annexed to the Additional Protocol and returns the executed Certificate and other required documents to ABC Legal, which passes everything along to the attorney that requested service.\(^{39}\)

### III. Service By Letters Rogatory

Some countries are not party to the Hague Service Convention or the IACLR and Additional Protocol. When a party to be served resides in one of these countries, service of process must be accomplished via letters rogatory.\(^{40}\) Examples of countries that are not currently party to either international service treaty to which the United States is party include Nicaragua, Guyana, Mongolia, Saudi Arabia, and Syria.\(^{41}\)

When letters rogatory are the only acceptable manner of effectuating service of process in a foreign country, the process is complex, costly,\(^{42}\) and time-consuming.\(^{43}\) The first step in the letters rogatory process is to obtain letters rogatory from an appropriate judicial officer in the domestic relations matter. The practitioner must take care to ensure that the judicial officer issuing the letters rogatory is considered an acceptable authority by the recipient country.\(^{44}\)

Once prepared, letters rogatory are transmitted to the appropriate judicial authority of the foreign country through diplomatic channels. Specifically, the letters rogatory and accompanying documents, translations, and applicable fees are sent to the U.S. State Department.\(^{45}\) The State Department transmits the materials, through diplomatic channels, to judicial authorities in the foreign country. The foreign judicial authority takes action on the

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\(^{39}\) Id.; See also Office of International Judicial Assistance, supra note 20, at 7.

\(^{40}\) Service of Process, supra note 9.


\(^{42}\) 22 C.F.R. § 22.1, Item 51 (2023) (noting that the current cost for consular assistance in processing letters rogatory abroad is $2,275).


\(^{44}\) Id.

\(^{45}\) Id.
letters rogatory in conformity with local law, then either returns the executed letters rogatory to the State Department through diplomatic channels, or returns them to the requesting attorney directly, if requested to do so in the letters rogatory.\textsuperscript{46} If the executed letters rogatory are returned to the State Department, the State Department returns them to the issuing court by mail and notifies the requesting party. The State Department maintains country specific information indicating whether letters rogatory are necessary to execute service.\textsuperscript{47}

Family law practitioners should expect that service of process abroad will take far longer than the typical timeline for service, particularly when service must be made via the letters rogatory process. The Hague Conference on Private International Law estimates that 75\% of service requests made under the Hague Service Convention are executed within two months,\textsuperscript{48} while the State Department opines that service of process through execution of letters rogatory may take a year or more.\textsuperscript{49} Family law practitioners should take the additional time and cost of service of process abroad into account when advising and preparing clients for the process that lies ahead. If the client has the means to engage the assistance of local counsel in the foreign country, it is wise to do so as soon as possible so as to maximize the benefit of local counsel’s expertise.

\section*{IV. Conclusion}

The domestic relations practitioner who wishes to perfect service abroad in a family law matter must not only understand relevant state procedural law but must also determine whether an international service treaty applies. If a treaty applies, and service must be executed solely in accordance with such treaty, then the practitioner must follow the precise procedures provided by such treaty to effectively serve the foreign-resident party. In some instances, when service must be made in a country which is not party

\begin{itemize}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Judicial Assistance Country Information, supra} note 41.
\item \textsuperscript{49} \textit{See Preparation of Letters Rogatory, supra} note 43.
\end{itemize}
to a service treaty, practitioners must master and pursue a complex and time-consuming letters rogatory process to accomplish proper service. Service abroad is likely to be time-consuming and costly, whatever the means of service. Yet, the time and cost are warranted to avoid a claim of defective service and possible dismissal.
Navigating Diplomatic Immunities in Family Law: Finding an Appropriate Forum for Families Covered by Diplomatic Immunity

by Frances Goldsmith and Inès Amar

When individuals are sent abroad in a diplomatic capacity, they often do not realize the consequences this may have on their rights in the event of divorce or a dispute involving children. The diplomatic privilege of immunity, with which comes a certain stature, creates a void in terms of jurisdiction and solutions available to diplomatic families abroad in a time of crisis (breakdown of the marriage, custody fights, domestic violence, etc.). Having immunity in the jurisdiction where the family resides can deprive, under certain conditions examined below, a diplomatic agent from what can be considered the most appropriate forum to make custody determinations and/or special measures for the children and both spouses.

Immunity can also deprive spouses of the sole jurisdiction that may rule on the use of the matrimonial home as well as on other practical measures related to it. Consequently, finding an available and appropriate forum for the separation becomes problematic with lasting consequences for the family. Thus, while immunity offers protection to its subject, immunity rules can sometimes become an obstacle to the enforcement of a child’s rights, to the defense of a victim of domestic violence, and to alternatives for a woman who has been repudiated.

This article will detail below in which cases will immunity rules will predominate over certain fundamental rights and

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1 Me Frances Goldsmith, Paris, France – Me Inès Amar, Paris, France, with special thanks to Melissa Kucinski, who provided valuable assistance on the U.S. perspective of the article.
2 See infra text at notes 22-51.
3 See infra text at notes 34-38.
analyze where immunity rules stand in the hierarchy of rights in the realm of family law.

This article examines the contours of diplomatic immunity and the consequences it may have on family related matters. When advising clients who may benefit from diplomatic immunity, it is necessary to first determine the issue addressed in Part I: who is covered by such immunity. The second central issue is analyzed in Part II: whether such immunity includes civil, jurisdictional and/or immunity to enforcement of a judgment.

I. Who Can Claim Immunity

The three main categories of people who can claim immunity are: (a) diplomats, (b) consular agents, and (c) members of international organizations. The main difference of treatment between the three categories is that, while both diplomats and consular agents enjoy immunity within the limit of their mission and functions, only diplomats benefit from civil immunity. Members of international organizations are in some cases granted diplomatic immunity.

A. Diplomats

The Vienna Convention on Diplomatic Relations of April 18, 1961 applies as regards diplomatic agents.\textsuperscript{4} It has been ratified by 193 countries and is considered as one of the most if not the most successful international convention, and it relies on mutual recognition of sovereign equality between States. It is therefore necessary and a cornerstone for reciprocal trust and interactions between sovereign States.\textsuperscript{5}

Diplomatic agents enjoy inviolability of their person as per Article 29 of the Convention, and of their private residence, their papers, correspondence and, except as provided in paragraph 3 of article 31, their property under Article 30. It is usually inferred that this also extends to the furniture located within the private

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Diplomatic agents also benefit from immunity from jurisdiction, under Article 31.1 of the Convention, which states that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State, as well as immunity from the civil and administrative jurisdiction except in some limited cases detailed below.

The inviolability and the jurisdictional and enforcement immunity set out by Articles 29 to 36 of the Convention cover “diplomatic agents.” A diplomatic agent is “the head of the mission or a member of the diplomatic staff of the mission.”

Diplomatic immunity extends to members of the diplomat’s family. Article 37.1 provides: “The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.” Members of the family of the diplomatic agent therefore enjoy identical immunity to that of the diplomatic agent. Members of the family include the spouse and the children of the diplomat. The reasoning behind the members of the family also enjoying immunity stems from the fear that persecution against the family members could be used as a way of coercing a diplomatic agent indirectly.

Consequently, the arrival, the departure, and the fact that a person becomes or ceases to be a member of the family of the diplomat must be notified to the Ministry for Foreign Affairs of the receiving state (or any other ministry as may be agreed) according to Article 10 of the Convention.

Diplomatic immunity extends to some members of staff who enjoy different degrees of immunity.

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7 Vienna Convention on Diplomatic Relations, supra note 4, art. 1.
8 Id. art. 37(1).
9 Under French law, for the spouse see Cour d’appel [CA] Paris, Aug. 6, 1908, JDI 1909, at 150, for the children, see T. civ. Chinon, July 27, 1931, RDIP 1931, at 668, cited in Donnier, supra note 6, at 60.
10 See Compte Rendu Analytique dela 403e Séance, Relations et Immunités Diplomatiques, 1 EXTRAIT DE L’ANNUAIRE DE LA COMMISSION DU DROIT INTERNATIONAL, A/CN.4/SR.403 (1957); in addition there is confirmation of this principle in the ICJ Arrest Warrant decision (Democratic Republic of Congo v Belgium, Apr. 11, 2002).
11 Vienna Convention on Diplomatic Relations, supra note 4, art. 1.
Members of the administrative and technical staff (“members of the staff of the mission employed in the administrative and technical service of the mission” under Article 1 of the Convention) enjoy immunity from criminal jurisdiction, but immunity from civil and administrative jurisdiction only as to acts performed within the course of their duties. The immunity extends to members of their family forming part of their household.

Members of the service staff (“the members of the staff of the mission in the domestic service of the mission” under Article 1) enjoy immunity only in respect to acts performed within the course of their duties.

Private servants (“a person who is in the domestic service of a member of the mission and who is not an employee of the sending State” under Article 1) enjoy “privileges and immunity only to the extent admitted by the receiving State,” and in practice receiving States will not admit many such exceptions. However, Article 374 specifies that “the receiving state must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.”

The scope of the immunity – whether it was performed within or outside of the agent’s functions is not defined in the Convention and has to be determined by case law. For example, French courts have determined that personal acts such as refusing to pay rent for their personal housing or acts performed after a mission had been over for a year are not performed within the course of the diplomat’s duties, while sharing the official position of the Turkish government that the Armenian genocide was performed within the functions of the consular agent, which gives rise to immunity.

The length of the immunity – when the immunity begins and ends – depends on who is claiming it. For the diplomat, under Article 39.1 of the Convention, it begins from the moment the diplomat enjoying the immunity either enters the territory to take up the post, or, if already in the territory, when the appointment is notified to the Ministry for Foreign Affairs (or such other ministry as may be agreed).
According to Article 39.2, the immunity ends when the diplomatic agent leaves the country, or on expiration of a reasonable period in which to do so, but subsists until that time, even in the case of armed conflict. Immunity relating to acts performed in the exercise of the functions will remain in effect.

Also, once a person becomes persona non grata as per Article 9 and without need for justification, they also lose the benefit of immunity in the receiving State, as they will either be recalled to the sending State or their functions (and immunity attached) will be terminated. The immunity may only cover acts and proceedings brought during the time for which the diplomat enjoyed immunity.

For the members of the diplomat’s family, if the diplomat dies, family members will continue to enjoy the immunities to which they are entitled until the expiration of a reasonable period in which to leave the country.\(^{15}\)

**B. Consular Agents**

The Vienna Convention on Consular Relations of April 24, 1963 applies as regards consular agents. It is almost as widely ratified as the Vienna Convention on Diplomatic Relations (with ten countries short).

While consular agents enjoy personal inviolability in criminal matters, their jurisdictional immunity is limited to acts performed in the exercise of their functions.\(^{16}\) Their immunity therefore does not cover their own family matters and does not extend to members of their family. That is the case even if consular agents are, on an exceptional basis, exercising diplomatic functions.\(^{17}\)

Therefore, the issues relating to consular agents will not be examined in this article\(^{18}\) as they will normally not benefit from civil jurisdiction for family matters.

\(^{15}\) Vienna Convention on Diplomatic Relations, *supra* note 4, art. 39.3.

\(^{16}\) *Id.* art. 43.

\(^{17}\) *Id.* art. 171.

\(^{18}\) It is important to note however that consular agents (as well as diplomatic agents) benefit from “Personal inviolability” according to Article 41 of the Convention, which prevents them from being liable to arrest or detention pending trial. This has important implications for domestic violence cases. Consular agents do benefit from jurisdictional immunity for acts falling within their functions as a consular agent (under Article 43 of the Convention) – this excludes contracts entered into for personal purposes, such as leases. Both
C. Members of International Organizations

The immunity awarded to members of International Organizations is set out either by the Charter of the Organization or by the Headquarters Agreement between the organization and the State where the headquarters of the organization is held. Therefore, there is no general rule as to the immunity of the members of an international organization, since it must be assessed on a case-by-case basis, depending on the need of the organization and its member, and on the relationship between the State and the organization.

Under French law, since immunity of international organizations only finds its source in a charter or an agreement, it is only admitted by the French courts if France is linked to the organization either by an Accession Treaty or a Headquarters Agreement. The Court of Appeals of Paris reached this result in a 1993 case, denying immunity for the Economic Community of West African States due to the absence of a customary rule and of France not being a member of the organization.¹⁹

For example, the French Supreme Court, criminal section, held that the member of the international organization could not raise the immunity defense in a 2015 case where Protocol number 2 relating to the Agreement of Cotonou provided for immunity “to their beneficiaries only in the interest of their official functions and that the pursuit of personal interests could not be absorbed,” confirming the Court of Appeals judgment.²⁰

In some cases, these instruments will provide an immunity to some members of the international organization identical to that of a diplomatic agent, and it will also extend to the members of the family of the employee. For instance, in the case opposing His Highness Mohammed Bin Rashid Al Maktoum and Her

Royal Highness Haya Bint Al Hussein, the Royal Court of Justice denied immunity for a Head of Government as it concerned civil proceedings not related to his official functions, while citing cases where the immunity of enforcement of civil and criminal proceedings were granted to Heads of Government. It is therefore of the utmost importance to decipher what is meant by a person holding immunity and to consult the charter or bilateral agreements for specific organizations.

II. What Types of Immunity May Be Invoked (Civil, Jurisdictional, Enforcement)

Civil immunity covers both jurisdictional immunity and enforcement immunity. Jurisdictional immunity allows a person not to become subject to the jurisdictions of the receiving State, while enforcement immunity allows a person not to be subject to measures of execution of the receiving State.

A. Jurisdictional Immunity

As mentioned above, Article 31.1 of the Vienna Convention on Diplomatic Relations of 1961 provides jurisdictional immunity before civil courts.

Under French law, this will prevent a party from filing a suit against a person enjoying jurisdictional immunity or prevent a party who benefits from jurisdictional immunity from petitioning to the courts of the hosting State without applying for the proper waivers beforehand. At a procedural hearing, the other party will have to raise the immunity argument as a “fin de non-recevoir,” an argument that aims to have the petition be declared inadmissible, rather than an argument on jurisdiction as is often seen in common law jurisdictions. If the petition is found inadmissible, it will end the proceedings before the judge has a chance to rule on the merits of the case. From its origin, the aim of jurisdictional immunity has been to prevent the actions of a diplomat from being appreciated by a court of the hosting State or the courts being utilized in an

\[\text{[2021] EWCA Civ 890.}\]

\[\text{As opposed to an “exception d’incompétence,” cf. Cour de cassation [Cass.] Civ. 1, no. 238, Apr. 15, 1986, 84-13.422.}\]
improper fashion by the hosting state to apply pressure on the emissaries of another State.

In the United States, family law is a matter of state law and family law matters are considered civil actions. These lawsuits are therefore addressed in local courts with personal and subject matter jurisdiction over the parties and issues according to the law of a specific U.S. state. A party who enjoys immunity from civil actions would, under the Vienna Convention on Diplomatic Relations of 1961, be immune from being sued in “civil and administrative jurisdiction,” including in a family law matter in U.S. state courts. These matters are wide-ranging, and include divorce, support, division of financial assets, custody of children, Hague Abduction Convention suits, domestic violence restraining orders, and even child abuse and neglect cases. There are only a few exclusions to this immunity.

If a civil family law matter is filed in U.S. state courts, it is incumbent upon the party who enjoys the immunity to seek dismissal of the suit for lack of jurisdiction, and, in doing so, this party bears the burden of providing evidence to prove their status as a diplomatic agent to the court. The party could prove their status through a variety of documents, including a certificate from the receiving State (in the United States, through the U.S. Department of State), a diplomatic identification card (typically issued by the receiving State), or even official letterhead or correspondence that lists the party as a diplomatic agent. Even if the diplomatic agent party delays in seeking dismissal of the suit, the court will be slow to find that the party has waived their immunity argument. Assuming that the court finds that the diplomatic

23 Barber v. Barber ex rel. Cronkhite, 62 U.S. 582, 584 (1858).
25 Vienna Convention on Diplomatic Relations, supra note 4, art. 31.
26 Most domestic violence restraining orders are civil actions in the United States, although there may be companion criminal charges that could be sought based on the behaviors that warrant a restraining order. Indeed, they are sometimes known as “civil protection orders.” See ABA COMM’N ON DOMESTIC & SEXUAL VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (2020), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf [https://perma.cc/6QJ9-D2KK].
28 Id.; In re Baiz, 135 U.S. 403 (1890); Carrera v. Carrera, 174 F.2d 496 (D.C. Cir. 1949).
29 Baiz, 135 U.S. 403.
agent has conclusively established, through evidence, that they are immune from civil process, then there are no exceptions, and U.S. state courts will dismiss the family law proceedings. While this may seem like a harsh penalty, particularly in family law cases that involve requests that may be unavailable in the litigants’ sending State, such as a restraining order for violent acts against one’s spouse or abuse of one’s child, U.S. state courts hearing family law matters will not examine the legal remedies available in the other country before dismissing the case. Of course, in these complex family law cases, this result may force the aggrieved party to seek legal recourse in the courts of the sending State, which may or may not have jurisdiction over certain actions outside of its borders.

The issue of immunity further presents a challenge when a court in the sending State issues an order, but when that order cannot then be enforced in the receiving State because of the diplomatic agent’s immunity.

In addition to the above complications, immunity extends to the service of process in a lawsuit because the diplomatic agent’s person and private residence is inviolable to such an action against them.

B. Jurisdictional Immunity as Applied to Divorce Cases

In 1957, the commission on international law of the United Nations issued a summary analysis of the 403rd session on diplomatic relations and immunities. In this summary, the position on the right to divorce and a diplomat’s status is clearly stated: “The diplomatic agent conserves his immunity even for a divorce case, which in appearance has no link with the problem at hand, as a divorce action initiated in the local courts is incompatible with his dignity as a diplomat.” While it may be debatable whether undergoing divorce proceedings is incompatible with (or a violation of) someone’s dignity, French courts have upheld the principle that jurisdictional immunity covers such inherently personal matters.

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30 22 U.S.C. § 254d (“[a]ny action or proceeding brought against an individual who is entitled to immunity . . . under any . . . laws extending diplomatic privileges and immunities, shall be dismissed.”).
32 Vienna Convention on Diplomatic Relations, supra note 4, arts. 29, 31(1).
33 Compte Rendu Analytique dela 403e Séance, Relations et Immunités Diplomatiques, supra note 10, § 74.
The Paris Court of Appeals confirmed in 1978 that diplomatic agents can invoke jurisdictional immunity in divorce cases. More precisely, the court held that the divorce proceedings and thus a ruling on personal status could not take place against the diplomatic agent, given that the state of Cameroon had not waived the agent’s immunity.

The same court confirmed this position more recently in a decision in 2004 in which a divorce petition issued against an ambassador of UNESCO was dismissed as inadmissible. The petitioner claimed that her husband could not invoke the benefit of jurisdictional immunity, granted by his ambassador status, for acts that were in the scope of his private interest, such as defending himself in divorce proceedings and which concerned the personal status of the spouses. The Court of Appeal did not follow this reasoning and confirmed that the husband’s diplomatic status rendered any personal claims against him inadmissible. The impossibility to access the French courts for divorce was upheld even though the spouses had lived in Paris for eighteen years at the time of the decision.

What is also interesting to note in the 2004 Paris Court of Appeals case is that the husband had repudiated the wife in the Lebanese Shari’a courts two or three years prior to her filing for divorce in France. By upholding the husband’s immunity, the wife was barred from seeking remedy to a form of divorce that is continuously considered by the French courts as a violation of fundamental human rights. Furthermore, in France, jurisdictional immunity in divorce proceedings also covers all monetary claims, including those covered by public policy such as maintenance obligations. Consequently, the French Court of Appeal gave precedence to international relations and state sovereignty over what is consistently considered a basic human rights issue—equality of the sexes, as well as the right to maintenance obligations which is guaranteed by French public policy rules.

35 Cour d’appel [CA] Paris (1ère chambre, section C), Nov. 9, 2004, Supple c/ Freiha.
Another example of jurisdictional immunity in divorce proceedings is illustrated by a Montpellier Court of Appeal decision from 2006. This decision made the important distinction between the immunity enjoyed by diplomatic and consular agents and rejected the arguments of jurisdictional immunity invoked by the husband as he was a consular agent and therefore only benefited from jurisdictional immunity for acts accomplished within the scope of his mission.37

Another consideration is how jurisdictional immunity applies to parental authority and habitual residence. A recent decision of the European Court of Justice (ECJ), from August of 2022 provides a welcome answer to the question whether diplomatic immunity, and the fact that missions are temporary, affect the habitual residence of a child.38 In this case, two European Union (EU) nationals, one Spanish and the other Portuguese, were married, and both held diplomatic positions in Togo. They had two children, who were born in Spain, the mother having travelled there to give birth. The mother petitioned the Spanish courts to rule on the parental authority over the children claiming that Spain was their habitual residence, since the station in Togo was temporary.

The Advocate General found in his conclusions that:

Consequently, in the light of all of those elements, it should be considered, on the one hand, that the residence of the spouses in the territory of Togo is, in principle, continuous and stable and, on the other, that their interests concerning professional, private and family matters are focused on that State. Although I am inclined to consider that those elements suggest a priori that the habitual residence is not in Spain and that the centre of the spouses’ life is in Togo, it is however for the referring court to verify whether all the factual circumstances specific to the present case actually make it possible to consider that the spouses do not have their place of habitual residence in Spain.39

37 Cour d’appel [CA] Montpellier, Nov. 14, 2006, 1ère chambre, section C, 05/4565. In this case, it is interesting to note that the husband and wife were divorced in Morocco in parallel to the French proceedings in which the wife received a “repudiation indemnity.”

38 C-501-20 (ECJ Aug. 1, 2022). This case is extremely important as it also gives a good overview of private international law rules in the European Union concerning family law proceedings, including whether certain restrictions as to jurisdiction in the Brussels II ter regulation concerning jurisdiction in the event of divorce can also be transposed to parental authority matters.

39 Id.
The ECJ followed the Advocate General’s arguments and determined that diplomatic status does not affect the determination of habitual residence as long as the children and the family have reached some level of stability in the place where they are stationed. The length of the term of residence is therefore taken into account by the ECJ.

The ECJ, however, did not rule on how immunity could affect the Togo court’s jurisdiction and the possibility for the spouses to petition the courts of the habitual residence of the children. This is logical because it was up to the Togo court, as the court of the habitual residence of the children, to decide whether immunity precluded the courts from making a custody determination, and the parents had to seek a waiver from the competent authorities. The EU could not dictate policy on the Togo court regarding the admissibility of such claims when the parties have jurisdictional immunity. The court did specify, however, that for the parents to be able to use residual jurisdiction rules or forum necessitatis to petition to a European court, they had to demonstrate the impossibility of the Togo courts being able to rule on the case (the mother plead corruption and not immunity).

The above decision is welcomed in that decisions on children and immunity are very rare. An example reported out of England from 1998 demonstrates however that even though the children’s habitual residence was in England and the mother typically could not leave England without the English court’s authorization, the English judge held that the issue of diplomatic immunity prevented the High Court of England from having jurisdiction and thus set aside the mother’s application. In this case, the mother, a German national, had commenced divorce proceedings against the children’s father, a senior American diplomat serving in the United Kingdom. She applied under section 8 of the Children Act 1989 for a residence order, a specific issue and prohibited steps order, as well as an order to leave to remove the children to Germany under section 13. The husband argued that by virtue of the diplomatic immunity that both he and the children enjoyed, the court did not have any jurisdiction to hear the case. The court followed

the husband’s reasoning and the mother was left to petition to a foreign court for leave to remove the children from England.

C. General Considerations on Jurisdictional Immunity and Child Related Matters

A thorough study carried out by a team of Norwegian researchers examined the impact of jurisdictional immunity on domestic violence and the limited options offered to families due to jurisdictional immunity. One of the more notable cases in this study is Re Terrence K, a case heard by the New York courts in 1987, where the father was stationed in New York and both parents were accused by social services of abusing the three children of the family. The case was dismissed by the Appellate Division of the Supreme Court of New York because the parents benefited from jurisdictional immunity.

A recent case cited by the study was tried in the English courts and the central issue the English judge had to determine was whether the child of a diplomat had access to social services. The court stated that the question gave rise to: “. . . a seemingly irreconcilable clash between two international treaties incorporated into our domestic law by statutes. These are the 1961 Vienna Convention on Diplomatic Relations, enacted by the Diplomatic Privileges Act of 1964, and the 1950 European Convention on Human Right, enacted by the Human Rights Act of 1998.” The Judge decided that by virtue of diplomatic immunity the case could not proceed and had to be stayed until the foreign government had decided whether to waive the diplomatic immunity enjoyed by the family. If that waiver had been granted, the stay could have been lifted and the proceedings would have been revived.

Consequently, any recourse to social services or child protective measures is also covered by jurisdictional immunity, leaving families no options for protection until the sending State sends the diplomat home and protective measures can be carried out there (which is ultimately what happened in this case).

42 Bjornsen et al., supra note 5.
44 A Local Authority v. AG and Others [2020] EWFC 18, [2020] Fam 311; A Local Authority v. AG (No2) [2020] EWHC 1346.
Because of the lack of access to social services, it may also be hard for a parent to prove domestic violence since in many jurisdictions social services play a role in detecting such violence, analyzing family dynamics, and offering solutions for the protection of the children. This lack of proof may have an effect in the event of a wrongful removal or retention and the possibility for a parent to claim a grave risk exception under Article 13b of the 1980 Hague Convention on Child Abduction.\textsuperscript{45} There may be no record of any domestic violence because such proof sometimes needs to be collected over the years, and if families move every two years, as is common in the diplomatic community, abuse can go undetected. After a wrongful removal, the possibility of a court returning the child upon the condition of ameliorative measures in the diplomat’s hosting State seems difficult to evaluate since, again, such services are not available due to immunity.

In the United States, the proper jurisdiction to resolve a particular family law issue, from a U.S. perspective, is not tied to a person’s nationality. As a consequence, a custody lawsuit for instance in a diplomatic agent family is quite complex. In the United States, jurisdiction over a child’s custody is premised on the child having certain tangible connections to a place for the courts of that place to issue orders related to that child’s wellbeing. The jurisdiction with authority to issue a custody order is the child’s “home state”\textsuperscript{46} (where the child has resided with a parent for the six months prior to the lawsuit’s filing, excluding any temporary absences from the home state) or, if no home state exists or the home state declines its authority, then jurisdiction is found where the child has the most significant connections.\textsuperscript{47} A U.S. state’s recognition of a foreign custody order is premised on that foreign country having assumed its jurisdiction over the child in “substantial conformity” with the United States’ jurisdictional principles of the child having that tangible connection.\textsuperscript{48} After

\textsuperscript{46} Unif. Child Custody Jurisdiction and Enforcement Act § 201 (Unif. L. Comm’n 1997).
\textsuperscript{47} Id. § 102(7) (definition of “home state”).
\textsuperscript{48} Id. § 105.
examining jurisdictional immunity in general and as applied to divorce and child-related cases, it is necessary to examine enforcement immunity, since, absent jurisdictional immunity, a person can still escape enforcement measures in the receiving State at a later stage in the proceedings.

D. Enforcement Immunity

Under the concept of enforcement immunity, which forms part of the broader notion of sovereign immunity, the authorities of one State are precluded from taking measures of constraint against the property of another State to “satisfy the demands of creditors under court decisions, arbitral awards and similar jurisdictional instruments.”

In other words, when one party is immune from enforcement proceedings, courts can neither recognize a foreign judgment or an arbitral award rendered against the party benefiting from the immunity, nor make and execute orders or injunctions against it.

As mentioned above, Article 31.3 of the Vienna Convention on Diplomatic Relations of 1961 provides enforcement immunity in civil and administrative cases. Under French law, the Code of civil enforcement proceedings sets out in article L.111-1 that “(f)orced enforcement and conservatory measures are not applicable to persons who benefit from enforcement immunity.”

“This will prevent a debtor enjoying enforcement immunity from seeing his assets be frozen or seized. Similarly, penalty payments cannot be ordered against the diplomat.”

Therefore, the aim of the enforcement immunity is to protect the beneficiary from being constrained, and it is related to the person’s property as opposed to the person’s actions.

After examining which persons have the capacity to claim immunity, as well as the types of immunity they may invoke, the next section examines the ways to mitigate immunity when it applies.


50 French Code of Civil Enforcement Proceedings, art. L.111-1.

III. Potential Solutions to Mitigate the Effects of Immunity in Family Matters

A. Exceptions to Immunity from the Vienna Convention of 1963

1. Nationality

A limitation common to the diplomatic agent, and individually to members of the family or members of the staff who enjoy diplomatic immunity is that they cannot enjoy diplomatic immunity if they are nationals of the receiving State. Members of the administrative and technical staff of the missions and their families and members of the service staff as well as private servants of members of the mission also cannot enjoy immunity if they are permanent residents in the receiving State.

This limitation is set out by Article 38 of the Vienna Convention. 52

2. Other Exceptions

Article 31.1 of the Vienna Convention on Diplomatic Relations of 1961 53 also provides the specific cases under which civil and administrative immunity shall not be enjoyed by diplomatic agents:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

52 Vienna Convention on Diplomatic Relations, supra note 4, art. 38:
1. Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national or of permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

53 Vienna Convention on Diplomatic Relations, supra note 4, art. 31.1.
(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

The same exceptions apply to enforcement immunity, as per Article 31.3 of the Convention. 54

While there is generally a void on the interpretation of this exclusion in the U.S. family law context, one court opinion does addresses it specifically. The Supreme Court of Connecticut concluded that this exclusion applies, regardless of whether it is brought in a civil family lawsuit, so long as real property is the object of the litigation, because the overarching purpose of immunity is to “ensure the efficient performance of the functions of the diplomatic missions” 55 and therefore, from a practical perspective, immunity should have some exclusions. In the Connecticut case, the real property was not the primary residence of the diplomatic agent husband, and his sending State already provided a limited waiver of immunity for the sole purpose of dissolving his marital status in the Connecticut state courts. 56 The Supreme Court of Connecticut therefore concluded that the trial court could proceed with the lawsuit related to the house in Connecticut, even though it was in a family lawsuit related to the parties’ divorce, despite the husband’s immunity.

It is important for family practitioners to notice that maintenance obligations, whether owed to a spouse or a child, are not included in the list of exceptions. Therefore, a diplomatic agent cannot be ordered to provide maintenance to a dependent child or spouse/ex-spouse absent a waiver, and in case of a jurisdiction waiver, cannot be forced to pay the sums absent a waiver of enforcement immunity.

3. Enforcement Immunity

On top of the exceptions mentioned above for jurisdictional immunity and which also apply in the case of enforcement immunity (Article 31.3), it is specified that, even in those cases (immovable property, succession, professional or commercial activity) where the diplomatic agent does not enjoy enforcement immunity, the measures can be taken only if it is “without infringing the inviolability of his person or his residence.” 57

54 Id. art. 31.3.
55 Id. preamble.
56 Fernandez, 545 A.2d 1036.
57 Vienna Convention on Diplomatic Relations, supra note 4, art. 31.3.
This condition is important to point out as, in actions relating to private immovable property in the context of a divorce for example, numerous remedies could only be imposed by infringing on the inviolability of the residence of the diplomatic agent. Therefore, this limitation constitutes an almost all-encompassing protection for the diplomatic agent, and in practice it will lead to the diplomatic agent enjoying immunity even when it relates to private immovable property and regardless of the exception set out in the text. For example, if a court orders that the diplomatic agent must let the other spouse and children enjoy the former family home for the duration of the proceedings, this will not be enforceable, leading to serious hardship for the family, since the parents could be “forced” into a difficult cohabitation as a result. Similarly, if a restraining order is implemented against a diplomatic agent as a result of a waiver, while they still live in the family home, there will be an important issue of enforcement since such a measure would necessarily infringe on his or her person and/or residence.

There is in addition no exception regarding the immunity enjoyed by the diplomatic agents from the criminal jurisdictions or the criminal courts.

B. Waivers

1. Principle

Article 32 of the Vienna Convention on Diplomatic Relations of 1961 sets out the principle under which immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 (members of the family and some members of staff) may be waived by the sending State. Only the sending State can waive immunity, which excludes the possibility of the agent waiving it themself (for example, by appearing in court, or by being the petitioner). However, it is interesting to note that Article 32.3 provides: “The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected to the principal claim.”

No other provision implies that the diplomatic agent needs the waiver/authorization of the State before engaging in proceedings himself.

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58 Vienna Convention on Diplomatic Relations, supra note 4, art. 32.3.
2. *Form of the waiver*

The waiver must always be express, according to Article 32 of the Convention. Separate waivers must be issued in civil or administrative proceedings, since Article 32.4 specifies that simply because a jurisdiction has issued a waiver of immunity shall not imply that immunity from execution is also in place. In that scenario, a separate waiver will be required. Therefore, it must be noted that, while one could believe that after obtaining the jurisdiction waiver the diplomatic specificity has been overcome, it is still necessary to obtain the enforcement waiver as well, to avoid a situation where a judicial decision becomes a mere *lettre morte*.

3. *Process in France*

Under French law, and according to the laws of the sending State, the Ministry for Foreign Affairs is competent to waive immunity for the head of the mission, who can in turn waive it for the other members of the mission. Waiving immunity is a possibility as opposed to an obligation, and the court cannot control the use of the right to waive immunity.\(^59\)

The person enjoying the immunity cannot themselves waive it. That is because immunity is granted not to protect the person but to safeguard the independence of the sending State.\(^60\) Therefore, for the diplomatic agent to waive immunity, this waiver must have been authorized expressly by the government of his sending State.\(^61\)

However, provided that the diplomatic agent has expressly waived immunity from jurisdiction and execution in a transaction, the diplomat cannot refute such waiver at a later time, claiming he or she was not entitled to do so without the agreement of his or her government. This was the outcome of a 2007 case\(^62\) in which the court considered that the fact that the diplomatic agent had failed to request the necessary authorizations was not an argument that the diplomatic agent could use against the third party.

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\(^{59}\) Prezas, *supra* note 34, at 96.


In the case of members of international organizations, immunity can be waived only with the authorization of the organization (usually the Secretary of General Director). It is uncertain whether the organization has the right or the duty to waive immunity. However, the judge once again cannot control the decision of the organization to waive it or not, but the judge can rule on the conditions in which the decision to waive was taken.

It is interesting to note that, even if a waiver from jurisdictional immunity is obtained, it does not include a waiver from enforcement immunity, according to Article 32.4. Therefore, it is possible to obtain a judgment from a family court, which cannot be executed against the diplomat.

In a case from 2017, the Paris Court of Appeals rejected the claimant’s assertions on the basis that only an accrediting state can waive a diplomatic agent’s immunity under very specific circumstances. In this case, the claimant was the condominium syndicate and its assertion was that the defendant, the ambassador of Tajikistan, had waived his diplomatic immunity by virtue of Article 32 of the Vienna Convention. The ambassador invoked jurisdictional immunity to avoid paying damages relating to the claims the syndicate brought on the apartment that he had rented.

In another case, this time ruled by the Versailles Court of Appeals, a landlord was claiming overdue rent payments from a tenant that had diplomatic immunity due to being an ambassador. She claimed that the beneficiary of diplomatic immunity can waive their immunity even without consent of the accrediting state. The Court of Appeals of Versailles rejected the claim on the basis that she could not have deduced or implied from the attitude of the defendant that he had given up his diplomatic immunity.

In the 2017 case mentioned above, it seems that the court left behind the requirement of the waiver of the State being

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63 Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418 (1946), art. V, § 20. This says the Secretary General for the UN can and will have to waive immunity if, in his opinion, it would prevent justice from being done and if it can be waived without prejudice to the organization. Only the Security Council has power to waive immunity for the Secretary General of the UN.

64 TAOIT, 2222/2003 (July 16, 2003, cited in Prezas, supra note 34, at 111.


express, in order to obtain the “fair” result of punishing the diplomatic agent who was relying on the absence of an express waiver by the State in bad faith.

4. **Process in the United States**

The rules for requesting an immunity waiver to resolve family law related issues are set out in the Foreign Affairs Manual.\textsuperscript{67} The Manual provides that immunities shall not be waived except with prior consent of the Department. The key factor for the Department to grant the waiver or refuse to do so, is whether the interests of the U.S government are likely to be injured as a result of the waiver, as well as whether the interests of the individual will be adversely affected. There is, however, a presumption in favor of granting a waiver for mission members, as well as for Department employees, except for the latter if the employee consents or if the waiver is “essential to protecting the interests of innocent third parties.”\textsuperscript{68} In private domestic matters, including divorce, separation, maintenance, child custody, and child support, the Department will normally grant a waiver if both parties consent. If one party is in the United States and the other party is at post, a waiver of immunity will be authorized to allow service on the party at post absent that party's consent “only if the waiver is necessary in order to prevent undue hardship on the party seeking service or family members, and if the action is to be pursued in the United States.”\textsuperscript{69} Waiver of immunity will normally be granted to allow a domestic relations action to be pursued in the host country if both parties consent and if the prosecution of the action will not “adversely affect the interests of the U.S. Government.”\textsuperscript{70}

Consequently, in most cases, it is necessary for both parties to consent to the waiver to immunity, meaning that in highly litigious cases where a race for jurisdiction is in play, such a waiver is not likely to be granted. Needing the consent of both parties is a natural consequence of diplomatic immunity being extended to family members. Things could be different if the parents are not married,

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\textsuperscript{67} U.S. DEP’T OF STATE, 2 FOREIGN AFFAIRS MANUAL § 221.5 Waiver of Immunity (Dec. 6, 2021).
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
and immunity is not extended, although a literal interpretation of the rule cited above under which a waiver will normally be granted for domestic actions absent adverse effect on the U.S. government would lead to the agreement to a waiver from both parents being a prerequisite for the waiver. There may be other practical solutions in the absence of waiver.

5. **Workarounds**

   a. **From a French perspective**

      In practice, when a family conflict has arisen (especially in a context where there have been violent incidents, or in case of a potential child abduction), the State will not necessarily grant a waiver. However, in many cases, especially where there are accusations of domestic violence, the authors have observed that the State will encourage or order the diplomat to move back to the sending state, which will appease the conflict and/or allow the immunity to be levied and for the family matter to be adjudicated by the court.

      This solution is often used in practice, as the reputation of the diplomat and the reputation of the State are closely linked, and States are often unwilling to let conflicts escalate for diplomatic families abroad. In case of a serious issue (e.g. violence) in the receiving state, the diplomat could be declared “persona non grata” according to Article 9 of the Convention and have the sending state recall the diplomat and/or terminate their functions.

      Also, one can also explore the possibility of adjudicating the case in the sending state even if the diplomat enjoys immunity in the receiving state where they are habitually resident. Article 31.4 of the Vienna Convention on Diplomatic Relations of 1961 provides: “The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.”71 For example, under French law, there exists a privilege of jurisdiction which grants jurisdiction to the French courts over all French nationals, under Article 14 of the Civil Code.

      Therefore, if a French diplomat has been sent to the United States and their spouse wants to file for divorce, the spouse can petition the French courts and mitigate the effects of immunity in the receiving state. However, if the diplomat and their family

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71 Vienna Convention on Diplomatic Relations, *supra* note 4, art. 31.4.
maintain their habitual residence in the sending State, there could be an issue of enforcement in the receiving State, at two levels: first, the receiving State might not recognize jurisdiction of the foreign courts on the basis of citizenship only and could refuse to enforce such a ruling; and, second, the diplomat will still benefit in the receiving State from immunity from jurisdiction. Therefore, while a judgment will exist, it will be very difficult to enforce. However, the diplomat could receive pressure from the sending State to enforce it and be threatened from being sent back to the sending State in the absence of execution.

b. From a U.S. perspective

While immunity creates a complex situation for a diplomatic agent family, there are certainly workarounds. If, for instance, a diplomatic agent family is located in the United States and enjoys immunity from civil family lawsuits in the United States, and then has a child, born in the United States who has never stepped foot in the sending State from which their parents originate, that child may nonetheless be subject to the sending State’s judicial system and laws when a court is deciding that child’s custody. If a diplomatic agent family separates while in the United States, but both parents remain in the United States and pursue a custody order in their home country, there will then be a further issue with a U.S. court recognizing that foreign custody order. Even if one could argue that the child’s home state (within the United States) declined to issue a custody order for lack of jurisdiction because of immunity, and the child’s most significant connections are then with the sending State where their parents have connections, there remains a lack of enforcement of this order in the United States over the diplomatic agent parent.

If the diplomatic agent family is from the United States, and is sent overseas, and then has a child in the foreign country, then the child’s home state would be that foreign country, except for the

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73 Unif. Child Custody Jurisdiction and Enforcement Act § 105.
issue of immunity which complicates the jurisdictional analysis. Presumably, the parent wishing to initiate a custody lawsuit could return to the last U.S. state where the family resided, and attempt to avail themself of those courts, and seek a custody order, arguing that the home state would, because of immunity, decline to issue a custody order, so the place with the most significant connections to the family is that U.S. state. For a child already born when the family moved overseas, there may be an argument that the child is just temporarily absent from their home state in the United States. This becomes more complicated if the family does not intend to return to the U.S. state from where they came, or if they moved around within the United States, state to state, prior to moving overseas (for example, packing up and selling a house, staying with relatives in another state for a month before moving, etc.). In other words, the parent has a venue in which to seek a custody order, but their use of the U.S. courts remains complicated. They would be required to serve process of the U.S. lawsuit on the diplomatic agent parent, presumably in the foreign country, and that parent’s immunity would present a block on service. Even a willing diplomatic agent cannot necessarily accept service while sitting in the receiving State. Assuming that parent is properly served, perhaps while traveling through a third country, and the U.S. custody lawsuit proceeds, the parent seeking that order may hit roadblocks in enforcing that order in the receiving State because of the other parent’s immunity. Even more complicated is that, since the sending State – the United States – is an available venue for litigation for this family, if the parent seeking custody removes the child from the receiving State and returns to the United States with the child, they may be subject to litigation in the United States under the Hague Abduction Convention. This will happen if

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74 Section 102(7) of the UCCJEA provides the definition of a “Home State” under the Act and adds that “A period of temporary absence of any of the mentioned persons is part of the period [taken into account to compute the 6 months of residence giving rise to jurisdiction of the courts of the State in question].” Id. § 102(7). One could argue that a child moved from his or her country of habitual residence for a parent’s diplomatic assignment is “temporary absent” from the home state under the UCCJEA.

75 Hague Convention on the Civil Aspects of International Child Abduction, supra note 45.
a U.S. judge is persuaded that the foreign country is the child’s habitual residence and that the diplomatic agent parent had a right of custody under the law of that foreign country.\textsuperscript{76} The U.S. Supreme Court clarified that “habitual residence” is a factual determination, and not based on jurisdiction.\textsuperscript{77} In other words, even if the courts in the receiving State have no jurisdiction to resolve custody of the child, the U.S. court resolving the return petition may still conclude that the receiving State is the child’s habitual residence, paving the way for the court to return the child.

Even if there are creative jurisdictional workarounds, they are not always obvious or easy to secure, and they may require physical relocation of the parties for the duration of the litigation or at least when in-person attendance is required by the court. Another option is, of course, to request a waiver of immunity from the immunity-holding government. The Foreign Affairs Manual of the U.S. Department of State outlines the U.S. government’s guidance in private domestic relations matters (including divorce, separation, spousal support, child custody, and child support).\textsuperscript{78} If both parties consent to the waiver, and the lawsuit is filed in the United States, the U.S. Department of State will normally grant any “necessary” waiver of immunity. If one party is in the United States, and the other is at post, then a waiver will be granted for the purpose of allowing service of process on the posted party if that posted party consents. If they do not consent, then a waiver of immunity will be authorized only if it is “necessary in order to prevent undue hardship on the party seeking service or family members, and if the action to be pursued is in the United States.”\textsuperscript{79} In other words, consent is a large component of immunity waivers when the U.S. government is the holder of the immunity.

\textsuperscript{76} In \textit{Pliego v. Hayes}, Civ. Action No. 5:15-CV-00146, 2015 WL 4464173 (W.D. Ky. July 21, 2015), a Spanish diplomat enjoying immunity in Turkey filed a return petition in a U.S. court seeking the return of his child using the Hague Abduction Convention after the mother abducted the child to the United States. At issue was his immunity and whether that immunity from certain civil and criminal lawsuits presented an intolerable situation, which the court concluded it did not. As a note, the Spanish government waived his immunity for purposes of a child custody lawsuit to proceed in one court case that had been filed in Turkey.

\textsuperscript{77} Monasky v. Taglieri, 140 S. Ct. 719 (2020).

\textsuperscript{78} U.S. Dep’t of State, supra note 67, § 221.5 Waiver of Immunity.

\textsuperscript{79} Id.
Separate from jurisdictional workarounds and seeking waivers of immunity, a diplomatic agent family has relatively few options.

**Conclusion**

While immunity should not be synonymous with impunity, that can often be the result when immunity is provided, even if that immunity is confronted with other fundamental personal rights. There is typically a workaround concerning the possibility to divorce or to obtain child support. However, when immunity rules clash with rules of public policy, such as equality of the sexes and children’s rights, immunity appears to take precedence in the few decisions found. Refusal by the hosting country to hear questions concerning child abuse or remedying a shari’a law repudiation does not necessarily mean judicial recourse is denied, as the typical schema would be to have the intrafamily issue heard in the sending State. However, such recourse is not available when the repudiation took place in the sending State or the latter does not have the necessary infrastructure to prevent child abuse, creating therefore a gaping hole in the legal system to remedy the violation of these fundamental rights.

One could also ask whether diplomats and their spouses and family members of diplomats are aware of the rights they are waiving when serving their country, since diplomatic immunity is typically seen and presented as a benefit of the posting and not as a waiver of access to justice. The glitz and glam and intellectual pull of being a diplomat tend to outshine this often-neglected situation and while it is indeed an advantage for most individuals, immunity can create serious consequences that were far from expected by the diplomatic family.
To Return or Not To Return – That Is The Question: Tensions Between Non-Refoulement and Orders of Return Under the Hague Abduction Convention

by Melissa A. Kucinski & Richard Min

I. Introduction

Eleven thousand, four-hundred and fifty-four migrants entered the United States as refugees in 2021. A refugee is someone who is unable or unwilling to return to their country of nationality, or someone who is “unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” This class of migrants are eligible to apply for legal status from the U.S. government to live in the United States as either a “refugee” or an “asylee.” A person sitting outside of the United States may apply for “refugee” status, while a person who has already entered the United States may apply for “asylum” status. Refugee status indicates that the person is of special humanitarian concern to the United States, with certain priority categories, including those referred by the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, or certain non-governmental organizations (Priority One), special humanitarian cases (Priority Two), and family reunification cases.


(Priority Three). In 2021, the United States only accepted referrals from UNHCR in the Priority One category. Asylum status is available to any foreign national physically present in the United States, so long as they meet certain requirements, and must be applied for within one year of entry to the country, with certain exceptions.

This article will focus on asylum-seekers – specifically parents who cross an international border, enter the United States with their child, and then apply for asylum status on behalf of themselves and/or their child. Asylum-seekers who are physically present in the United States and are granted asylum status typically cannot be removed under the principle of non-refoulement, established in several international agreements, including the 1967 United Nations Protocol Relating to the Status of Refugees (“1967 Protocol”). The United States is bound by the 1967 Protocol to comply with Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, “with respect to ‘refugees’ as defined in Article 1.2 of the Protocol” even though the United States is not a signatory to the Convention. Article 33.1 of the Convention states that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

The Refugee Act of 1980 was enacted in the United States to “bring United States refugee law into conformance with the [1967 Protocol].” The principle of non-refoulement is entrenched as part of the United States’ commitment to international human

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4 Baugh, supra note 2.
5 Id.
7 Baugh, supra note 2.
9 See generally 189 U.N.T.S. 137, 150 (July 28, 1951).
rights through the Refugee Act of 1980. Article 243(h) of the Refugee Act, which amended prior discretionary language, stated that “[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” Federal law, however, grants broader protection to those who are granted asylum (rather than any alien) by simply prohibiting their removal or return to their “country of nationality . . . or last habitual residence.”

If an asylum-seeker is a parent, they may bring their child with them when they enter the United States and seek the same legal status for their child. Depending on the family’s circumstances, the child may have been removed from their home country and brought into the United States without the proper permission of the other parent or home courts, qualifying that child’s migration as a child abduction, with potential civil and criminal implications, including under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention).

The Hague Abduction Convention, ratified by the United States in 1988, is an international treaty that establishes a civil mechanism for the prompt return of children under the age of sixteen when they have been removed from or retained outside of their habitual residence in violation of custodial rights. The Convention is in force between the United States and eighty other countries. The Convention does not, however, offer remedies in all international child abuctions because not all countries are Contracting States to the Convention, and for those Contracting States that have acceded

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13 This was subsequently amended to read that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A).
17 Id.
to the Convention, the United States has not accepted all acceding countries as partners. This article will focus on child abductions into the United States by asylum-seekers that fall within the parameters of a Hague Abduction Convention case.

In 2019, the U.S. Department of State Office of Children’s Issues opened 488 cases where a parent brought their child into the United States from a country that is a treaty partner with the United States under the Hague Abduction Convention.\(^\text{18}\) In that same year, of the top ten countries yielding asylum-seekers into the United States, five were also in the top ten countries for incoming cases of parental child abduction under the Hague Abduction Convention\(^\text{19}\) – Honduras, Mexico, Guatemala, Colombia, and Venezuela – with abductions from Honduras accounting for 31% of all reported incoming abduction cases.\(^\text{20}\) It seems inevitable then that there is overlap in asylum and child abduction cases.

In Part II, this article will explore existing U.S. asylum jurisprudence and examine how U.S. courts have addressed the tension between non-refoulement of an asylum-seeker and returning an abducted child. In Part III, this article will highlight some prospective legal issues, such as ameliorative measures or returns to a third country, that may arise out of this tension in future Hague Abduction Convention cases in the United States.

II. Tensions in Asylum Applications and the Return of Abducted Children

While the Hague Abduction Convention provides a civil remedy to return abducted children, children are not always returned. The Hague Abduction Convention provides for limited exceptions to the return remedy. These exceptions include that: (1) rights of custody were not breached; (2) the abduction was consented or

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\(^\text{20}\) Id.
acquiesced to; (3) there is a grave risk that a child’s return would expose the child to physical or psychological harm or an intolerable situation; (4) the child is mature and objects to the return; (5) the child is settled in the new environment after the parent requesting the return delayed in requesting such a return for a year or more; or, (6) a return would not be permitted by “the fundamental principles . . . relating to the protection of human rights and fundamental freedoms.”

There is no exception based on a child’s immigration status. However, a child’s immigration status (and, in more limited circumstances, a parent’s immigration status) could be considered as one factor in a broader analysis.

It is unsurprising, therefore, that tensions can materialize between the principle of non-refoulement and the return remedy in Hague Abduction Convention cases. On the one hand, the Secretary of Homeland Security is expressly prohibited from removing or returning a person who is granted asylum in the United States to that person’s country of nationality or last habitual residence.

On the other hand, the courts of the United States are mandated to return a child who was wrongfully removed to or retained in the United States forthwith, short of one of the limited exceptions, upon the request of a person actually exercising rights of custody over that child. It has, therefore, come to pass that

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21 Hague Abduction Convention, supra note 15.
23 On March 1, 2003, the Immigration and Naturalization Service (“INS”) ceased to exist as an independent agency within the Department of Justice and its functions were transferred to the newly formed Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 471, 116 Stat. 2135 (Nov. 25, 2002). USCIS assumed INS’s authority over asylum applications. Id. at § 451. All references to the Attorney General in that statute now refer to the Secretary of Homeland Security. See 6 U.S.C. § 557 (“With respect to any function transferred by or under this chapter . . . reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred.”); see Sanchez v. RGL, 761 F.3d 495 (5th Cir. 2014), U.S. Amicus Brief, n.9.
26 Hague Abduction Convention, supra note 15, art. 12.
there are children in the United States who either have an asylum application pending or who have been granted asylum and cannot be removed from the United States by the federal government, but where a U.S. court nonetheless orders that the child return, in some cases, back to where they fled perhaps for fear of persecution. Both proceedings address circumstances in another country, and the impact of those circumstances on the asylum-seeker. Neither proceeding resolves the underlying custody dispute. In other words, if a child cannot remain in the United States (is removed under U.S. immigration law or returned after an abduction), there is no further elaboration on the circumstances under which the child will reside upon return, short of an existing custody order being in place in the foreign country. In a Hague Abduction Convention proceeding, however, there may be more flexibility, as seen later in this article, for tailoring a return to protect a child.27

While asylum applicants might routinely be involved in international parental child abduction litigation in the United States, in most cases, their asylum application plays a minor role in the court’s analysis to return the child, or not.28 For example, the child’s immigration status may be one of many considerations as to whether the child is settled in the United States.29 It may also shed light on whether a child’s habitual residence shifted to the United States.30 However, any outright conflict between non-refoulement principles and the prompt return of a child under the Convention are rarer occurrences.

When these conflicts do arise, a parent is likely highlighting the child’s asylum application as the key argument for not returning the child. The argument that there is a grave risk that the child would be exposed to physical or psychological harm – the same harm that caused the parent and, more importantly, the child to flee their home country and migrate to the United States – is the most common.31 The parent may also argue that returning a child

27 See infra text at notes 99 - 107.
31 Salame v. Tescari, 29 F.4th 763 (6th Cir. 2022); Sanchez v. RGL, 743 F.3d 945 (5th Cir. 2014).
would not be permitted by fundamental principles of human rights under Article 20 of the Hague Abduction Convention.

A. Asylum Applications in the United States

Over the past decade, asylum has become an increasingly politicized issue with different administrations instituting ever-changing policies. Because a migrant must be physically present in the United States to apply for asylum status, policies have been focused on how to prevent, or not, migrants from crossing into the United States at the border.\textsuperscript{32} Once migrants are in the United States, they have one year, short of a qualifying exception, to file an application for asylum.\textsuperscript{33} If a migrant expresses the intent to apply for asylum, the U.S. Department of Homeland Security will conduct a credible fear process, and may detain the migrant during this process.\textsuperscript{34} The legal burden on the migrant to prove, during this initial process, that they have a credible fear of persecution or torture in their home country is a “well founded fear of persecution.”\textsuperscript{35} After this initial screening, the migrant would then proceed to a second “merits” interview to determine whether he or she meets the eligibility criteria for asylum.\textsuperscript{36} “Persecution” is “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”\textsuperscript{37} The Seventh Circuit Court of Appeals has defined it as “the infliction of suffering or harm, under

\begin{footnotesize}
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\item \textsuperscript{32} Remarks by President Trump at the 45\textsuperscript{th} Mile of New Border Wall | Reynose-McAllen, TX (Jan. 12, 2021), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-45th-mile-new-border-wall-reynosa-mcallen-tx/.
\item \textsuperscript{35} INA § 101(a)(42)(A). See also 8 U.S.C. § 1101(a)(42)(A).
\item \textsuperscript{37} Matter of Acosta, 19 I&N Dec. 211, 222 (B.I.A. 1985).
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government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.) in a manner condemned by civilized governments.”

Permanent or serious injury is not required to prove that the immigrant was persecuted. Persecution may be emotional or psychological. Courts in the United States have found a variety of qualifying emotional or psychological persecutions over the years, including a child’s trauma in observing his family injured and a parent’s fear that her child would be subject to female genital mutilation. Other courts have found certain emotional and psychological impacts to not rise to the level of persecution, for example, a child who witnessed his father beaten by guerillas and witnessed others being executed, and depression because of a spouse’s forced abortion.

Generally, persecution does not include harassment or discrimination. Since the asylum-seeker must be unable or unwilling to avail himself or herself of the protection in the country of persecution, then the applicant must show that the government, or persons or organizations that the government is unable or unwilling to control, inflicted the persecution. The persecution must be “on account of” one of five enumerated grounds: race, religion, national origin, political opinion, or membership in a particular social group. Therefore, “generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”

If the asylum-seeker adequately proves past persecution, then there is a presumption that he or she has a well-founded fear of future persecution, which can be overcome if the U.S. government can establish, by a preponderance of the evidence, that there is a

38 Shellong v. INS, 805 F.2d 655, 662 (7th Cir. 1986).
40 Rusak v. Holder, 723 F.3d 1080 (9th Cir. 2013).
41 Hernandez-Ortiz v. Gonzalez, 496 F.3d 1042, 1045 (9th Cir. 2007).
42 Abay v. Ashcroft, 368 F.3d 634, 640-42 (6th Cir. 2004).
43 Roriguez-Ramirez v. Ashcroft, 398 F.3d 120, 124-25 (1st Cir. 2005).
44 Yi Ni v. Holder, 613 F.3d 415, 428 (4th Cir. 2010).
45 De Zia v. Holder, 761 F.3d 75 (1st Cir. 2014); Martin Martin v. Barr, 916 F.3d 1141 (8th Cir. 2019).
46 Juan Antonio v. Barr, 959 F.3d 778, 793-95 (6th Cir. 2020).
“fundamental change in circumstances such that the applicant no longer has a well-founded fear” such as changed conditions in the home country.\(^{49}\) If the applicant can avoid future persecution by moving to another part of their country, and, given the circumstances, it is reasonable to expect them to make such a relocation, then the presumption can be overcome.\(^{50}\)

There are a few reasons why the government must deny an application for asylum without having an evidentiary hearing on a disputed fact. These mandatory denial grounds include: the applicant was involved in the persecution of others, there is reason to believe the applicant committed a serious non-political crime outside of the United States prior to arrival, the applicant is a danger to U.S. security, the applicant was convicted for a serious crime in the United States and is a danger to the community, certain terrorist activity, the applicant is firmly resettled in another country prior to arriving in the United States, if the applicant failed to apply for protection from persecution in at least one country of transit \textit{en route} to the United States’ southern border by land, a prior asylum denial short of changed circumstances, or missing the one year deadline.\(^{51}\) The government may also deny asylum as a matter of discretion, even if the applicant is otherwise eligible.\(^{52}\)

While the Refugee Act requires that persecution be based on a well-founded fear, the Act has a different standard when it comes to a request to withhold the removal of the applicant to their home country. This standard requires a showing of “probability of persecution.”\(^{53}\) Since asylum is based on circumstances in the migrant’s home country, the migrant necessarily provides information to the U.S. government about their home country and their circumstances there. Under federal regulations, asylum information may not be disclosed to a third person without the asylum-seeker’s consent, except in rare circumstances.\(^{54}\) The rare circumstances include use of the information in defense of a legal

\(^{51}\) INA § 208(b)(2)(A)(i)-(vi).
\(^{52}\) INA § 208(b)(2)(A)(v).
\(^{53}\) Stevic, 467 U.S. 407
\(^{54}\) 8 C.F.R. §§ 208.6(a), 1208.6(a) (2020).
action or a U.S. criminal or civil investigation. Much of the evidence that an asylum applicant will share with the U.S. government in the application process could be relevant to a judge in a U.S. court reviewing whether to return an abducted child under the Hague Abduction Convention.

The issue of asylum is not just a domestic or internal issue. It is an issue of human rights and is addressed through international law. Under the 1967 Protocol, to which the United States is a Contracting State, the United States is prohibited from returning an alien to a country where “it is more likely than not that his life or freedom would be threatened on account of one of the protected grounds, provided none of the bars to protection apply.”

U.S. compliance with this international obligation is implemented through the Immigration and Naturalization Act (INA) where a migrant can seek withholding of their removal from the United States by demonstrating by a “clear probability of persecution” that their removal should be withheld. This standard is higher than the evidentiary standard to be granted asylum in the first place. The withholding of removal is granted only in proceedings before an immigration judge, which is a different factfinder than an asylum officer who grants or denies an application for asylum.

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55 8 C.F.R. §§ 208.6(c), 1208.6(c) (2020).
56 Sanchez, 761 F.3d 495, U.S. Amicus Brief at 23.
57 8 U.S.C. § 1231(b)(3).
58 Cardoza-Fonseca, 480 U.S. at 430.
59 See, e.g., Roberto Rosas & Valeria Montalvo, The Right to Immigrate: A Comparative Analysis of Immigration System in the United States and Mexico, 24 Rutgers Race & L. Rev. 121, 172, n.297 (2023) (“When an immigrant turns themselves in at the border to an immigration officer and states a fear of return to their home country, immigrants are placed in credible fear proceedings. In credible fear proceedings, immigrants are interviewed by asylum officers. . . . These interviews can be conducted in the immigrant’s native language by using a telephone interpreter service.”). See also The Difference Between Asylum and Withholding of Removal, American Immigration Council (Oct. 6, 2020), https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal.
B. The Hague Abduction Convention in the United States and Arguments Surrounding Asylum

The United States is a Contracting State to the Hague Abduction Convention, with the primary goal of promptly returning a child under the age of sixteen after that child has been wrongfully removed from or retained outside of their habitual residence.60 A person (or entity) who is actually exercising a right of custody over that child may petition a court in the United States where the abducted child is located to request that child's return.61 The term “prompt” is loosely interpreted to mean six weeks because the Hague Abduction Convention includes language permitting the parent who requested the child’s return to ask the courts hearing their return request to elaborate on reasons as to why the court has not decided the case after six weeks.62

Recent cases in the United States and in other countries have illustrated the clear conflict between asylum procedures and the Hague Abduction Convention. The conflict typically arises when asylum has been granted on behalf of the abducting parent or the child and a court is considering a request to return the child under the Hague Abduction Convention. In some cases, the asylum application is still pending at the time the court is resolving a parent’s request to return their child under the Hague Abduction Convention, at times leading the respondent parent to seek a stay of the Hague Abduction Convention proceeding until the asylum request is resolved.63 The conflict is, simply stated, that one branch of the U.S. government (executive) is prohibited from removing the asylum grantee,64 while another branch (judicial) is required to direct the return of children with limited exceptions.65

This conflict is complicated by various factors including the different standards of proof in asylum and Hague Abduction Convention cases; the involvement in a Hague Abduction Convention case of a party (the petitioning parent) who is not a party to the asylum claim; the fact that evidence in the Hague Abduction

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60 Hague Abduction Convention, supra note 15, art. 1.
61 22 U.S.C. § 9003(b).
62 Hague Abduction Convention, supra note 15, art. 11.
64 8 U.S.C. § 1158(c)(1)(A).
65 Hague Abduction Convention, supra note 15, art. 12.
Convention case is tested under cross-examination, which may not be the case in an asylum claim; and the reality that the factual findings in the Hague Abduction Convention case with respect to the child’s potential exposure to grave risk will likely overlap substantially with the grounds for any grant of asylum.

For example, in 2006 in response to a question about the intersection between asylum and Hague returns, the U.S. Central Authority expressed its disagreement with a California state court decision that denied the return of a child pursuant to the grave risk of harm exception based on the child’s derivative status under the abducting parent’s asylum grant as a result of domestic violence. The United States disagreed with the decision because the standard for granting asylum is “much lower than the 13(b) standard, and because asylum hearings are not contested hearings.”

More recently, in preparation for the Eighth Special Commission Meeting of the Hague Conference on Private International Law on the Practical Operation of the Hague Abduction Convention, the United States’ reflection on the intersection between asylum and Hague Abduction Convention issues came across as more explanatory rather than a clearly defined position on the matter. The U.S. Central Authority stated:

This is a topic on which relatively few courts in the United States have opined. As such, the posture of the caselaw may continue to evolve. However, currently, a grant of asylum may be relevant, but is not dispositive to, a finding by the court hearing a case for return under the Hague Abduction Convention that a respondent has sufficiently proven the exceptions to return defined at Article 13(b) or Article 20. The elements to be proved, the burdens of proof, and the legal standard used when deciding whether to grant asylum in the United States differ from those used in the Hague Abduction Convention and the International Child Abduction Remedies Act (the U.S. implementing legislation for the Convention) that, if proven, allow courts the discretion to grant or deny

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66 A Central Authority is a designated office or agency that has primary responsibility for the implementation of operation of a Convention within that country. In the U.S. the Central Authority is the U.S. State Department, Office of Children’s Issues.


68 Id.
return under Article 13(b) or Article 20. Thus, U.S. courts have held that even if a child has been granted asylum, a court in Hague Abduction Convention proceedings must still analyze whether the evidence satisfies the exceptions to return in Articles 13(b) and/or 20. Moreover, under current U.S. caselaw, a grant of asylum does not remove a court’s authority to determine whether a child should be returned under the Hague Abduction Convention, and does not prohibit the court from ordering return.69

Additionally, both petitioning parents and those parents defending against the child’s return, may use a child’s (and sometimes the parent’s) immigration status as a practical impediment to resolving a Hague Abduction Convention case. Immigration status can have a direct impact on the ultimate outcome of the legal proceedings – whether a parent can be physically present for the court case, whether a child has the legal authority to return to the country where the petitioning parent is located, or whether a family can resolve a child’s or family member’s travel to see the child.70

1. A Child’s Settlement in the United States

When a petitioning parent delays in filing a lawsuit to seek their child’s return for one or more years after the wrongful removal or retention, the respondent parent may argue that the child is now settled in the United States.71 Petitioning parents have argued that, if the child’s immigration status in the United States is uncertain, the child could not be settled in their new environment. A child’s immigration status is only one of many factors a court would assess in determining if the child is settled.72 The child’s inability to remain in the United States may be a factor against a finding that the child is settled in the United States, but if the

71 Hague Abduction Convention, supra note 15, art. 12.
72 Hernandez, 2023 WL 2317792, at #8.
respondent parent clarifies that the child is not at risk of being placed in removal proceedings or returned to their home country, courts have typically given little weight to the child’s lack of legal status in the United States as bearing on the ultimate outcome.\textsuperscript{75}

2. \textit{Parents’ Shared Intentions to Migrate a Child}\textsuperscript{74}

A petitioning parent must also successfully argue that the child was removed from the child’s habitual residence, which is a fact-intensive analysis that could include the parents’ intentions as to where the child would reside, along with the child’s connections to their respective countries, old and new.\textsuperscript{74} For immigrant families who may form a plan to relocate to the United States as a unit, and then to seek asylum status once in the United States, the question may arise whether the child’s habitual residence has shifted from the country where the family started to the United States. In some of these situations, one of the parents decides to abandon the family plan to move as a unit when the parents’ relationship deteriorates and creates a situation where their immigration status may be part of the factual analysis in the case.\textsuperscript{75}

3. \textit{Harm to the Child in the Habitual Residence}\textsuperscript{76}

A child’s asylum application often is one of many facts that inform a court as to the child’s connections, or lack thereof, to the United States. In more cases, however, a respondent parent might actually use their positive outcome in their credible fear process to argue that if the U.S. government found there to be a credible fear of persecution or torture in the home country, then a court hearing a case to return the child back to that home country should likewise find that there is the likelihood of exposure to a grave risk of harm in the home country under Article 13(b) of the Hague Abduction Convention.\textsuperscript{76}

\textsuperscript{74} Monasky v. Taglieri, 140 S. Ct. 719 (2020).
\textsuperscript{75} Delgado v. Osuna, 837 F.3d 571, 577 (5th Cir. 2016); Hernandez, 2023 WL 2317792, at *8;.
\textsuperscript{76} Sanchez v. Sanchez, Case No. 1:18cv449, 2021 WL 1227133 (M.D. N.C. Mar. 31, 2021) (the respondent parent presented her credible fear screening paperwork as evidence, but that the paperwork differed in material ways from
One of the first appellate Hague Abduction Convention cases in the United States that focused on the tension between a child’s asylum application and whether that child should be returned to the home country (here, Mexico) was the case of *Sanchez v. RGL*.

In *Sanchez*, three Mexican children were taken to the United States by their aunt and uncle. While in the United States, the children sought asylum claiming fear of their mother’s boyfriend who they alleged was abusing them, was a gang member, and was a drug dealer. Their mother then initiated a Hague Abduction Convention proceeding seeking the return of the children to Mexico. At the time of the initial district court decision, the children’s asylum application had been rejected on procedural grounds. The U.S. Department of Health and Human Services, Office of Refugee Resettlement filed a motion seeking a stay of any ruling arguing that “the asylum applications, if re-filed, may shed light on the Court’s determination of whether the children face a grave risk of harm . . . [and] may provide information relevant to the Court’s determination [regarding the Article 20 human rights exception].” The district court rejected the motion for a stay and granted the petition, finding that the Articles 13(b) and 20 exceptions were not established. The court noted that a determination on the asylum applications would be relevant but that it would not wait the 6-9 months it was likely to take (at that time) for such a determination.

The children appealed the district court decision, and after the filing of an appeal, the children were granted asylum. On appeal, the children argued that the asylum grant conflicted with the district court return order and should control under the last-in-time rule, since it was granted after the district court decision. The children also argued that, in the alternative, the case should be remanded back to the district court considering the grant of her testimony at the Hague Abduction Convention trial causing the court to conclude she lacked credibility and reliability as a witness).

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77 *Sanchez*, 761 F.3d 495.
78 *Id.*
80 *Sanchez*, 761 F.3d 495.
asylum and whether the Article 13(b) or 20 exception now applies. Their mother argued that since the Hague proceedings were more thorough, that decision should control rather than the grant of asylum. The United States, in its amicus brief, argued that a grant of asylum was not dispositive of the issue but certainly relevant to the Article 13(b) and 20 exceptions.

The Fifth Circuit, addressing the inherent conflict between grants of asylum and return orders under the Hague Abduction Convention, determined that “[t]he asylum grant does not supersede [sic] the enforceability of a district court’s order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security under the INA.”81 The Fifth Circuit noted that the evidentiary burden in an asylum case (preponderance of the evidence) is lower than what is required to establish an Article 13(b) and 20 exception (clear and convincing evidence).82 However, the relevance of new evidence as part of the asylum grant to the issues present in the Hague case was sufficient to remand the case back to the district court for further proceedings to consider “all available evidence from the asylum proceedings.”83

In Sanchez, ultimately the petitioner mother abandoned her request to have the children returned and allowed the children to remain in the United States, leaving the legal issue a bit in flux. However, the Fifth Circuit addressed several critical questions concerning the interaction between asylum and Hague Abduction Convention cases. First, the Fifth Circuit rejected the last-in-time rule.84 Second, it found that an asylum grant does not trump the ability of courts to issue return orders pursuant to the Hague Abduction Convention.85 Finally, it found that asylum claims are relevant to Hague proceedings insofar as the evidence and issues overlap but noted that the burden of proof is higher in Hague cases

81 Id. at 510.
82 Id.
83 Judge DeMoss dissented stating that he would have affirmed the return order, noting that “the district court spent a tremendous amount of time and effort considering whether exceptions to returning the children under the Hague Convention were applicable.” Sanchez, 761 F.3d at 511 (DeMoss, J., dissenting).
84 Sanchez, 761 F.3d at 509-10.
85 Id. at 510.
and stated that “[d]espite similarities, the asylum finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Article 13(b) of the Convention about whether return ‘would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.’”\(^86\)

4. **Human Rights and Asylees**

More recently, there was a second appellate Hague Abduction Convention case in the United States to address this issue. Relying heavily on Sanchez,\(^87\) the Court addressed a child’s derivative asylum grant and whether the child must be returned to Venezuela. While the majority reached a similar position as the Fifth Circuit, a dissenting judge in the Sixth Circuit felt differently, and elaborated on some arguments that arose in a similar Canadian Hague Abduction Convention case.

In *Salame v. Tescari*,\(^88\) two children were abducted from Venezuela by their mother. The father filed a Hague Abduction Convention case in which the mother raised an Article 13(b) exception based on the father’s alleged physical and verbal abuse, that Venezuela is a zone of war and famine, and because the Venezuelan court system would be unable to adjudicate the underlying custody dispute. The district court determined that the mother did not establish her exception and directed the return of the children back to Venezuela.\(^89\) This case is distinguishable from Sanchez in that the children were derivative asylum applicants and asylum was granted prior to the district court decision.

The Sixth Circuit agreed with the Fifth Circuit in Sanchez, that it is the courts and not a governmental agency that has the “authority to determine [the] risks” children may face upon return, presumably to their country of habitual residence. “‘Prior consideration of similar concerns in a different forum’ may be relevant, but a grant of asylum does not strip the district court of its authority to make controlling findings regarding circumstances the children may face upon return.”\(^90\) The Sixth Circuit, like the Fifth before it, noted the lower evidentiary burdens in asylum cases

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\(^{86}\) Id.

\(^{87}\) Id.

\(^{88}\) 29 F.4th 763.

\(^{89}\) Id. at 766.

\(^{90}\) Id.
compared to the Article 13(b) exception in Hague cases, and further noted that interested parties may not be afforded the ability to participate in asylum proceedings.\(^91\)

In a particularly thoughtful dissenting opinion, Judge Moore held that “a district court abuses its discretion when it declines even to consider” a grant of asylum.\(^92\) Judge Moore’s dissent was at least partially instructed by a decision from the Canadian Court of Appeals for Ontario, in \textit{A.M.R.I. v. K.E.R.}, which held that:

A finding of refugee status accorded by the IRB to a child affected by a Hague Convention application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, that is, to a risk of harm. In these circumstances, Canada’s non-refoulement obligations and the import of a child’s refugee status must be considered under the art. 13(b) (grave risk of harm) and art. 20 (fundamental freedoms) exceptions to mandatory return under the Hague Convention.\(^93\)

As Judge Moore noted, court opinions from “sister signatory” nations are “entitled to considerable weight.”\(^94\) Moreover, the U.S. Congress, as part of the Hague Abduction Convention’s implementing legislation, directs the “uniform international interpretation of the Convention.”\(^95\)

Judge Moore’s analysis in \textit{Salame} is notable for its liberal interpretation of the Convention, at least compared to existing jurisprudence at the time. As part of her analysis into the Article 13(b) claims, Judge Moore focused on the fact that the mother would not be able to return to Venezuela for future custody proceedings because of her asylum grant and the risk that her status would be revoked. Thus, in such circumstances, children are placed in an intolerable situation when a parent must choose between losing their asylum status (also acknowledging a legitimate fear of persecution) or possibly losing custody of their children. Judge Moore, however, does not go so far as to say that the asylum grant necessitates a finding of the Article 13(b) exception based on an

\(^{91}\) \textit{See also Jose Junior}, 2023 WL 4725909.

\(^{92}\) \textit{Salame}, 29 F.4th at 773.


intolerable situation, but rather that a district court must consider a grant of asylum when analyzing this exception.\textsuperscript{96}

Judge Moore’s comments pertaining to the Article 20 exception are even more notable considering the mother’s failure to raise that argument in the district court and on appeal. However, Judge Moore concretely stated that “[r]eturning an individual who has been granted asylum to their country of nationality violates basic human rights principles and shocks the conscience.”\textsuperscript{97} Article 20 is intended for “the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.”\textsuperscript{98}

Judge Moore, however, offered her opinion that the provision found in the 1951 Convention Relating to the Status of Refugees that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his [protected status]” prohibits “loopholes through which refugees can be removed.”\textsuperscript{99} She found a basis for this in the United States’ commitment to international human rights and international asylum protections which, in her view, clearly implicated the Hague return remedy.\textsuperscript{100}

To reiterate, Judge Moore’s clear and concise language on this matter did not lead her to the conclusion that the petition in \textit{Salame} should be denied, but rather a more limited opinion that the matter should be remanded to the district court for further proceedings to consider the asylum grant.

\textsuperscript{96} \textit{Salame}, 29 F.4th at 777.
\textsuperscript{97} \textit{Id.} at 778.
\textsuperscript{98} 51 Fed. Reg. at 10,510 (Mar. 26, 1986). A district court in Texas recently applied this exception because a child’s special educational needs would not be accommodated if the child were returned to Mexico. This exceptional decision, however, was reversed by the Fifth Circuit, which stated that the district court “essentially made an impermissible custody determination.”\textsuperscript{99} \textit{Salame}, 29 F.4th at 778.
\textsuperscript{100} \textit{Id.} United Nations High Comm’n on Refugees, 1951 Convention and Protocol Relating to the Status of Refugees, art. 33, ¶ 1, https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees; \textit{see also} Universal Declaration of Human Rights, art. 14 (1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).
III. Issues on the Horizon

A. Ameliorative Measures to Protect Asylum Seekers upon Return

Separately from the existing U.S. jurisprudence is the question as to how the most recent U.S. Supreme Court Hague Abduction Convention case of *Golan v. Saada*\(^{101}\) may instruct a court, at least in an analysis of the child’s exposure to harm in the home country to determine whether a child would be safe if returned. One of the underlying premises of an asylum application is that a person was persecuted in the country from where they came. It, therefore, as a matter of logic, seems harmful to the person to be returned to that country. However, caselaw suggests that past persecution may be ameliorated by returning a migrant asylum-seeker to another part of that country in some circumstances.\(^{102}\) This concept is not uncommon in Hague Abduction Convention return cases, too. In fact, in the case of *Golan v. Saada*, the U.S. Supreme Court reinforced a judge’s discretion to consider mechanisms to ameliorate harm to a child upon their return to their habitual residence.\(^{103}\) This case has since led judges to consider a wide range of proposals to safely return children when a return would otherwise be harmful. One of those ways could be to return a child to a different part of the country, particularly if the harm that would befall the child is localized. Most certainly, the Supreme Court’s opinion in *Golan v. Saada*, has created additional litigation, with petitioning parents more routinely arguing that if the court were to find harm in the habitual residence, the court should consider measures that would ameliorate the harm.\(^{104}\) This may create an avenue for a deeper exploration into the actual persecution that might face a child if returned to the country from where they came.

U.S. judges in Hague Abduction Convention return proceedings have been readily examining these ameliorative measures since the *Golan v. Saada* opinion, and have crafted safe-harbor

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\(^{101}\) Golan v. Saada, 142 S. Ct. 1880 (2022).


\(^{103}\) Golan, 142 S. Ct. at 1895.

orders that would allow a soft landing for children upon their return, including provisions for an allegedly abusive parent to refrain from seeing the child until the home court system can resolve a safe arrangement for the child, or prohibitions on a parent consuming alcohol or driving the child after consumption. The judicial discretion highlighted in the Golan v. Saada opinion could be applied in situations where a child asylum-seeker’s persecution or harm could be ameliorated by putting in place certain provisions to allow for a safe return.

B. Return to a “Safer” Country as a Remedy for Asylum-Seekers

Another potential issue that may arise is whether a fear of persecution and/or exposure to harm in the home country/habitual residence may argue for a child’s return to a third country. This is a rare remedy available under the Convention. The Convention specifically left open the flexible alternative to return a child to a third country. This is, perhaps, most common when no parent remains in the child’s habitual residence post-abduction, and so it is impractical to return a child to that country. Nonetheless, the Hague Abduction Convention’s Explanatory Report states, “[t]he Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. . . . including such a provision in the Convention would have made its application so inflexible as to be useless.”

It seems illogical that the court in a Hague Abduction Convention return proceeding would mandate a child be repatriated to some random third country when the family has no connections to that country. This flexible interpretation of the Convention, however, does give a court some options, in the right situation, to return a child to another country location that may be safer to the child, where the child may have some connections with that country or

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with a parent who is able to reside in that country. With abducted children and mobile families often holding citizenship from multiple nations, or even potentially owning residences in more than one country, this could, in a rare circumstance, be a potential option for the family to return a child, when there is a grave risk or a fear of persecution in the habitual residence.

C. Asylum Application, but No Outcome at the Time of the Hague Abduction Convention Decision

There is a tension between non-refoulement and returning an abducted child when that child’s application for asylum has been granted. This tension is further exacerbated by the length of time to review an asylum application in contrast with the mandatory prompt return of an abducted child under the Hague Abduction Convention. In many Hague Abduction Convention return cases, the child’s application for asylum remains pending,


109 Note that many attorneys argue that the Hague Abduction Convention fixes the forum for litigating the underlying custody matter; however, this is technically incorrect at least pursuant to U.S. law. Therefore, there have been arguments that a court should not return a child to a third country when that third country clearly has no jurisdiction to render a child-custody determination. That argument is a red herring. Each country determines its rules for child-custody jurisdiction. The United States has signed, but not yet ratified, the Hague Child Protection Convention, which could help in these circumstances when countries may have conflicts among their internal laws.


111 Article 12 of the Hague Abduction Convention requires the return of wrongfully removed or retained children absent the exceptions. Article 1 of the Hague Abduction Convention sets the goal of a prompt return.
with some distant date for its review, or even no date at all. While not common, there have been requests by asylum-seekers to stay the Hague Abduction Convention proceeding pending the asylum application outcome. In the United States, the courts have applied the Salame v. Tescari analysis, and denied such requests, arguing that this cuts against the mandatory obligation, under the Hague Abduction Convention, to resolve a case expeditiously.

The United Kingdom Supreme Court took the opposite approach in a case that ordered a child returned to South Africa when that child, who is gay, had sought asylum in England. In the case of G v. G, the UK Supreme Court, having determined that a derivative asylum claim for a child is understood as the child’s application for asylum, further determined that a return order pursuant to the Hague Abduction Convention cannot be enforced while an asylum request is pending and that the “two Conventions are not independent of each other but rather must operate hand in hand.” The UK Supreme Court, however, found that the bar against enforcement of a return order does not impact the requirement that Hague Abduction Convention cases be expedited nor does it impact the trial court’s ability to make findings of fact or conclusions of law.

D. Using an Alternative to the Hague Abduction Convention to Return a Child

In some situations, a parent foregoes the remedy available under the Hague Abduction Convention and seeks recourse in the local U.S. state courts where the child is sitting post-abduction pursuant to that state’s enactment of the uniform statute related to child-custody jurisdiction. If a parent, sitting in a foreign country, has, or can obtain, a clear court order from that foreign country’s courts, in substantial conformity with the jurisdictional predicates of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), as enacted in each specific U.S. state, that parent

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112 Jose Junior, 2023 WL 4725909.
113 Id.
115 Id. at ¶ 134.
116 Id. at ¶ 159 ("any bar applies only to implementation"); ¶ 160 ("the High Court should be slow to stay an application prior to any determination").
may be able to quickly seek enforcement of that foreign court order in a U.S. state court.\textsuperscript{117} If the parent uses this remedy, the asylum applicant parent sitting in the United States has even fewer arguments available to them. There is an argument that, if the child-custody laws of the foreign country violate fundamental principles of human rights,\textsuperscript{118} the state court need not recognize the foreign country as equal to a sister state for purposes of recognizing its custody order, but that is a narrower argument than the Article 20 argument under the Hague Abduction Convention, focused solely on child-custody laws and proceedings.

E. \textit{Coordination Between Asylum and Hague Cases}

As mentioned above, the conflict between asylum laws and procedures and Hague Abduction Convention laws and procedures is complicated by various factors including the different standards of proof; the involvement in a Hague Abduction Convention case of a party (the petitioning parent) who is not a party to the asylum claim; the fact that evidence in the Hague Abduction Convention case is tested under cross-examination, which may not be the case in an asylum claim; and, the reality that the factual findings in the Hague Abduction Convention case with respect to the child’s potential exposure to grave risk will likely overlap substantially with the grounds for any grant of asylum.

The UK Supreme Court, in \textit{G v. G}, addressed some of these conflicts and proposed several “practical steps . . . aimed at enhancing decision making in both sets of proceedings.”\textsuperscript{119} The applicability of some of these proposals may not be workable in the United States under its current legal regime but are perhaps aspirational if the goals of both international laws are to work in tandem.

First, the UK Supreme Court suggested that in situations where an asylum claim is made in parallel to a Hague Abduction

\textsuperscript{117} Robert G. Spector, \textit{International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy than the Abduction Convention}, 49 FAM. L.Q. 385 (2015). The UCCJEA is enacted in each U.S. state except for Massachusetts, which has enacted the predecessor act, the Uniform Child-Custody Jurisdiction Act.

\textsuperscript{118} \textit{Unif. Child Custody Jurisdiction & Enforcement Act} § 105 (\textit{Unif. L. Comm’n} 1997).

\textsuperscript{119} \textit{G}, [2021] UKSC 9 at ¶ 165.
Convention case, the immigration authorities in charge of making asylum determinations should intervene in the Hague case.\textsuperscript{120} Second, the court overseeing the Hague case should have a “clear line of communication” with the immigration authorities and the child should be represented in the Hague case with access to the asylum documentation.\textsuperscript{121} Third, there should be a dedicated office within the immigration authorities that deals with the asylum cases that intersect with Hague cases.\textsuperscript{122} Fourth, and perhaps most importantly, the evidence from the Hague case should be made available to the immigration authorities.\textsuperscript{123} Pursuant to U.S. immigration law, asylum grants may be reversed if the basis for asylum is no longer applicable or warranted.\textsuperscript{124} Fifth, the court should consider whether to make available normally confidential asylum documentation in the Hague case.\textsuperscript{125} Sixth, there should be some consideration for expediting the asylum proceedings when they run parallel to Hague cases.\textsuperscript{126} Seventh, judges with family law experience should be assigned to asylum cases that run in parallel to Hague cases.\textsuperscript{127} Eighth, a single court should have oversight over both proceedings.\textsuperscript{128}

The proposals set forth by the UK Supreme Court, in \textit{G v. G}, seem almost impossible in the United States considering the procedures available and established in both asylum and Hague Abduction Convention cases. Asylum cases are not decided by the traditional U.S. federal judges that are often deciding a Hague Abduction Convention case. Federal judges that handle Hague Abduction Convention cases are also drawn from the normal pool of federal judges and do not necessarily have any experience in family law. Nor is the sharing of evidence between courts and

\textsuperscript{120} \textit{Id.} at ¶ 166.
\textsuperscript{121} \textit{Id.} at ¶ 167.
\textsuperscript{122} \textit{Id.} at ¶ 168.
\textsuperscript{123} \textit{Id.} at ¶ 169.
\textsuperscript{124} \textit{See} INA § 208(c)(2).
\textsuperscript{125} \textit{G [2021]} UKSC 9 at ¶ 170.
\textsuperscript{127} \textit{G [2021]} UKSC 9 at ¶ 175.
\textsuperscript{128} \textit{Id.} at ¶ 177.
administrative bodies something that would be likely without further legislation or administrative coordination between the judicial and executive branches of the U.S. government. The necessary coordination required to accomplish the suggestions made in *G v. G*, highlight both the tension between asylum and abduction issues and the difficulty in resolving this tension.

**IV. Conclusion**

With an increasing number of asylum seekers entering the United States there will undoubtedly be more child abduction cases involving asylum seekers. U.S. courts will have to determine whether to follow the preexisting jurisprudence or if a legal basis exists to create a new path forward honoring both U.S. commitments to protect asylees from a potentially harmful return and to protect children from the harmful effects of international child abduction.
Strategic Planning For International Divorces

by
Jeremy D. Morley*

I. Introduction

Lawyers representing clients with significant international connections who are contemplating a divorce may have a duty to provide strategic advice about the various potential divorce forums. They may even have a duty to advise clients about how to restructure their circumstances so as to facilitate alternative divorce jurisdictions. This article contends that such duties exist and that such advice is often necessary to protect the interests of international clients. Alternatively, lawyers with internationally-connected clients may be well advised to expressly disclaim their provision of such advice.

These opinions should be of concern to family lawyers who are admitted to practice only in their local jurisdictions and who do not have expertise, experience, or knowledge concerning the laws and practices of other countries. However, it may be unethical for a lawyer to provide information and advice about the laws and practices of other jurisdictions, except to the extent expressly authorized by the rules governing the practice of law in the relevant jurisdictions and by the rules of the attorney’s home jurisdiction.\(^1\) While the ethical issues may be tricky, the need for many international clients to obtain reliable, practical, and strategic advice about forum selection matters is clear.

Professional soccer teams usually win more games when they play at home than when they play away, even though the rules of the game are the same wherever the games are played.\(^2\) But in

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\(^1\) Rule 5.5 of the ABA Model Rules of Professional Conduct provides that, “(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”

the arena of international family law, the place of the divorce case matters far more than a mere change in the location of a sporting event. The rules and practices governing divorce, finances, and child custody vary dramatically from forum to forum, leading to outcomes that may vary dramatically, sometimes in life-changing ways. Yet lawyers often do not provide the advice about these issues that clients urgently require, and that many clients are entitled to expect, perhaps to the significant detriment of the clients’ best interests.

The starting point in planning for an international divorce may be when a lawyer is first informed of the client’s impending marriage. Lawyers representing international clients who plan to marry and who want the protection of a prenuptial agreement should always consider the international ramifications of any proposed agreement. Clients may also seek professional advice concerning premarital financial planning, which can be greatly complicated if the parties have substantial international connections.

The purpose of this article is to discuss the lawyer’s role in working appropriately with clients to plan strategically for a potential divorce that has significant international elements. In Part II, this article first discusses the premarital issues that family lawyers handling international clients may face. In Part III, it then focuses on the situations that arise after the marriage when an internationally-connected client seeks advice about a potential or actual separation or divorce.

II. Pre-Breakdown Planning

A. International Prenuptial Agreements

1. Overview

Clients will often ask for an “international prenuptial agreement.” Of course, there is no such thing. Prenuptial agreements are drafted under the laws of specific jurisdictions, and no lawyer can draft a prenuptial agreement that will be globally enforceable.

Not only do divorce requirements and procedures vary from country to country, but so do the substantive laws concerning the division of assets and spousal and child support. Moreover, the

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laws about prenuptial agreements and marriage contracts vary considerably around the world.\textsuperscript{4} Outside of the European Union, there is generally no international law that governs the application of local law to international personal relationships. Just as important, the attitudes of courts about such contracts diverge significantly from country to country.

Accordingly, lawyers must not assume that a “prenup” that is currently valid in the place of the marriage, or the place of current residency, will be equally valid in other places which might have divorce jurisdiction in the future. Indeed, they should assume and advise that there will most likely be significant differences.

While conventional domestic prenuptial agreements raise grave malpractice concerns for family lawyers, these concerns become a hazardous minefield when the issues are multi-jurisdictional. This is a very highly specialized area, with significant risk for family law practitioners who do not have the requisite experience. Counsel should be prepared to work with foreign counsel, to understand foreign law, to become familiar with different legal concepts that may apply to the client’s circumstances, and to work in an environment in which there are no clear-cut rules or procedures. Accordingly, the client should be advised that local counsel will need to be retained in the various foreign jurisdictions, and that it is local counsel’s advice upon which the client will ultimately be relying. This should be supported by an appropriate protective letter to the client and confirmatory notes to the attorney’s file.

2. \textit{One “Quarterback”}

It is strongly recommended that one lawyer should usually be in overall charge of the entire process, as the chief coordinator among the various lawyers in the different jurisdictions. This lawyer should manage the client’s retention of the lawyers in foreign jurisdictions to advise on their local laws and procedures, or should obtain clear authority from the client to engage those lawyers as well as sufficient funding to cover the anticipated legal charges to avoid potential responsibility for such legal fees.

3. **Potential Jurisdictions**

Prenuptial agreements for internationally-connected people must often be drafted with a view to their potential enforceability in an array of potential jurisdictions. These might include the states or countries of the current place of residence, domicile, or nationality of either spouse; or in which they marry; or in which they might reside together during their marriage; or in which they currently have or might in the future have significant assets; or in which either of them might reside after a separation.

Once potential jurisdictions are identified, the burden should be placed on the client, preferably in writing, to identify the jurisdictions that fall or are likely to fall within these categories. The client should then be asked to provide instructions to the principal lawyer who is retained to oversee the preparation of the agreement as to whether the lawyer should work with counsel in each such jurisdiction concerning such matters as the potential enforceability of the agreement and whether any modifications to the proposed agreement are recommended. However, a client cannot make these judgments without receiving at least some knowledgeable input from the principal attorney concerning the process of obtaining the advice that will be needed for the client to make informed decisions on these matters, unless the client clearly disclaims any concerns about enforceability in other jurisdictions or the lawyer expressly states that no advice concerning any other jurisdictions is being provided.

The risk letter to be delivered to and executed by the client should acknowledge the client’s well-informed decisions concerning these issues and should provide clear instructions as to which foreign jurisdictions should be reviewed. The risk letter should stress that the jurisdictions as to which the client or the primary lawyer will seek the advice of local lawyers are limited to those specific jurisdictions that the client has selected and to no others.

4. **Selection of the Governing Law**

A critical element of any international prenuptial agreement is the choice of the jurisdiction under whose law the agreement will be drafted. Obviously, lawyers should not be wedded to their own jurisdiction as the “home” of the agreement. It must also be recognized that silence concerning the choice of law might equate to the selection of the jurisdiction in which the agreement is drafted.
Deciding on the best choice of law provision requires adequate information and input about the applicable laws and practices of the various competing jurisdictions and about the potential effect of the foreign law in any of the potential jurisdictions. The decision should be made upon the advice of counsel with substantial experience in international family law matters, who has consulted or will consult with appropriate local counsel in other relevant jurisdictions. It is likewise important to be aware that choice of law clauses may or may not be valid in other jurisdictions.

A choice of law clause should usually be drafted broadly and provide for the application of both the substantive and the procedural laws of the foreign jurisdiction to be effective.

5. *Choice of Court Clause*

A “choice of court” clause, whereby the parties select their preferred forum for a future divorce case, can be extremely useful. It enables the parties to know in advance which court is supposed to handle their case, and it may strengthen their choice of law clause if the chosen court and the chosen law are the same.

However, there is no guarantee that courts in other countries will respect such a clause. Certainly, the parties cannot create jurisdiction by contract in a court whose rules do not confer jurisdiction in the particular case. If the jurisdiction requires a minimum period of residency for a divorce, or that the parties be nationals, domiciliaries, or habitual residents of the country, the choice of court clause may well fall flat. Moreover, matters relating to children may be subject to separate jurisdictional rules that cannot be amended by contract.

Nevertheless, it may prove most helpful if the prenuptial agreement requires the parties to commence their divorce case

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7 The Hague Convention on Choice of Court Agreements arts. 2(a), 2(b), June 30, 2005, 44 I.L.M. 1294, does not apply to family law matters including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships, as well as maintenance obligations.
in one of several potential forums in which jurisdiction is realistically likely to be accepted. Accordingly, a choice of court clause should often be included in prenuptial agreements for international people.

6. Other Recommendations

It is good practice to require the client to sign a thorough and carefully drafted risk disclosure letter that includes the special elements of risk that exist when foreign countries are or may be involved.

Clients should be informed that there are no guarantees concerning the enforceability of any prenuptial agreements, that such uncertainty is increased when foreign countries are involved, and that foreign jurisdictions vary substantially as to the extent to which they enforce prenuptial agreements.

Clients should also understand not only that a prenuptial agreement cannot control future decisions about child custody or child support, but that the future international relocation of children might create dramatically adverse consequences affecting all aspects of the current and future relationship between the spouses. An international move might significantly impact a parent’s ability to acquire sole or unequal custody of children pursuant to the laws and practices of another jurisdiction and might enable a parent to prevent further international visits or moves. The consequential power imbalance may then have dramatic financial consequences to the benefit of one parent and the detriment of the other.

Counsel should understand that the way the courts of a particular country apply their own laws or foreign laws may vary considerably. For example, when reviewing foreign law it is important to understand that the meaning of the terms the foreign local lawyers may use, such as “marital property,” “regime,” “domicile,” “needs” and “fairness,” can vary dramatically.

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8 For example, marital property in Sweden includes the spouses’ premarital assets, Swedish Marriage Code, ch. 7, § 1); in Thailand, the “Sin Somros” property that is divided equally upon a divorce does not include items necessary for the job or profession of one party, Thai Civil and Commercial Code, § 1471, while in Switzerland, marital property does not include the matrimonial home as to which there are special rules, Swiss Civil Code art. 201.

9 Thus, under the English common law a “domicile of origin” is automatically acquired upon a person’s birth in the location of birth, and it is
Similarly, counsel should be alert to the fact that there may be significant differences concerning the substantive laws that apply in other jurisdictions, including provisions that a prenuptial agreement or marriage contract cannot limit a spouse’s right to spousal maintenance.\(^\text{10}\)

Consideration should also be given as to differences in the various jurisdictions concerning such factors as the validity of the method of execution,\(^\text{11}\) the need for independent legal representation,\(^\text{12}\) any requirements concerning drafting procedures,\(^\text{13}\) any need for disclosure of assets, the applicability and meaning of overall considerations of fairness or unconscionability,\(^\text{14}\) and the potential applicability of conflict of laws issues.\(^\text{15}\)

Counsel should also ascertain whether either or both parties have any language barriers that need to be addressed in a way to ensure that they understand the process of signing the prenuptial agreement and its meaning. Counsel should also secure clarity on client confidentiality whenever a foreign lawyer is retained because the applicable rules vary considerably between different jurisdictions. Furthermore, counsel should ensure that clients understand that future relocations of either or both of the spouses might have

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\(^{10}\) See Delphine Eskenazi & Inès Amar, *The Impossible Existence of the Concept of Matrimonial Regime in Common Law Countries, or How to Fit a Square Peg into a Round Hole*, 52 (2) NYSBA Fam. L. Rev. 26 (Summer 2020).

\(^{11}\) For example, a prenuptial agreement entered into in Brazil must be made by “public deed” in accordance with Brazilian law. *Brazil Civil Code* art. 1.653.

\(^{12}\) Australian law requires that each party be independently represented. *Family Law Act* 1975 § 90G (Austl.).

\(^{13}\) In France, all matrimonial agreements must be drafted by deed before a French notaire. *Code Civil* art. 1394(1) (Fr.).

\(^{14}\) See Jeremy D. Morley, *International Prenuptial Agreements Are Necessary but Dangerous*, 46 (2) NYSBA Fam. L. Rev. 8 (Summer 2014).

\(^{15}\) See *In re Marriage of Proctor*, 125 P.3d 801 (Or. Ct. App. 2005), opinion adhered to as modified on reconsideration, 129 P.3d 186 (2006) (applying the chosen law only to the construction of the agreement, not to asset division matters, because of the limited language of the choice of law provision).
an enormously significant bearing on the potential divorce forum and on the future enforceability of the prenuptial agreement.\textsuperscript{16}

It is also essential to decide whether to have two or even more agreements that contain essentially the same terms as the primary agreement but are executed in accordance with the various local laws, or instead to insist that there should be one global prenuptial agreement to avoid unnecessary confusion. If more than one agreement is to be executed, it is essential to include terms that will determine the priority among the various agreements.

If there will be only one agreement, counsel should consider whether to insist on compliance with the procedural and substantive requirements of the “toughest” potential jurisdiction, or whether to comply with such rules as to all potential jurisdictions.

B. \textit{Premarital Financial Planning}

Family lawyers might also be asked to provide advice concerning other financial matters before marriage. One specific area of advice might concern trusts, such as asset protection trusts.\textsuperscript{17}

For internationally-connected clients, it might be advisable or necessary to consult with lawyers in other jurisdictions concerning the likelihood that assets that are placed in trust will be immune from being treated as assets that can or must be divided between the spouses upon a divorce. The treatment of such trusts varies considerably among foreign countries and is entirely uncertain in many other countries.\textsuperscript{18} These issues may well require thorough analysis as well as careful disclaimers.

C. \textit{International Postnuptial Agreements}

During the marriage it might be appropriate for a client to propose a postnuptial agreement to handle the possible consequences of a potential divorce. As is the case with purely domestic potential divorces, a postnuptial agreement for internationally-connected parties may well clarify the terms of a potential divorce.


and provide security and peace of mind to the parties. However, the viability of such agreements for international couples might require far more careful analysis than would be the case for purely local parties.

The primary issue will be whether postnuptial agreements are generally enforceable in each of the potential jurisdictions. For this, the same process should be undertaken as described above in respect of prenuptial agreements, while recognizing that courts in many jurisdictions do not enforce postnuptial agreements or hold them to a higher level of scrutiny.

There also needs to be a consideration of whether choice of law and choice of court clauses will likely be upheld, whether the material factors, especially jurisdictional, will alter significantly if one or both spouses relocate to another state or country.

III. Advice upon Actual or Anticipated Marital Breakdown

Once a client seeks advice concerning a possible or actual breakdown of a marriage that has international issues, there are many factors that may need to be considered.

A. Divorce Jurisdiction

The first issue will usually be to consider that of jurisdiction to handle the divorce and the financial and child-related consequences of the divorce. There are substantial variations in the rules of countries around the world concerning jurisdiction in these cases. Accordingly, in considering the availability of potential divorce jurisdictions, lawyers will need to be knowledgeable about such rules or to become knowledgeable about them. Lawyers should certainly not assume that the rules about jurisdiction that apply locally are those that apply overseas. It is far safer to start with the expectation that the rules will be different and that the practical effect of those rules will be even more different.

Family lawyers in the United States should understand that U.S. rules about divorce and child custody jurisdiction are particularly unusual. The rules fall into at least three fundamental and distinct jurisdictional groupings. There are different rules about jurisdiction for a bare divorce than there are for the financial consequences
of a divorce, and there are further and different rules for child custody jurisdiction.\textsuperscript{19} This results from the unique provisions of the U.S. Constitution and the uniform child custody laws that apply throughout the country but with individual variations between the states. In addition, the rules concerning divorce residency requirements vary significantly between the states, both statutorily and in their judicial interpretation. Consequently, issues concerning the jurisdiction of courts in the United States to handle family law matters are unusually complex and, in the author’s experience, both surprising and confusing to family lawyers in other countries.

In some countries, there are liberal rules about jurisdiction for divorce and child custody, which are moderated by providing judges with broad powers to stay or dismiss individual cases as necessary for convenience and fairness.

Thus, in Australia, the Family Law Act 1975 provides that proceedings for a divorce order, which include proceedings concerning the financial consequences of a divorce, may be instituted if, at the date on which the application for the order is filed, either party to the marriage (a) is an Australian citizen, or (b) is domiciled in Australia, or (c) is ordinarily resident in Australia and has been so resident for one year immediately preceding that date. The Act further provides that proceedings may be instituted in relation to a child if: (a) the child or a parent of the child or a party to the case is present in Australia or is an Australian citizen, or is ordinarily resident in Australia, or (b) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.\textsuperscript{20} However, an Australian court may decline jurisdiction if it considers itself a “clearly inappropriate forum” to resolve the dispute.\textsuperscript{21}

Courts in some other countries have substantially broader powers to dismiss matrimonial cases for reasons of convenience or fairness.\textsuperscript{22} In sharp contrast, in civil law countries there is generally


\textsuperscript{20} Family Law Act (1975) § 39(3) (Austl.).

\textsuperscript{21} Voth v. Manildra Flour Mills, (1990) 65 ALJR 83 (HC).

\textsuperscript{22} In England, the Domicile and Matrimonial Proceedings Act, 1973, sch. 1,§ 9, provides for a discretionary stay based on the balance of fairness and convenience if a matrimonial case is proceeding in another jurisdiction.
no such power and discretionary dismissal is generally unavailable. Accordingly, stays for reasons of fairness and convenience in divorce cases cannot be issued by courts in the European Union.\textsuperscript{23} In other countries such as Argentina, both divorce and child custody jurisdiction exist if the parties’ last conjugal residence was in that country, and child custody jurisdiction follows automatically and without a discretion to stay or dismiss.\textsuperscript{24}

Once the rules and practices concerning the availability to the parties of different potential jurisdictions are collected, an analysis should be made whether it would be appropriate and beneficial to discuss with the client whether the necessary connections to any specific jurisdictions could or should be enhanced or reduced to maximize or minimize the opportunity to have the divorce and related litigation be conducted in a favorable or unfavorable jurisdiction.

**B. Forum Selection or Forum Shopping**

Forum selection is an essential element of any international family lawyer’s work. The differences between alternative international forums can be momentous.

For example, in some jurisdictions, including England,\textsuperscript{25} Australia,\textsuperscript{26} and Connecticut,\textsuperscript{27} the courts have the power to consider and divide all of the parties’ assets, including their premarital assets, while in other jurisdictions, such as most U.S. states, premarital assets are separate property that usually cannot be equitably divided.\textsuperscript{28} And in other jurisdictions such as India, the divorce courts will generally make no division of any of the parties’ assets that are not in joint names.\textsuperscript{29}

\textsuperscript{24} Diego Horton, Perez Maraviglia & Horton Abogados, Family Law in Argentina: Overview (2023).
\textsuperscript{26} Family Law Act (1975) § 79 (Austl.).
\textsuperscript{29} Rajinder Goyal, Foreign Court Decree of Divorce, Its Competency & Validity in India with Analysis of Concept of Matrimonial Property, SSRN (Nov. 2, 2022), http://dx.doi.org/10.2139/ssrn.4266289.
Likewise, differences concerning spousal support vary dramatically between different jurisdictions. While English and California law provide for generous spousal support, the laws and practices of Texas provide for less generous support, the laws of Pakistan and of most other Islamic jurisdictions provide for very little, and the laws of Japan provide for no such support.

While courts in New York County will likely award shared and equal custody to the parents wherever possible, Japanese law currently provides that only one parent may have sole custody of a child, and in Kuwait (or most of the Middle-Eastern countries) legal guardianship automatically belongs to the father.

Unmarried partners in British Columbia, Canada, may be deemed to be in a “spousal relationship” that entitles them to be treated as spouses for the purpose of securing financial remedies upon the termination of the relationship as if they were actually married, whereas without a signed contract, such rights do not exist in New York.

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30 See Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 and its progeny.
33 Pakistan, GLOBAL REPOSITORY OF MUSLIM FAMILY LAWS, https://campaign-for-justice.musawah.org/repository/pakistan/ (last visited Nov. 22, 222).
35 This is based on the author’s experience in handling custody cases in New York City.
38 FAMILY LAW ACT § 3(1) (B.C.).
Marriage contracts are enforceable in Sweden, but prenuptial agreements are enforceable in Jamaica only if they are deemed to be fair, and prenuptial agreements are not enforceable in Ireland or India.

If forum selection is identified as “forum-shopping,” a court may consider it to be inappropriate. That may certainly be the case in international child custody matters. Indeed, the Hague Convention on the Civil Aspects of International Child Abduction (the “Convention”), and its implementing legislation are designed to “prevent an international version of forum-shopping.” Similarly, the Uniformed Services Former Spouse’s Protection Act was enacted “in response to concerns about ‘forum-shopping’ spouses who might seek to divide the pension in a state with more favorable laws, but with little contact with the pensioner.” It is also well established that the public policy of statutes requiring in-state residency for the initiation of divorce cases, is “to prevent forum shopping by divorce litigants.”

On the other hand, there is great merit to the opinion that,

Trying to stay in one court and out of another may appear manipulative, but it is nothing new. Lawyers should not be chastised and punished unless they bring frivolous claims, or the forum they choose plainly lacks jurisdiction over the case. Rather, they should be applauded for engaging in the appropriate and necessary practice of forum selection. Forum shopping is bad and evil only if we use the phrase to mean the bringing of frivolous claims in an improper forum.

A U.S. district court judge correctly insisted that, “[i]n reality, every litigant who files a lawsuit engages in forum shopping when

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41 FAMILY PROPERTY (RIGHTS OF SPOUSES) ACT § 10 (2003) (Jam.).
43 Krishna Aiyar v. Balamma, ILR (1911) 34 Mad 398, but see Amrita Ghosh & Pratyusha Kar, PRENUPTIAL AGREEMENTS IN INDIA: AN ANALYSIS OF LAW AND SOCIETY, 12 NuJS L. Rev. 2 (2019) indicating that the prohibition may be moderating.
44 Navani v. Shahani, 496 F.3d 1121, 1128–29 (10th Cir. 2007).
he chooses a place to file suit.” \(^{48}\) International family lawyers work to assist their clients in that process. Indeed, the Iowa Supreme Court held that even though the plaintiff had chosen to move to the state to benefit from its liberal divorce laws, it was perfectly appropriate to do so and it did not justify staying or dismissing the case. \(^{49}\)

Accordingly, international family lawyers should often be retained to engage in the process of international forum selection and should pursue the selection of the best available jurisdiction diligently and enthusiastically once they are expressly retained to work as part of a team that is hired for that purpose. On the other hand, they must recognize that if their work is likely to be viewed as forum-shopping, it might be inappropriate, unhelpful, or even counterproductive.

To provide advice as to international forum selection, a lawyer must take the same kind of protective steps that are discussed above concerning international prenuptial agreements. Full disclosure to the client of the limits of the lawyer’s knowledge and ethical capability is absolutely essential, and the selection of the specific potential jurisdictions to consider should be made with the express input and authorization of the client, and with the clear advice of local counsel in each such potential jurisdiction.

C. Relevant Issues for Each Potential Jurisdiction

Once the potential jurisdictions have been identified, the factors to be considered for each potential jurisdiction should include the following:

1. Divorce Grounds

Counsel will need to determine whether a divorce is available to the parties, analyzing what the client will need to prove to secure a divorce and what evidence the client must secure to do so. A divorce is not available in at least one jurisdiction (the Philippines) \(^{50}\)


\(^{49}\) In re Marriage of Kimura, 471 N.W.2d 869 (Iowa 1991).

and in many jurisdictions a period of separation must exist prior to a non-consensual divorce (e.g., China\textsuperscript{51} and Singapore\textsuperscript{52}) or even prior to a consensual divorce (e.g., Malta).\textsuperscript{53}

2. **Applicable Law**

Counsel will further need to determine the law that a foreign court will apply under its choice-of-law rules. This concept is unfamiliar to most U.S. divorce lawyers since courts in the United States generally apply the law of the forum to divorce issues.\textsuperscript{54} That does not hold true for foreign countries, especially civil law jurisdictions. For example, in Japan the Act on General Rules for Application of Laws provides that their divorce will be governed by the law of their shared nationality or their shared habitual residence or otherwise of the country that is most closely connected with them, except that Japanese law will apply if either spouse is Japanese.\textsuperscript{55}

3. **Assets to Be Divided**

The rules in each target jurisdiction regarding the property that is subject to being apportioned between the parties upon a divorce, or that can be considered in making an economic apportionment between the spouses, should then be evaluated.

In some countries, there are no provisions for any division of assets upon a divorce except for jointly-owned assets or assets that are the subject of binding interspousal contracts. Examples include the Sharia law countries such as Pakistan and Egypt, which require that assets payable pursuant to the spouses’ Islamic marriage contract should normally be delivered upon a divorce but provide for no division of any other assets of the parties regardless of the

\textsuperscript{51} Civil Code of China art. 1079.
\textsuperscript{52} Singapore Women’s Charter § 94(1).
\textsuperscript{54} Rhonda Wasserman, Family Law Disputes Between International Couples in U.S. Courts, 43(2) Fam. Advoc. 22 (2020).
\textsuperscript{55} Japan’s Act on General Rules for Application of Laws arts. 25, 27.
length of the marriage or the needs of the parties.₅⁶ Likewise, cases under the Hindu Marriage Act in India do not allow for any claim to divide assets that are not already in joint name.₅⁷

Another specific issue that may need to be analyzed concerns the treatment of premarital assets, since, unlike most U.S. states, some jurisdictions, including Australia, allow and even encourage the courts to divide even a party’s premarital assets.₅₈ Likewise, it may be critical to consider the treatment that is given to assets that a spouse has placed in trust, since jurisdictions vary considerably in their treatment of these assets, such that some jurisdictions will “pierce” the trust (e.g., in Hong Kong a discretionary trust will constitute a financial resource if, at the spousal settlor’s request, the trustee acting in good faith would likely advance the trust’s capital or income to that spouse,₅⁹ while the courts in other countries including South Africa₆₀ will not do so unless the trust was created or funded with fraudulent intent.₆₁

Other issues to be evaluated include the rules concerning inherited assets, since although many jurisdictions do not divide assets that a spouse has received as an inheritance, some countries do; and the rules concerning gifted assets, since many jurisdictions do not divide assets that a spouse has received as a gift, but some do. Other issues to be considered include the rules about matrimonial residence, because some but not all jurisdictions have specific rules that are designed to protect both parties’ rights to


₅₈ Australian Family Law Act § 79.


₆₂ For example, section 4 of the Ontario Family Law Act provides that assets inherited during a marriage are not “net family property” except to the extent used for the purchase of a matrimonial home. Ontario Family Law Act § 4.
the marital residence (e.g., Canada\textsuperscript{63} and Germany\textsuperscript{64}), while others do not (e.g., Japan); and the treatment of commingled assets, since some jurisdictions have special rules that separate non-divisible property may be converted to divisible marital property if it is commingled with marital property.

4. **Effect of a Prenuptial or Postnuptial Agreement**

If a prenuptial agreement is in force, or a postnuptial agreement is being contemplated or already exists, counsel should analyze whether such agreements are enforceable in each potential jurisdiction and if so whether there are any potential defenses to complete enforcement. Jurisdictions vary significantly as to the bases upon which such prenuptial agreements may be invalidated or restricted, the nature of the burden of proof concerning their validity, and other critical factors concerning their applicability. The existence of a prenuptial or a postnuptial agreement requires counsel to determine whether it is likely to be upheld in the target jurisdiction; whether any modification of its terms is likely or possible; and whether any exceptions to the extent of recognition will be imposed.\textsuperscript{65}

Particular consideration may also need to be given to unforeseen circumstances that occurred subsequent to the agreement, such as financial success or failure; the birth or death of children; unforeseen health issues; or family relocation.

5. **Asset Division Methodology**

Once the rules of each target jurisdiction concerning the assets that are likely to be divided upon a divorce have been identified, counsel will then generally need to analyze the ways in which the courts or other agencies in each such country determine the division. The relevant issues will include the division formula or the factors that a court will consider in determining the division of the assets. This includes a review of the impact, if any, of the conduct or fault of the parties, since some jurisdictions take only economic

\textsuperscript{63} Id.

\textsuperscript{64} German Civil Code arts. 1568a, 1568b.

fault into consideration, others consider fault only in extreme circumstances, while others evaluate conduct under religious law or customs and the conclusions have a substantial impact on the financial outcome. Further issues include the methods that the courts in each of the target jurisdictions apply to value assets such as interests in business or real estate, the date as of which assets are valued, and the tax impact of any division.

6. Interim Remedies

The ability to obtain orders that prevent the interim disposition of assets while divorce proceedings are pending varies substantially from country to country. Moreover, many jurisdictions impose automatic stays on the disposition of assets as soon as divorce cases are filed. The rules and practices of different courts on such issues may have a highly material impact on the ultimate result.

There may well be a need for additional interim orders, such as to prevent the removal of children, or to secure (or resist) applications for interim support orders and these issues must often be further analyzed and compared.

7. Discovery Rules and Practices

The differences between the discovery rules and procedures in the various potential jurisdictions might be of great consequence. American lawyers are accustomed to liberal rules of discovery, which are often extremely effective whenever an adverse party is not forthcoming in providing financial information, but the United States is to some extent an outlier in this regard. There are vast differences between the disclosure requirements in divorce cases in different countries. Such differences may well lead to a significant difference in the outcome of cases even in situations in which the

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66 For example, in Austria a divorce may be based on the fault of one party, in which case that party must pay maintenance to the other spouse if certain conditions are established. Alfred Kriegler, Family Law in Austria: Overview, https://uk.practicallaw.thomsonreuters.com/7-568-0448?transitionType=Default-&contextData=(sc.Default)&firstPage=true (last visited Nov. 19, 2023). In Hong Kong, the Court of Appeal upheld the refusal of the trial court to recognize a judgment obtained by the husband in the Shenzhen Intermediate People’s Court in China because of the conduct of the husband in secreting vast assets and not disclosing them to the court in China. ML v. YJ, [2009] HKCA 230.
applicable substantive provisions concerning the division of assets and the determination of support are similar.

While American jurisdictions such as California, and countries such as England, Canada, Australia, Singapore, and Hong Kong are at one extreme in requiring complete financial disclosure, in civil law jurisdictions the typical practice is for the parties to be required to present their own evidence to the court but there are generally no procedures for a party to engage in self-directed discovery. For example, no discovery is provided for in Japan. In Germany divorced spouses are required to provide information to each other as to their income and assets, and the Code contains mechanisms to compel the delivery of such declarations, but there is little that a party can do in advance of trial to probe such declarations or to search for suspected assets. In Austria, neither the General Austrian Civil Code nor the Austrian Marriage Act contain any explicit provisions obliging the spouses to provide each other or the competent authority with information on their income and assets.

In China, effective on January 1, 2023, the Hengyang County People’s Court issued specific rules ordering divorcing spouses to truthfully declare their marital assets. Courts in other provincial governments have since followed suit. How effective these requirements will be remains to be seen.

Accordingly, in any consideration of appropriate jurisdictions, international family law counsel must carefully evaluate the discovery rules in each potential jurisdiction and should especially consider the ways in which the statutory rules are actually applied.

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68 Stephan N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DePaul L. Rev. 299 (2002).
69 Id.
70 German Civil Code § 1580.
8. **Spousal Support**

There are extreme variations between countries as to the availability of post-divorce spousal support. For example, none is available in Japan, although a (usually modest) lump-sum might be payable,\(^{73}\) and none is available in France, although a “compensatory allowance” may be ordered.\(^{74}\) There are also substantial differences as to the amount of spousal support and the duration of spousal support. For example, only three months of support is available in Sharia law countries, whereas in Ireland spousal support is payable until death or remarriage.\(^{75}\) Other issues that might need to be considered include the criteria for the award and calculation of support, the extent to which discovery of income and assets is available, whether the courts will impute income if a party asserts an inability to work, the effect of health issues, the consideration to be given to child support, and the tax consequences of spousal support payments.

9. **Child Support Issues**

Similarly, there are extreme variations between countries as to the availability of child support, the determination of the amount of basic support, the obligation to cover specific expenses such as educational costs, healthcare expenses, and discretionary items such as summer camps, and the length of time during which payments must be made. In many countries, spousal maintenance is limited to a transitional period that is designed to assist a spouse in adjusting to new circumstances. In Finland, although spousal maintenance is provided for by the Marriage Act, in practice, it is rarely awarded. In Denmark, spousal maintenance is generally awarded, if at all, for only a year or two. One recent analysis shows that there is a large discrepancy between the average annual amounts received by lone mothers within the European Union, ranging from only €4,710 in Austria to just €512 in Hungary.\(^{76}\)

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\(^{74}\) *French Civil Code* arts. 270 – 281.

\(^{75}\) *Ireland’s Family Law (Divorce) Act 1996* § 13.

10. Child Custody Issues

Forum selection concerning child custody matters is often critical because jurisdictions around the world vary enormously in their treatment of children upon a divorce and concerning the rights of parents regarding their children. Issues about children are often the most important matters as to which effective, knowledgeable, and experienced international legal advice is most critically required. Such disputes frequently overshadow disputes about financial matters in the eyes of clients. In other cases, and most unfortunately, disputes about children may be used tactically as leverage in disputes that are really about money. In any event, the financial consequences of a divorce are typically intertwined with child custody issues.

Child-related disputes for international people frequently revolve around the issue of deciding the country in which the children will reside, and whether the children will visit the country in which the non-residential parent will reside. The rules and practices on relocation and international visitation vary dramatically from country to country. And since international child abduction is rampant, lawyers may need to provide effective and knowledgeable advice concerning the prevention of international child abduction or even whether removing a child overseas to escape domestic violence would be legal and advisable. International family lawyers must advise about measures to prevent – or permit – the removal of children overseas.

The primary method of forum selection concerning children is that of physically moving the child to another country or to prevent such a move. These matters often require immediate and knowledgeable action if a move overseas is imminent.

Unlike most other countries, the United States has no exit controls. A parent or even a third party may take a child


78 Any such discussions should be handled with exceptional care. Consider the consequences, for example, of being informed by a client that he or she intends to abduct a child and the duty of lawyer who determines that that would constitute the crime of international parental kidnapping under 18 U.S.C. § 1204.

overseas without oversight by governmental agencies. As long as
the person has the requisite passports, either legal or otherwise,
to satisfy an airline agent that they may enter the destination
country, they will be allowed to board a plane for a ticketed
departure. However, there are steps that can and should be
taken, often on an emergency basis, to prevent an abduction.
Any lawyer who is informed of a threat to abduct children by the
other parent has a duty to recommend immediate and effective
action to prevent such an abduction and then to take such action
if retained to do so.

If a child is removed or retained away from the country of
the child’s habitual residence without the consent of a person with
a right of custody over the child under the laws of the habitual
residence, it is normally deemed to be international child abduc-
tion within the meaning of the Hague Convention. The effects of
such an action will depend on whether the two countries are treaty
partners under the Convention, whether any of the treaty excep-
tions to the requirement of expeditious return can be established,
whether the country to which the child is taken complies with the
Convention, whether a custody case can be effectively brought in
that country, whether the criminal laws in the habitual residence
will have a helpful or unhelpful impact in seeking the return of the
abducted child, and a host of other factors.

It may be the duty of a lawyer to advise a client about the
potential consequences of the other parent’s intended or potential
removal of a child for the purpose of visiting a foreign country. It
would surely be negligent for a lawyer in such a circumstance to
tell a client that a visit to Peru would be safe because it is a treaty
partner with the United States under the Hague Convention with-
out warning the client that the U.S. State Department has reported

80 See, e.g., Katherine Jenkins, Note, The Hague Convention on International
Parental Kidnapping: Still the Best Hope for Children?, 6 Cardozo Int’l & Comp.

81 See Jeremy D. Morley, The Hague Abduction Convention, Practical
2021); Jeremy D. Morley, International Family Law Practice, ch. 9, 10 (Thomson
Reuters, 2020 ed.); Jeremy D. Morley International Child Abduction and Non-
Hague Convention Countries, in Research Handbook on International Child
to Congress that Peru is noncompliant with the Convention.\textsuperscript{82} Likewise, it would be inappropriate for a lawyer to tell a client that his child’s visit to India with the other parent should be safe because he has a strong custody order issued by a U.S. court when the likelihood that the Indian courts will effectively secure the child’s return is minimal.\textsuperscript{83}

If the international relocation of a child is consensual, but a marital breakdown then ensues, the impact of the move on both custody issues and financial issues can be momentous. The same applies if the relocation occurs after a breakdown of the marriage if the relocation is court-authorized, or even if the relocation is an abduction but there are no significant adverse consequences in the destination country.

If the children relocate overseas with one parent, will the other parent have effective and reasonable rights to see the children in both the new country and in the place where the children are currently located? This will depend on considering whether a parent moving overseas with a child can be relied on to facilitate the left-behind parent’s rights and also on whether the legal system in the new country can be counted on to enforce those rights effectively and expeditiously. In some cases, it may be appropriate and necessary to insist on placing certain conditions on a proposed relocation, such as requiring that a mirror order be issued by a court in the new country that contains all of the terms and conditions of the custody order issued in the place of the children’s current residence or that the initial custody order be homologous in the new country.

To take some extreme examples of such consequences, a citizen of China who moves with a child and foreign spouse to live in China will then likely have sole virtual control of the child, may even be able to compel the other parent to leave China, and may choose to condition the other parent’s access to the child on


a resolution of financial claims. In the reverse situation, if such a family lives in China and then moves to the United States, the Chinese parent will be unable to exercise unilateral control over their child to the exclusion of the other parent and will normally be unable to return to China with the child over the objection of the other parent.

The optimal time for each parent to obtain the most useful and critical advice concerning the potential consequences of any such moves is well in advance of any breakdown of the marriage. The relevant issues concerning the child custody laws of any foreign jurisdiction primarily address the rules and practices concerning the allocation of rights of care, control, and decision-making about children.

Substantial attention needs to be given to understanding the meaning behind the diverse labels that are used in various jurisdictions to allocate such responsibilities. Even within English-speaking countries, the terminology varies substantially. In Scotland, the applicable terms include “parental responsibilities” and “parental rights”; in Australia the primary term is “parental responsibility”; in New Zealand, the terms include “guardian” and “parenting.”

The relevant custody and access issues in the different potential jurisdictions as to which clients need competent and comparative advice include, for example, whether a foreign custody order will be recognized and enforced in the foreign country; whether and under what circumstances the courts in the foreign country will have the right to modify the orders of the courts in the child’s prior residency; whether the courts in the foreign country will apply their domestic laws or the laws of the parents’ shared

86 Children (Scotland) Act 1995 §§ 1, 2.
87 Family Law Act § 61B.
88 Care of Children Act 2004 §§ 15, 48.
89 Courts in Brazil might issue orders that purport to recognize foreign custody orders, but they are always modifiable. Jeremy D. Morley, Child Relocation to Brazil, Mirror Orders and Homologized Orders, https://
nationality (or of any other jurisdiction) to future child custody decisions; \(^90\) whether their domestic child custody laws are based on gender factors, nationality factors, religious factors, age factors or other factors; whether preferential rights of custody are commonly accorded; whether child custody orders are enforceable and under what circumstances; \(^91\) and how the rules that govern determinations in the foreign court are actually applied.

11. Other Procedural Issues

There are always substantial differences between the procedural rules and practices of courts in different jurisdictions. These differences might cause significant differences in the outcomes of potential matrimonial proceedings, and may well need to be taken into account when determining the best jurisdiction for a client.

An obvious example is that there can be substantial differences in the time that it will take for a divorce case to be commenced and concluded. This might inure to the benefit or to the detriment of a particular client, depending on the circumstances of the case. Merely by way of example, matrimonial cases proceed expeditiously in Kazakhstan, Sweden, and Singapore, and very slowly in India, Guatemala and Serbia. \(^92\)

Likewise, some countries limit the availability of multiple appeals or other post-trial proceedings, while other countries have systems that encourage the filing of numerous post-trial proceedings, such as Mexico’s *amparo* system. \(^93\)

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Other procedural factors to consider include whether differences in the rules of evidence might impact the outcome of the case, whether subpoenas will likely be needed and are available, what sanctions are imposed and what inferences are drawn as a result of nondisclosure or false disclosure, whether testimony will be required to be in person or can be provided by video or telephone, and whether court orders are enforceable.

12. **Philosophy and Integrity of the Courts**

In many jurisdictions, the courts have wide discretion in determining the issues that must be decided in a contested matrimonial case. Often the character, biases, and outlook of the decision-makers are far more important than the actual legal rules. Such factors are generally most apparent in determinations as to child custody, and most noticeable in countries that apply religious principles, such as Sharia law in Muslim countries\(^\text{94}\) and Jewish (and Sharia) law in Israel,\(^\text{95}\) but they also have application to matters concerning the division of assets and post-financial divorce support.

In addition, the independence of the judiciary and its susceptibility to bias and corruption often need to be frankly considered. In many cases, a client will claim that the other party has special influence in specific countries, and these issues will then need to be considered.

13. **Attorneys’ Fees**

In many cases the preferred outcome may depend on the ability of a party to pay the legal fees that will be incurred and on the right to seek attorneys’ fees from the other spouse. Thus, counsel should consider such factors as the anticipated legal fees in each target jurisdiction, the availability of legal aid, the ability to collect legal fees from the other spouse and the obligation of one side to

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pay such fees to the other party, and the other expenses that will likely be incurred, whether for experts, travel, or otherwise.

IV. Conclusion

Strategic planning for an international divorce is often necessary and even essential. It is a process that clients are entitled to expect from lawyers who agree to be retained for such work. It often raises a host of difficult ethical, procedural, and substantive challenges for counsel. While it may be complex, tricky, and difficult, it is typically both intriguing and challenging. The work must be handled effectively and responsibly by lawyers who are competent to handle it, often as part of an experienced international team. Planning for an international divorce generally requires knowledgeable, adequate, effective, and complete disclosure to the client of the limitations of counsel’s role in the process and of the various caveats that are discussed in this article.

When done well, such strategic planning will serve a client’s interests appropriately and effectively. When it is not done well, it might even damage the client, violate ethical rules concerning the practice of law, and violate a duty of care that a client is entitled to expect.
International Child Custody Disputes Between India and the United States: No Hague, So Vague!

by
Stutee Nag*

I. Introduction:

“The business of the law is to make sense of the confusion of what we call human life - to reduce it to order but at the same time to give it possibility, scope, even dignity.”

Archibald MacLeish

If international parental child abduction is any parent’s worst nightmare, then having it happen to (or from) a non-Hague country may be a close second.

Child custody laws differ significantly between India and the United States of America. However, child custody disputes between the two countries are increasingly common due to the large Indian population in the United States. What does not help are the divergent views of the two countries concerning the Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention” or the “Convention”). While the United States is highly committed to meeting its treaty obligations under the Convention, India has refused to sign it. Similarly, while International Parental Kidnapping is a federal offense in the United States, Indian courts generally presume the custody of a child with a parent (usually the mother) as lawful unless there are extreme circumstances.

This article compares the applicable laws and standards in international child custody disputes in both countries, specifically

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focusing on Indian child custody law. It centers on the typical issues that arise when one parent (the “taking parent”) removes the child from the United States to India (or vice versa) without the consent of the other parent (the “left-behind parent”). Part I gives a broad overview of the article. Part II provides the statistical facts concerning the presence of a large Indian population in the United States. Part III discusses international parental child removal from the United States to India and vice versa. Part III.A. in particular discusses the cases of child removal from the United States to India. It differentiates the writ (habeas corpus) jurisdiction of an Indian court from the temporary emergency jurisdiction of a U.S. court. This Part further discusses the applicable standard for a writ of habeas corpus and the various governing factors for such a writ, in particular, the existence (and the weight) of a foreign custody order. It then lists the potential challenges for a left-behind parent in the United States.

Part III.B. sheds light on the issues that may emerge for a left-behind parent in the relatively limited (yet growing) number of cases where the child is removed from India to the United States. It discusses the need of the left-behind parent to secure a custody order from the appropriate Indian court. Part III.B. then discusses the provisions related to the enforcement of a foreign custody order in the United States. This Part further addresses the various potential issues with securing a temporary emergency custody order in the United States. Eventually, Part III.B. concludes with a discussion of the various challenges faced by a left-behind parent in India.

Part IV provides a brief overview of the Hague Convention, addresses the reasons for Indian's refusal to sign the Convention, and then discusses the efforts of the U.S. government to encourage India to sign the Convention. Part V enumerates and discusses various reasons why India must sign the Hague Convention. Part VI concludes with a suggestion that India must sign the Convention to address the rampant confusion regarding international child custody disputes involving India.

II. Indian Diaspora in the United States

India is not only the most populous country in the world but, with nearly 18 million Indians living abroad, it also has the largest
emigrant population of all the countries. Of these 18 million Indian immigrants, roughly 2.7 million live in the United States and represent the second-largest U.S. immigrant group. The overall Indian diaspora in the United States consists of a staggering number of 4.9 million U.S. residents who were either born in India or have an Indian ancestry or origin.

In Fiscal Year (FY) 2022, 967,500 new citizens were naturalized in the United States, with 65,800 being Indians, the second largest group. Also, in FY 2022, 72.6% of H-1B visa beneficiaries for high-skilled workers in the United States were Indian citizens. In the 2021/22 academic year, India sent 199,182 students to study in the United States, making it the second top-sending country to the United States. Many Indians come to the United States either through family sponsorship by a U.S. citizen or as dependents of someone holding the primary U.S. visa (as an employee or a student). Another lesser-known fact is that every year thousands of undocumented Indian nationals are increasingly arriving at the U.S. borders, mainly through Mexico. According to Customs and Border Patrol data, more than 16,290 Indian citizens were detained by the U.S. authorities at the Mexican border in 2022.

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4. Id.
As increasing numbers of Indian citizens arrive and settle in the United States as students, employees, dependents, sponsored by their families, and even through unauthorized means, the number of international marriages involving Indians in the country is also increasing. Unfortunately, this rise in international marriages has also led to a surge in divorce cases and child custody disputes between India and the United States.

While there is a significant presence of Indian citizens in the United States, there appears to be much confusion regarding child custody cases involving the two countries. This is primarily due to the differences in their respective laws and public policies.

III. International Child Custody Disputes Between India and the United States

A. Child Removal from the United States to India

1. Overview of the general process to secure the child’s return to the United States

India has not signed the Hague Convention. Therefore, if a parent takes his child from the United States to India without the consent of the other parent, then the left-behind parent does not have the option to initiate a Hague case against the taking parent to secure the child’s timely return.

As far as matters concerning a child’s welfare are concerned, the Indian courts’ position is that such matters can be heard under the parens patriae jurisdiction of the court. The writ jurisdiction of an Indian court in a custody case comes under the scope of its parens patriae jurisdiction.

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9 The Indian National Commission for Women, while establishing a Non-Resident Indian (NRI) department to deal with matrimonial disputes concerning NRI women, noted that, “It is . . . hardly surprising that there is growing evidence today that even as the number of NRI marriages is escalating by thousands every year, with the increasing Indian Diaspora, the number of matrimonial and related disputes in the NRI marriages have also risen proportionately, infact at most places much more than proportionately.” NATIONAL COMMISSION FOR WOMEN, Introduction to NRI Cell of Commission, http://ncw.nic.in/ncw-cells/nri-cell/introduction#:--text=It%20is%20therefore%20hardly%20surprising,at%20most%20places%20much%20more (last visited Dec. 1, 2023).
2. **Writ of habeas corpus**

Thus, generally, when a child is wrongfully removed from the United States to India, the most sought-after option for the left-behind parent is to initiate a writ of habeas corpus with the appropriate Indian court and request the child be returned.

The Indian Constitution confers writ jurisdiction only on the superior courts of India, i.e., the Indian Supreme Court\footnote{\textit{India Const.} art. 32} and the High Courts.\footnote{\textit{Id.} art. 226.} In general practice, such a writ is usually initiated before the relevant Indian High Court under whose jurisdiction the child is physically present. The writ court’s jurisdiction to make orders regarding custody arises as soon as the child is within its territorial jurisdiction.\footnote{Majoo v. Majoo, (2011) 6 SCC 479, at 15 (India), \url{http://indiankanoon.org/doc/637664/}.}

Indian courts use their writ jurisdiction sparingly, especially in child custody cases. The Supreme Court of India has held in \textit{Gaud v. Tewari}, that habeas corpus is a prerogative writ, which is an extraordinary remedy, and the writ is issued where an ordinary remedy provided by the law is either unavailable or ineffective and where it is proved that the detention of a minor child by a parent was illegal and without any authority of law.\footnote{Gaud v. Tewari, (2019) 7 SCC 42, at 7 (India), \url{http://indiankanoon.org/doc/184268381/}.} However, it must be noted that the custody of a child with either of his parents (especially the mother) is generally presumed lawful by the Indian courts.\footnote{Raghavan v. State (NCT of Delhi), (2017) 8 SCC 454, at 14 ¶ 30 (India), \url{http://indiankanoon.org/doc/53310178/}.}

3. **Writ of habeas corpus v. temporary emergency jurisdiction**

In an inter-country custody dispute between India and the United States, it is possible for the attorneys to inadvertently compare the Indian concept of writ of habeas corpus to the American concept of temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (the “UCCJEA”)\footnote{\textit{Unif. Child Custody Jurisdiction & Enforcement Act}, 9 U.L.A. 657 (Unif. L. Comm’n 1999) [hereinafter UCCJEA]. In the United States, the UCCJEA is the exclusive method for determining the proper state for} due to their superficial similarity.
Under the New York version of the UCCJEA, a New York court has temporary emergency jurisdiction concerning a child if the child has been abandoned or if it is necessary to protect the child in an emergency due to abuse or a threat of abuse against the child, her parent, or her sibling. The UCCJEA specifically limits the scope of emergency jurisdiction by excluding neglect cases. These requirements differ from the maintainability of a writ petition, as discussed above in Gaud, which does not set forth the specific requirements for abandonment or abuse. Thus, the Indian court’s ambit of writ jurisdiction is comparatively broad.

However, the child’s physical presence in the court’s territorial jurisdiction is required both in India and the United States. Moreover, the Indian courts have often held that they should invoke their writ jurisdiction sparingly. Similarly, in the United States, the standard for securing an emergency custody order from a U.S. court is difficult. The official comments to UCCJEA state that, temporary emergency jurisdiction is “an extraordinary jurisdiction reserved for extraordinary circumstances.” Accordingly, in keeping with the official comments, a New Hampshire court, while refusing to exercise its temporary emergency jurisdiction, held that “the exercise of temporary emergency jurisdiction is intended to be narrowly circumscribed.”

One of the significant differences, however, between the two is that if the U.S. court does exercise its temporary emergency jurisdiction, it will lose such jurisdiction as soon as the court in India issues a custody order. In contrast, if an Indian court decides to entertain a writ of habeas corpus, even if the concerned U.S. court has issued a custody order, the Indian court still has the liberty to undertake a summary or an elaborate inquiry. In a summary inquiry, the court may order the child to be returned jurisdictional purposes in child-custody proceedings that involve other jurisdictions. Forty-nine U.S. states have adopted the UCCJEA (with minor variations), except for the State of Massachusetts, which has similar laws in place.

16 N.Y. Dom. Rel. Law § 76–c (1).
18 UCCJEA, supra note 15, § 204, cmt., 9(IA) U.L.A. at 676.
19 In the Matter of Yaman & Yaman, 105 A.3d 600, 614 (N.H. 2014).
20 N.Y. Dom. Rel. Law § 76–c (2).
21 Raghavan, 8 SCC 454, at 12.
to the United States. The Indian court’s jurisdiction will end when the child leaves its territorial jurisdiction. But if, according to the Indian court, the facts and circumstances of the case warrant an elaborate inquiry into the question of the welfare and best interest of the child, the court may direct the parties to appear before the appropriate Indian forum to settle such dispute. Thus, unlike the temporary emergency jurisdiction, the Indian High Court will generally still retain appellate jurisdiction over the matter.

Another stark contrast between the two systems is that once a U.S. court exercises emergency jurisdiction, under the provisions of the UCCJEA, it becomes mandatory for the U.S. court to then judicially communicate with the Indian court if the Indian court is hearing an existing custody case regarding the child that has been removed to the United States. However, there is no such mandate for the Indian court if it exercises its writ jurisdiction over a child who has been removed from the United States to India.

4. **Governing standard in the writ petition**

Whether it is a case of a summary inquiry (by the Writ Court) or an elaborate inquiry (by the Indian Guardians court), the paramount consideration is the best interests and welfare of the child. The Indian Supreme Court has held in this regard that it is a well-settled principle of law that the courts, while exercising parens patriae jurisdiction, would be guided by the sole and paramount consideration of what would best serve the interest and welfare of the child to which all other considerations must yield. Indian statutory law defines “best interest of the child” as “the basis for any decision taken regarding the child, to ensure fulfillment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development.”

In international child custody disputes, determining the child’s best interest can be complex and influenced by numerous factors. In this regard, the Indian Supreme Court has held:

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22 N.Y. DOM. REL. LAW § 76–c (4).
24 Raghavan, 8 SCC 454, at 12.
The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent’s can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.27

While there is no exhaustive statutory list of factors for courts to consider, they can be inferred from past legal cases. When taken together, these factors can significantly impact the court’s decision and may sway in favor of one parent over the other. However, no single factor can determine the case’s outcome; each is unique and fact-specific. Therefore, the final decision can go either way.

5. Potentially applicable factors in a writ petition in India

Prompt action by the left-behind parent

A heavy-weighing factor is how “promptly and quickly” the left-behind parent acts once the child is removed to India.28 However, in a landmark case, where the child stayed in India for two years before the mother was effectively served with the notice of the writ petition against her because she was moving frequently (while enrolling the child in different schools) to avoid being served, the court considered such period insufficient for the child to have developed roots in the country and ordered the child to be returned.29 It is worth noting that while it may have taken time for the father to serve the mother, he had initiated the habeas corpus petition “promptly and without any delay.”30 The two-year delay was from filing the petition to the mother being served.

Length of the child’s stay in India

A second consideration is the length of the child’s stay in India and the extent to which the child has become settled in India. The Indian Supreme Court refused to order the return of a six-year-old child from

29 Chandran, 1 SCC 174, at 16, ¶ 22.
30 Id.
India to the United Kingdom because she had spent equal intervals of time in India and the United Kingdom, lived with extended family and maternal grandparents in India, and attended school in India for more than one year. Under very similar circumstances, the Indian court yet again did not order the return of a child who was 2½ years old at the time of removal to India, then stayed in India continuously until the age of 5, attended a reputed school in New Delhi, lived with his father and paternal grandparents, and was generally well-settled in India. The court, in this case, noted:

[U]nless, the continuance of the child in the country to which it has been removed is unquestionably harmful; when judged on the touchstone of overall perspectives, perceptions, and practicabilities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its well-being.

Existence of a foreign custody order

A question may arise in a situation in which the left-behind parent has secured a foreign custody order. The Indian courts’ position concerning a foreign custody order is quite clear. The fact that the left-behind parent has secured a foreign custody order in his favor, by itself, is not dispositive of anything, “merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se.” In fact, the Indian Supreme Court has directed the lower courts not to fixate on the fact that there is a foreign court order requiring the child to be returned but to order such a return only if it is in keeping with the governing principle of the best interests and welfare of the child. Thus, even when the left-behind father had a favorable foreign court order concerning the return of his two children, the Indian court, while considering it as one of the factors, still declined to order the children to be returned as opposed to the loving and caring environment that the children were accustomed to with their mother. In this case, the

31 Raghavan, 8 SCC 454, at 2.
33 Id. at 22, ¶ 35.
34 Raghavan, 8 SCC 454, at 15, ¶ 31.
35 Id. at 18, ¶ 32.
left-behind father had excessive alcohol addiction issues and lived alone with his mother, who was eighty years old.\footnote{Id.}

**Participation of both the parents in the foreign custody proceedings**

If there is a foreign court proceeding, however, where both parents fully participated, this may alter the outcome. In one such case where the mother participated and obtained a series of consent orders concerning the child’s custody/parenting rights, maintenance, etc., from the competent courts in the United States before she removed the child to India, the Indian Supreme Court held that an elaborate custodial determination was not required in this case and that the child must be ordered to return to the United States for an appropriate custody determination.\footnote{Chandran, 1 SCC 174, at 15, ¶ 21.}

**Initiation of the foreign custody proceedings by the taking parent**

A related issue is whether the taking parent initiated the foreign custody proceeding. In the *Chandran* case it was the mother, who was also the taking parent, who had initiated the custody proceedings before the Supreme Court of New York and had then removed the child to India when the proceedings were well underway in the state of New York. Similarly, in *Sahu v. State of Rajasthan*, where the mother herself approached the jurisdictional court in the United States, entered into an agreement based on which a consent order was issued, and then violated that order and came back to India with the child, it was a factor which the Indian court held against her.\footnote{Sahu v. State of Rajasthan, AIR 2020 (SC) 577, at 10, ¶ 31 (India), http://indiankanoon.org/doc/144083733/.
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In *Sakhamuri v. Kodali*, where the mother initiated custody proceedings in the United States, then brought the children to India in contravention of the U.S. custody order, and then commenced custody proceedings in India while claiming in the U.S. court that she was in India only for a limited period, the Indian court held it as one of the main factors in deciding against her.\footnote{Sakhamuri, 7 SCC 311, at 20, ¶ 48.} Where the left-behind parent first consented to the removal of the child by the taking parent to India from the
United States and then subsequently secured a favorable custody order from the court in the United States, for the return of the child, the Indian court did not attach any significant weight to such an order in determining whether to command the return of the child.\(^{41}\) It is also a settled position in Indian law that the principle of comity of courts, the first strike principle,\(^ {42}\) and the concept of “intimate contact”\(^ {43}\) must yield to the established doctrine of the welfare of a child.\(^ {44}\)

*Initiation of regular custody proceedings in India by the taking parent*

One factor that courts may find influential is whether the taking parent initiated a regular custody case in India after having removed the child to India. In a very recent case, an Indian High Court dismissed a writ petition of a left-behind father because after removing the child from the United States to India, the mother had initiated a divorce proceeding in India and asked for an interim custody order from the Indian court, less than three months before the father started a writ of habeas corpus in India.\(^ {45}\) Interestingly, in this case, before removing the child, it was the mother who had initiated custody proceedings in the State of New York.\(^ {46}\) After she unilaterally removed the child without the father’s consent and in plain defiance of the New York court’s jurisdiction, the New York court granted full custody to the father, and this fact was brought to the notice of the Indian court.\(^ {47}\) Even so, the Indian High Court did not allow the father’s writ petition for the child’s

\(^{41}\) *Majoo*, 6 SCC 479, at 15.

\(^{42}\) “That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic).” *Surya Vadanan v. State of Tamil Nadu*, (2015) 5 SCC 450, at 13, ¶ 56, (India), http://indiankanoon.org/doc/85436368/.

\(^{43}\) The concept of intimate contact provides that a “foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court.” *Vadanan*, (2015) 5 SCC 450, at 12, ¶ 53.

\(^{44}\) *Raghavan*, 8 SCC 454, at 22, ¶ 40; *Vadanan*, (2015) 5 SCC 450, at 9, ¶ 36.


\(^{46}\) Id. at 2.

\(^{47}\) Id. at 3.
return and directed him to approach the Indian family court where the divorce proceedings were pending.

_Taking parent “stealthily” securing the child’s presence in India_

Here, the mother and the child came to India from Canada for a purported visit of two months; then the mother informed the father that she did not intend to return to Canada and filed for custody of the child before the concerned Indian Guardian Court after almost three months of being in India.\(^{48}\) The left-behind father filed an application raising objections about the jurisdiction of the Guardian Court, but the Guardian judge dismissed his application. The father appealed successfully before the Delhi High Court, and the mother’s custody petition before the Guardian Court was accordingly dismissed by the Delhi High Court, holding that the Guardian Court lacked jurisdiction in this case because the mother had _stealthily_ secured the child’s presence in India.\(^{49}\)

_Steps taken by the taking parent to secure a favorable custody order in India_

In several cases, where the taking mother had been in India for over two years, after having removed the child(ren) from the United States and had still not taken any substantial steps to secure even an interim custody order in her favor, the court, while ordering the return of the child, held this fact in favor of the left-behind father.\(^{50}\)

_The left-behind parent’s role as a parent and his or her association with the child_

Courts also examine the left-behind parent’s association with the child. The court in _Sakhamuri v. Kodali_ stated that the crucial factors to be kept in mind by the courts concerning the parents are:


\(^{49}\) _Id._ at 7, ¶ 32.

(1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency; and last but not the least the factors involving a relationship with the child, as opposed to characteristics of the parent as an individual.\footnote{Sakhamuri, 7 SCC 311, at 20, ¶ 49.}

Where the left-behind parent provided extensive details of his association with the child and of the steps he had taken since the birth of the child to be associated with his upbringing (including extended periods of alone travel and stay time with the child), the courts in India took notice of such details and considered them as a relevant factor in deciding that the child must be returned to his home country.\footnote{Bhattacharya v. State of Karnataka, 2021 SCC Online SC 928, at 6-7 (India), http://indiankanoon.org/doc/36377351/.} In this case, the mother showed no inclination to retain the child with her in India, even after unilaterally removing the child to India from the United States. It was also one of the factors that, in the court’s opinion, favored the left-behind father, who was very keen on taking the child back to the United States.\footnote{Id. at 9, ¶ 16.} On the contrary, the Indian court declined to order the return of the child from India to the United States, where the left-behind parent did not seem to want actual custody of the child, had remarried during the pendency of the custody proceedings, and seemed to be only interested in the fact that the child should be brought up in the United States (instead of India) even if it were in the sole custody of the taking mother.\footnote{Majoo, 6 SCC 479, at 15.}

\textit{The age, gender, nationality, overall health, and the opinion of the child}

Courts will consider the age, gender, health, nationality, and—where appropriate—the opinion of the child. Where the child was a girl of almost seven years of age, the Supreme Court stated that “ordinarily, the custody of a “girl child who is around seven years of age, must ideally be with her mother unless there are circumstances to indicate that it would be harmful to the girl child to remain in the custody of her mother.”\footnote{Raghavan, 8 SCC 454, at 18, ¶ 33.} While refusing the child’s return, the court also bore in mind that the child in this
case suffered from a “cardiac disorder and needed periodical medical reviews and proper care and attention.” However, in another case, a three-year-old child was medically diagnosed with hydronephrosis (a condition that required surgery). In this case, the mother traveled to India for six months (with the limited consent of the father) to get the surgery done and then refused to return. Here, the fact that the child had undergone successful surgery and only required periodic medical reviews (which could be done from the United States as well) was a factor that the court considered in favor of the left-behind father.

Concerning the child’s age, it must be noted that to assume that a child of tender years will not be ordered to return, especially if the taking parent is the mother, may not be entirely accurate. The Supreme Court of India, in recent years, in three different matters, has ordered children as young as 2½ years old and 3½ years old to be returned to the United States from India. In Sahu and Mogal, the Supreme Court conducted a factor-by-factor analysis to adjudge the considerations favoring each parent and, while ordering the child’s return, noted that other than the age of the child, nothing is in favor of the mother. Therefore, the tender age by itself is not a decisive factor. In several such cases, the fact that the child was a “citizen by birth” of another country was considered one of the favorable factors in ordering the return of the child to that country.

Citizenship of the child plays a more relevant role when the left-behind parent can convince the court that the child was fully settled in his home country, had friends there, went to school in that country, and that removing the child from such a country would amount to uprooting him or her from her socio-cultural ties.

The Indian courts generally ascertain the child’s wishes and opinion in such disputes if the child is mature enough to form an opinion. However, where an eight-year-old boy appeared to have been brainwashed by the taking mother against the left-behind

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56 Id. at 19, ¶ 33.
58 Bhattacharya, 2021 SCC Online SC 928, at 1.
father, the court did not hold that factor against the father and
the child was ordered to be returned to the United States.\textsuperscript{60} In a
very recent case, an Indian court refused to order a nine-year-old
child’s return to Germany, while placing significant weight on his
opinion that he wished to continue to live with the taking fa-
thor (in Thailand), while noting that the child was brilliant, “with
an high intelligent quotient and capable of exercising options
wisely.”\textsuperscript{61}

Left-behind parent’s cooperation in facilitating the taking
parent’s return

In ordering the return of a child, Indian courts often consider
whether the left-behind parent is willing to accommodate the
taking parent’s needs and requirements in maintaining future
contact with the child once the child is returned to his or her home
country. Although it is not the sole consideration, Indian courts
may be more inclined to order a return where the left-behind
parent offers substantial access and visitation rights to the taking
parent. In most cases where the Indian court ordered the return
of the child, the left-behind parent made significant offers as to (a)
bearing traveling expenses and making living arrangements for
the taking parent, should he or she decide to return permanently
to the home country of the child, (b) bearing the cost of travel and
lodging arrangements for the taking parent if he or she decides to
stay back in India (e.g., during school holidays), (c) the frequency
of such visits, and (d) facilitating regular video conferencing, etc.
between the child and the taking parent. The courts, in such cases,
have often given special consideration to the fact that the left-
behind parent is willing to request the appropriate U.S. authorities
to drop the warrants (if any) against the taking parent. Where the
left-behind parent has given an undertaking that he would not
pursue any criminal charges against the mother for violating the
U.S. court order, such a factor has been duly considered by the
Indian courts.\textsuperscript{62} Thus, as the Indian courts have repeatedly pointed
out, in matters of international parental child removal to India, the

\textsuperscript{60} B\textit{and\textit{i}}, 15 SCC 790, at 15.
\textsuperscript{61} Pradhan v. State of Karnataka, 2023 W.P.H.C No.79/2023 at 10, ¶ 25
(India), http://indiankanoon.org/doc/168486202/.
\textsuperscript{62} Ch\textit{andran}, 1 SCC 174, at 17, ¶ 26(iii).
bedrock principle is just one: the “best interests and welfare of the child.” There is no exact science or applicable formula to conclude such cases. The Indian courts must conduct a fact-based analysis of each case and attach a certain weight to each additional factor while considering the above principle.

6. Potential challenges for the left-behind parent

Uncertainty of the outcome

One of the biggest challenges faced by a parent whose child has been taken to India is the concern of not knowing how to proceed in such a situation, accompanied by a fear of not being able to see his or her child again. Unlike a Hague abduction case, which is usually under a mandate to be resolved within six weeks of initiation, international custody disputes in India can be drawn out for years through appeals and other delaying tactics. While recommending that India sign the Hague Convention, the Indian Law Commission categorically noted this issue that there is an apparent lack of “uniform pattern” and “absence of progressive development” in the cases pertaining to minor children’s custody.63 According to the Commission Report, while some decisions were rendered by placing prime importance on the “welfare of the child,” others were based on mere “technicalities of various provisions of law and jurisdictional tiffs.”64 The reason behind this divergence, the Report noted, “can be the absence of law that governs this aspect.”65 As the multiple cases discussed above indicate, no single factor is dispositive to the outcome.

Left-behind parent’s dilemma whether to secure a U.S. custody order first or to directly approach the Indian court

Since a foreign custody order is, at best, only one of the factors to be considered by the Indian courts, a left-behind parent might wonder if it is it even worth securing it before initiating a writ petition in India. An existing foreign custody order appears to be particularly relevant when the taking parent initiated (and

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64 Id. at 11.
65 Id.
participated in) the foreign custody case. However, as pointed out earlier, in a very recent case, even despite such details, the concerned High Court did not order the child’s return.\textsuperscript{66}

\textit{Initiating a criminal complaint against the taking parent}

Another question is whether the left-behind parent should initiate a criminal complaint against the taking parent. International Parental Kidnapping is a federal crime in the United States.\textsuperscript{67} Therefore, the left-behind parent may (at the advice of counsel) or by himself initiate a criminal complaint against the taking parent once the child has been taken to India without his consent. However, there is no such offense as international parental kidnapping in India. Thus, the Indian courts may be cautious about ordering the taking parent to return the child to the United States because the taking parent may be arrested upon her return to the United States. This further deters the taking parent from coming back to the United States. Thus, the left-behind parent might be better off not initiating a criminal complaint against the taking parent.

\textit{Initiation of regular custody proceedings by the taking parent in India}

As discussed in the following section, the Indian equivalent for the U.S. “home state” jurisdiction is “ordinary residence.” However, one of the main differences between the two is the lack of a residency requirement under the concept of ordinary residence. As explained below, the length of stay is immaterial when considering the ordinary residence of the child; what matters is the parent’s intention to make India his or her permanent abode. Thus, if the taking parent can initiate a regular custody case before the left-behind parent initiates a writ petition, it might prevent the left-behind parent from successfully initiating a writ proceeding in India.\textsuperscript{68}

\textsuperscript{67} International Parental Kidnapping Act, 18 U.S.C. § 1204.
\textsuperscript{68} See supra discussion in text at notes 42-43. See also Vandanan, 5 SCC 450.
B. Child Removal from India to the United States

1. Overview of the general process to secure the child’s return to India

When the taking parent removes a child from India to the United States, the left-behind parent in India has the following options:

a) To initiate a child custody petition under the Indian Guardians Act, seek an order for the return of the child, and then have that order enforced under the UCCJEA in the concerned state in the United States; or

b) To directly approach the concerned U.S. court under its “temporary emergency jurisdiction” and seek an order for temporary sole physical and legal custody of the child and his return to India; or

c) To avoid any delay, implement the above measures simultaneously.

2. Securing an Indian custody order

Ordinary residence: In India, child custody disputes are primarily governed by the Indian Guardians Act. Under this Act, the jurisdiction of the court is based on the concept of the “ordinary residence” of the child. This Act provides that the district court under whose jurisdiction “the minor ordinarily resides” is the appropriate jurisdictional forum for custody disputes.69 There is, thus, a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court70 on the one hand and a court under the Guardian and Wards Act on the other.71

Meaning of “ordinary residence”: The term “ordinary residence” is not defined in the Indian Guardians Act. Thus, the meaning of this term is often derived from precedent-based law.

The Indian Supreme Court has held that the term “resides” implies something more than a “flying visit to” or casual stay at a particular place.72 A person resides in a place if he, through choice, makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case.73

69 Indian Guardians Act, supra note 23, § 9(1).
70 Where, as discussed earlier, the child’s physical presence within the court’s territorial jurisdiction is sufficient to confer jurisdiction.
71 Majoo, 6 SCC 479, at 15.
73 Id.
Thus, the question of ordinary residence of a child may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted, it can never be a pure question of law, capable of being answered without an inquiry into the factual aspects of the controversy.\textsuperscript{74}

\textbf{The purpose of residence, not the length, is relevant:} While interpreting the term “ordinary residence,” the Supreme Court of India relied on an English case,\textsuperscript{75} which held that the question of ordinariness does not depend so much on the length of stay as it does on the genuine intention of living somewhere permanently.\textsuperscript{76}

\textbf{Effect of consenting to the child living in India:} The Indian Supreme Court in \textit{Majoo v. Majoo}, dealt with the interpretation of the term “ordinary residence,” especially in the context of an international child custody dispute. In this case, the parties and their child visited India for a short trip from the State of California. However, owing to the father’s past behavior and ongoing misconduct towards the mother, she informed him of her decision not to return to the United States and to continue to stay in India with their child. The father consented to this decision and returned to California alone. However, he changed his mind after a month of his return and initiated a divorce and custody case in California.

Throughout the various stages of this case, the mother’s position before the Indian courts was that the father’s consent to her decision to stay back in India with the child shifted the child’s ordinary residence from California to Delhi. On the other hand, the father alleged that his consent was not given voluntarily and was a result of “duress and coercion.”

The mother placed extensive evidence on record to show the father’s free consent about the mother’s decision to stay back in India with the child. The evidence included a consent letter from the father, where he gave his “whole-hearted support”\textsuperscript{77} to the mother in her decision to stay back before leaving India. The mother also produced several emails from the father (after he left India), where he supported and seemingly assisted the mother

\textsuperscript{74} \textit{Majoo}, 6 SCC 479, at 15.
\textsuperscript{76} Nayar v. Union of India, 2006 (7) SCC 1 (India), https://indiankanoon.org/doc/1903935/.
\textsuperscript{77} \textit{Majoo}, 6 SCC 479, at 8.
with her move. These emails included their exchange regarding suggestions from the father concerning the child’s school in India, leasing the mother’s car in the United States, and the father’s discussions with their common friends about the mother’s decision to stay in India. Strangely, the father refused to produce any counterevidence to support his claim of duress, coercion, or threat in giving his consent.

Thus, in the light of the father’s unsubstantiated claims of involuntary consent, the Supreme Court of India decided in favor of the mother, holding that the child was “ordinarily resident” in New Delhi, India, and the Guardians Court in New Delhi had the child custody jurisdiction.

Effect of acquiescence to a foreign court’s jurisdiction: In Malhotra v. Malhotra,\(^\text{78}\) the mother took her three children from India to New Zealand (apparently without the father’s consent). She then initiated custody proceedings in New Zealand, and the father fully participated. The New Zealand court issued a consent agreement, requiring the mother to send the children to India for periodic visits. Accordingly, the mother sent the children to India to visit their father. However, on or about their scheduled return date, the father initiated a guardianship proceeding in India seeking custody of two of the three children. In this case, the mother successfully challenged the jurisdiction of the Guardianship Court. The primary reason for her success was that the Indian court found that the father had expressly acquiesced to the jurisdiction of the New Zealand court, according to which he had signed a consent custody agreement, thus making New Zealand (not India) the ordinary residence of the children.\(^\text{79}\)

Governing standard: As mentioned previously, in India, the governing standard for custody cases, whether it is a writ petition or a regular custody case, is the best interests and welfare of the child.\(^\text{80}\)

Temporary custody order: Where the child has been removed from India to the United States without the left-behind parent’s consent, a temporary custody order can be sought from the concerned Guardians Court requiring the taking parent to return


\(^{79}\) Id. at 25.

\(^{80}\) Raghavan, 8 SCC 454, at 12.
the child to India. The left-behind parent can then approach the concerned U.S. court with such an order to enforce it.

3. **Enforcement of a foreign custody order pursuant to the UCCJEA (and exceptions)**

The U.S. Department of State authoritatively reports that:

The UCCJEA requires State courts to recognize and enforce custody determinations made by foreign courts under factual circumstances that substantially conform with the UCCJEA’s jurisdictional standards and to defer to foreign courts as if they were State courts. However, State courts need not apply the Act (i.e., enforce a foreign court order or defer to a foreign court’s jurisdiction) if the child-custody law of the foreign country violates fundamental principles of human rights.

In addition, some U.S. States require that to enforce a foreign custody order, the custody decisions in the foreign country must be based on the “evaluation of the best interests of the child.”

The UCCJEA provides expedited enforcement procedures for enforcement of a foreign custody order. Additional procedures are in place to register such custody orders before enforcement.

4. **Securing a temporary emergency custody order in the United States**

In Part III.A.3 this article discussed basic details regarding a U.S. court’s temporary emergency custody. It must be noted that either parent can invoke the temporary emergency jurisdiction.

**Initiation of the temporary emergency custody proceedings by the left-behind parent:** Where the left-behind parent in India has initiated regular custody proceedings in India but is somehow unable to secure an Indian custody order promptly, he can directly approach the concerned U.S. court and seek the child’s return. In such cases, the left-behind parent must inform the U.S. court that he has initiated regular custody proceedings in India (even

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81 Indian Guardians Act, *supra* note 23, § 12(1).
82 Hoff, *supra* note 17, at 5.
83 UCCJEA, § 105 (International Application of [Act]).
84 Hoff, *supra* note 17, at 5
85 N.J. UCCJEA, § 2A:34-57 (C).
86 N.Y. DOM. REL. LAW § 75-g.
87 See *supra* section III.A.3.
if he does not have an order yet). If no proceedings have been commenced in India, the U.S. temporary emergency custody order may become a final determination (if the order so provides) when the issuing U.S. State becomes the child’s home State\(^\text{88}\) (i.e., in six months).\(^\text{89}\)

**Initiation of the temporary emergency custody proceedings by the taking parent:** Alternatively, and usually, it is the taking parent who invokes the emergency jurisdiction of the concerned U.S. court almost as soon as landing in the United States, and as a part of that proceeding explains the circumstances that would help the U.S. court determine if the child (his parent or sibling) is subject to abuse. In this case, if the custody proceedings are ongoing in India, as discussed previously, the U.S. court may still issue temporary emergency orders concerning the child’s custody. Still, it would be required to judicially communicate with the Indian court to resolve the emergency.\(^\text{90}\)

Where custody proceedings are pending in India, the U.S. emergency custody order must specify an adequate period within which the person seeking emergency relief (whether it is the taking parent or the left-behind parent) may obtain a custody order from the Indian court. However, if no custody proceedings are pending in India, then the U.S. court’s order may become final in six months.

5. **Potential challenges for the left-behind parent**

a. **Delay in securing a final Indian custody order**

As discussed in the previous section, the query regarding the ordinary residence of a child is highly fact-intensive. Thus, it can be expected that the taking parent will produce a hoard of facts that challenge the ordinary residence jurisdiction of the Indian Guardian Court. This may delay the trial or prevent the left-behind parent from securing an Indian custody order, which he may then enforce in the United States.

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\(^{88}\) For instance, in New York, the home state is defined as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.” N.Y. DOM. REL. LAW § 75-a(7).

\(^{89}\) Hoff, *supra* note 17, at 6.

\(^{90}\) *Id.*
b. Abuse of the Indian appellate system by the taking parent

If the left-behind parent does secure a favorable Indian custody order, the taking parent may prefer to appeal it. Such an order can be appealed in the concerned State High Court. A High Court’s order may then be appealed before the Indian Supreme Court. Thus, it may be several years before a final order is issued concerning the child’s custody, and the child may have become fully settled in the United States by then. Therefore, understandably, at such time, the U.S. court may be reluctant to uproot the child from his current settings and order his return.

It is also important to note that, according to the U.S. State Department’s website, a custody order is required to use the UCCJEA’s expedited enforcement procedures.

c. Refusal of the U.S. court to enforce the Indian order

Section III.B.3 discussed the requirements under the UCCJEA to enforce a foreign custody order and the applicable exceptions. Although, once secured, there are limited defenses that apply to the enforcement of such an order. Nevertheless, in some instances, even if the left-behind parent can secure a return order from the Indian court, a U.S. court need not accept it if any of the defenses apply.

d. Refusal of the U.S. court to exercise its temporary emergency jurisdiction on behalf of the left-behind parent

Even though the left-behind parent in India might directly approach the U.S. court in the hope of a faster resolution, it is not certain that the U.S. court will agree to exercise its temporary emergency jurisdiction. The U.S. courts exercise their temporary emergency jurisdiction sparingly and only under extraordinary circumstances. Thus, in a case where the mother had unilaterally

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91 Indian Guardians Act, supra note 23, § 47.
removed the child from India to Texas, the Court of Appeals of Texas overruled the emergency jurisdiction order passed by the Texas district court, which required the return of the child to India.\textsuperscript{94} The Court of Appeals held that the mother’s move with the child from India to Texas without the father’s knowledge or consent did not constitute “mistreatment” or “abuse,” supporting the exercise of temporary emergency jurisdiction. In this case, the mother had tendered evidence of the father’s alcohol addiction and verbal and physical abuse of the mother (sometimes in the child’s presence). On the other hand, the father did not produce any evidence to suggest that the mother had ever abandoned, mistreated, abused the child, or threatened to do so. In fact, the father testified that the mother had never been physically violent with the child and was a good parent.

Thus, it appears (especially) in the case of a non-Hague country like India that notwithstanding the allegations against the taking parent, where the child was removed from India without the consent or knowledge of the left-behind parent, the U.S. courts may refuse to assume temporary emergency jurisdiction, if there is no evidence to prove that the child is being mistreated, abused, or threatened with any immediate harm.

e. Taking parent invokes the temporary emergency jurisdiction of the concerned U.S. court

On the other hand, the taking parent can file for temporary emergency custody of the child almost as soon as she lands in the United States with the child. Since the taking parent has already taken the drastic measure of unilaterally removing the child from her home country, she is generally prepared to raise all possible arguments against the left-behind parent. In other words, the taking parent will approach the concerned U.S. court with all kinds of evidence supporting her position that the child’s removal was done to avoid immediate harm to the child by the left-behind parent.

f. No defined residency requirements under the Indian Guardians Act

Another potential issue, briefly touched upon earlier, is that, unlike the UCCJEA, the Indian Guardians Act does not

\textsuperscript{94} \textit{In re S.J.}, 522 S.W.3d 576 (Tex. App. 2017).
provide a defined “residency requirement” (e.g., six consecutive months immediately before the commencement of a child custody proceeding). Thus, “home state” (i.e., the ordinary residence) jurisdiction may be established in India almost instantly, depending on the other supporting facts. This might cause confusion, and it is possible that the U.S. court may be cautious about enforcing the Indian court order if the taking parent can convince the U.S. court that her stay in India was merely a “holiday” or a “flying visit,” and thus, India lacked the equivalent of the “home state” jurisdiction.

g. Immigration challenges

It may be the case that the left-behind parent in India does not have a valid visa to travel immediately to the United States at the time of the child’s removal. Due to COVID-related backlogs, it could take months (if not more) for someone to secure even a mere tourist visa to countries like the United States. The length of stay of the parent in the United States could be another cause of concern for the left-behind parent, since the permissible period of stay as a tourist in the United States is usually restricted to six months. Some true emergency measures could be implemented but are generally available only for a limited period and limited purposes. The criteria to be granted such an emergency visa are limited to only a few categories (e.g., death/funeral, medical needs, urgent business travel, or for studies), and an international child custody dispute does not seem to fall under those criteria.95

IV. The Hague Convention

A. General Overview

The Hague Convention aims to protect children from the harmful effects of their international removal (or retention). The Convention seeks to achieve this goal by establishing a legal procedure (a “shared civil remedy” among partner countries) for promptly returning internationally abducted children to their country of habitual residence. In doing so, the Convention thwarts

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any attempts at forum shopping by the taking parent without the knowledge or consent of the left-behind parent.

The Perez-Vera Report, which is generally considered the official commentary of the Convention, states that the situations envisioned by the Convention are those that derive from the use of force to establish artificial jurisdictional links on an international level to obtain custody of a child. The idea behind the Convention is not to settle a child custody dispute.96 The Convention merely backs the notion that child custody matters should be decided by the court in the country of the child’s habitual residence.97 In fact, it is only after the child’s return to its habitual residence that questions of custody rights will arise before the competent tribunals.98 This principle applies as much to removal that occurred before any custody decision was taken by the competent court in the child’s country of habitual residence as it does to removal in breach of a pre-existing custody decision.99

More than one hundred countries have signed the Hague Convention. As mentioned earlier, India is not one of those countries.

B. Applicable Standard in a Hague Return Case in the United States

Unlike a regular custody case, in the United States, the standard for determining a child’s “habitual residence” in a Hague case is “totality-of-the-circumstances."100

C. India’s Refusal to Sign the Hague Convention

India has refused to sign the Hague Convention primarily because it is India’s position that the “concept of habitual residence is not synchronous with the [Indian standard of the] best interest of

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97 Id. at 3, ¶ 9.
98 Id. at 4, ¶ 16.
99 Id. at 5, ¶ 19.
100 Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).
Although the Hague Convention became effective in the early 1980s, India did not take its first official stand until 2009, when the Law Commission of India issued its 218th report titled, *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)* (the “Report”), advising the government of India to sign the Hague Convention. In the Report, the Law Commission noted that international parental child abduction is “an interference with the parental rights.” Such acts by parents create a “considerable amount of confusion,” specifically concerning the competence of courts with regard to jurisdictional aspects of cases. The Report highlighted the fact that India not being a signatory to the Hague Convention may have a negative influence on a foreign judge who is deciding on the custody of a child because without the guarantee that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to permit the child to travel to India.

The Report discussed several Indian judgments concerning international child custody disputes with varying outcomes and stated that there is an apparent lack of “uniform pattern” and “absence of progressive development” in the cases of minor children’s custody. According to the Report, while some decisions were rendered by placing prime importance on the “welfare of the child,” others were based on mere “technicalities of various provisions of law and jurisdictional tiffs.” The reason behind this divergence, the Report noted, “can be the absence of any law that governs this aspect.” Such an approach that is mired by lack of uniformity could affect a child both physically and emotionally, the Report stated.

However, no substantial steps were taken until seven years after the Report. In 2016, the Indian authorities seemingly amped up their efforts to devise a solution concerning the menace of international child abduction in India. Ever since then, various authorities

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102 Law Commission of India, *supra* note 63.
103 *Id.* at 4.
104 *Id.*
105 *Id.*
106 *Id.* at 10.
107 *Id.* at 11.
108 *Id.*
have drafted several (unpassed) bills concerning India’s stand on international child abduction:

In early 2016, the Ministry of Women and Child Development (the “MoWCD”) drafted a Bill on the Civil Aspects of International Child Abduction,109 purporting to sign the Convention.

On October 17, 2016, the Law Commission of India submitted its 263rd Report,110 which contained another draft bill titled The Protection of Children (Inter-Country Removal and Retention) Bill, 2016. Once again, the Law Commission recommended that India should sign the Convention.

In 2017, the MoWCD formed a Committee (the “Committee”) to study the previous draft bills and develop a mechanism to address the difficulties the parents embroiled in international child abduction disputes faced. In April 2018, the Committee submitted its final report111 to the Ministry, acknowledging the Convention’s “noble intent” yet not recommending that India sign it.

The Committee submitted another draft piece of legislation titled The Protection of Children (Inter-Country Removal and Retention) Bill, 2018.112 The Committee also proposed that an “Inter Country Parental Child Removal Disputes Resolution Authority” (the “Proposed Authority”) must be established to provide a “one-window solution” in cases of inter-country removal and retention of children.113

Additionally, the Committee stressed mediation to resolve such conflicts.114 According to the Committee’s recommendations, a Mediation Cell was established in 2018115 by the National Commission for the Protection of Child Rights to mediate international custody disputes.

111 Bindal, supra note 101.
112 Id. at 205.
113 Id. at 192.
114 Id. at 193-94.
However, it has been five years since those recommendations. The Proposed Bill has yet to be signed, the Proposed Authority has yet to come into existence, and the Mediation Cell has yet to resolve any abduction cases (at least between the United States and India). Meanwhile, matters concerning international child removal to (and from) India are rising.

D. U.S. Efforts to Encourage India to Sign the Hague Convention

The United States has tried to encourage India to accede to the Convention for years. Under the auspices of the International Child Abduction Prevention and Return Act (ICAPRA), the U.S. Department of State is required to (a) submit an Annual Report on International Child Abduction to Congress by April 30 and (b) submit a subsequent report to the U.S. Congress on the actions taken towards those countries determined to have been engaged in a pattern of noncompliance.

In its Annual Report on International Child Abduction, 2023 (the “Annual Report”) the U.S. Department of State (as it has in the past) listed India as one of the “Countries Demonstrating a Pattern of Noncompliance” concerning any protocols regarding international parental child abduction.

While noting that some abduction cases were resolved by the Indian courts in 2022, the Annual Report categorically stressed that the “lack of clear, viable legal options for addressing international parental child abduction cases” under Indian law continued to make it difficult for India to resolve such cases (a sentiment that was very clearly reflected in the Indian Law Commission’s 218th Report).

The U.S. State Department then issued its Action Report on International Child Abduction, 2023 (the “Action Report”),

\[116\] Id.
\[117\] In the United States, ICAPRA is intended to ensure compliance with the Convention, to establish procedures for the prompt return of abducted children, and for other purposes.
\[118\] U.S. Dep’t of State, supra note 115, at 29.
\[119\] Id. at 30.
\[120\] Id.
where, once again, India has been declared by the State Department to be non-compliant with the Convention every year for the past eight years.

The Action Report details the steps the U.S. State Department took to resolve the pending parental child abduction cases between India and the United States and persuade India to accede to the Convention. It further highlights the fact that despite conducting bilateral meetings, issuing several diplomatic notes, calling for a “high-level” consular dialogue, holding discussions with Indian judges, Indian judicial leaders, government officials, and child advocates, and delivering a Demarche, India continues to demonstrate a pattern of non-compliance with the Convention.122 And these steps have yet to yield any positive results.

V. Is It Time for India to Sign the Hague Convention?

A. Comparison of the Writ of Habeas Corpus and the Hague Defenses

1. Purpose of a writ of habeas corpus v. purpose of a Hague case

As noted earlier, the purpose of the Hague Convention is not to settle custody disputes. Interestingly, the Indian Supreme Court, while dealing with the maintainability of a writ of habeas corpus in a child custody case, held that “Habeas corpus proceedings [are] not to justify or examine the legality of the custody. Habeas corpus proceedings are a medium through which the custody of the child is addressed to the discretion of the court.”123

2. Applicable factors in a writ of habeas corpus v. Hague defenses

Although India has not signed the Convention, over the last couple of decades, it has developed a list of applicable factors in cases seeking the return of a child to her home country from India. These factors were discussed in Section III.A.5. of this article. It is critical to note that

122 Id. at 16-18.
123 Gaud, 7 SCC 42, at 7, ¶18.
the various factors applied by the Indian courts are significantly similar to the defenses available under the Convention, discussed below.

Article 13 of the Convention lists the circumstances under which a State is not bound to order the child’s return. The interpretation of the exceptions provided in Article 13 may vary from country to country. As far as the United States is concerned, a court may deny the return of an abducted child if:

(a) there is a grave risk that the child’s return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; (b) the child objects to being returned and has attained an age and degree of maturity at which the court can take account of the child’s views; (c) more than one year has passed since the wrongful removal or retention occurred, and the child has become settled in his or her new environment; (d) the party seeking return consented to or subsequently acquiesced to the child’s removal or retention; (e) the return would violate the fundamental principles of human rights and fundamental freedoms in the country where the child is being held; and (e) the party seeking return was not actually exercising rights of custody at the time of the wrongful removal or retention.124

Thus, in a Hague return case in the United States, if the taking parent is able to prove by “clear and convincing”125 evidence that there is a grave risk that return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation, then that parent may have the defense of grave risk of harm.126 A finding of grave risk of harm essentially means that returning the child to the country of his habitual residence would expose him to “situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of

repatriation.” Similarly, in India, the courts have declined to order the return of a child to her home country, where serious allegations of abuse (e.g., severe alcohol addiction, sex addiction, and adulterous behavior) were leveled against the left-behind parent.

The child’s objection to returning to the country of her habitual residence is also a defense in a Hague case if the child has attained an age and degree of maturity at which the court can consider the child’s views. Similarly, Indian courts generally ascertain the child’s wishes and opinion in such disputes if the child is mature enough to form an opinion.

It is a Hague defense where more than one year has passed since the wrongful removal or retention of the child; similarly “prompt action” of the left-behind parent is a heavy weighing factor in a writ of habeas corpus in India.

Where the party seeking return consented to (or subsequently acquiesced) to the child’s removal or retention, that behavior amounts to a defense in a Hague return case. Similar requirements of consent and subsequent acquiescence have been discussed in the Indian context previously.

Where the party seeking return was not actually exercising rights of custody at the time of the wrongful removal, that can amount to a defense in a Hague return case. Similarly, where the left-behind parent was not able to show any special bond with the child or was only interested in the child’s return to the United States, even if the child was in the sole custody of the mother, Indian courts have refused to order the child’s return.

3. **No need for an actual custody order (unlike the UCCJEA)**

As discussed, an actual foreign custody order is required to use the UCCJEA’s expedited enforcement procedures. However, no

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127 Blondin v. Dubois, 238 F.3d 153, at 162 (2d Cir. 2001).
128 Sharma, 3 SCC 14, at 4, ¶ 6.
129 Majoo, 6 SCC 479, at 15.
130 See U.S. Dep’t of State, supra note 124.
131 Bhattacharyya, SCC Online SC 928, at 1; Sahu, (SC) 577, at 9, ¶ 29; Mogal, BHC AS 27116-DB at 25, ¶ 58.
132 See III.A.5.
133 Majoo, 6 SCC 479.
135 Majoo, 6 SCC 479, at 15.
136 See supra note 86.
A custody order is necessary to initiate a Hague case or to establish that the left-behind parent had existing rights of custody.

Therefore, if India were to sign the Hague Convention, the left-behind parent in India would have the simple option of initiating a Hague case instead of taking several long steps to successfully secure and enforce an Indian custody order in the United States.

B. A Narrow Focus on Domestic Violence and Unfair Presumptions Based on Gender

It appears that India has chosen not to sign the Convention due to its desire to help women of Indian origin who face domestic violence while residing in foreign countries by being able to provide these women with the option to return to their home country.137 Despite the noble intention behind this decision, there may be a better approach to this issue.

It is true that domestic and gender-based violence are critical concerns, but these issues are not exclusive to India. These phenomena are a global menace, and most of the Hague countries, including the United States, have effective measures in place to address this issue. A victim of domestic violence has the right to file a civil complaint,138 as well as a criminal complaint against the abuser. Additionally, the victim can also seek an order of protection. “An order of protection is issued by the court to limit the behavior of someone who harms or threatens to harm another person. It is used to address safety issues, including domestic violence.”139 To protect the victim, a judge can issue an order that prohibits the defendant from threatening or harassing the victim, the victim’s family, or anyone else specifically listed in the order. This order may also require the defendant to stay away from the victim, have no contact with the victim, vacate the victim’s residence, comply with custody orders, and pay child support, among other things.140 Another similar term for such an order is a temporary restraining order (TRO) which

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137 Bindal, supra note 101, at 152.
140 Id.
may be obtained on similar grounds as an order of protection.\textsuperscript{141} Within ten days of the TRO the court will schedule a hearing and both the victim and the abuser will have a chance to testify, and the judge will then consider both testimonies before issuing a final restraining order.\textsuperscript{142} It is important to know that there are domestic violence hotlines and domestic violence programs available in most states to assist victims of domestic violence free of charge. These services are available to everyone regardless of gender identity, age, race, ethnicity, religious beliefs, ability level, or immigration status. Some agencies listed on the State websites have staff or volunteers who can speak multiple languages and can offer assistance in the language of the victim.

The victim can also file for separation or divorce. If there is credible evidence of severe abuse, especially directed towards the child or towards the victim in the presence of the child, victims could seek sole legal and physical custody of the child. In addition, they may seek the court’s permission for international child relocation.\textsuperscript{143}

The standard of review in relocation cases is the best interests of the child.\textsuperscript{144} In such an analysis, several factors come into play when the court is faced with a motion to relocate, which include: (1) The nature, quality, extent of involvement, and duration of the child’s relationship with the parent proposing to relocate and with the non-relocating parent; (2) The reasonable likelihood that the relocation will enhance the general quality of life for both the child and the parent seeking the relocation, including, but not limited to, economic and emotional benefits, and educational opportunities; (3) The probable impact that the relocation will have on the child’s physical, educational, and emotional development. Any special needs of the child should also be taken into account in considering this factor; (4) The feasibility of preserving the relationship between the non-relocating parent and child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties; (5) The existence of extended family

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\textsuperscript{141} See Domestic Violence, supra note 138.

\textsuperscript{142} Id.


\textsuperscript{144} DePrete v. DePrete, 44 A.3d 1260, 1271 (R.I. 2012).
or other support systems available to the child in both locations; 
(6) Each parent’s reasons for seeking or opposing the relocation; 
(7) In cases of international relocation, the question of whether 
the country to which the child is to be relocated is a signatory to 
the Hague Convention on the Civil Aspects of International Child 
Abduction will be an important consideration; (8) To the extent 
that they may be relevant to a relocation inquiry, the Pettinato v. 
Pettinato factors also will be significant. However, no single 
factor is dispositive of an outcome.

In geographic relocation cases where the relocation will substantially 
affect the visitation rights of the noncustodial parent, a presumption 
arises that “such relocation is not in the child’s best interest.” (Matter 
of Atkinson v. Atkinson, 197 A.D.2d 771, 772, 602 N.Y.S.2d 953, 
The relocating parent must rebut such presumption by a showing of 
compelling or exceptional circumstances.

Here the wife’s relocation to Puerto Rico from the state 
of New York was held in the child’s best interest because the 
father abused alcohol and marijuana and subjected the mother 
to “continued domestic violence.” Furthermore, the father was 
unemployed and testified that if he were granted the custody, 
he would support the child “through food stamps and Medicaid 
in addition to his unemployment allowance.” The mother in 
this case was employed in Puerto Rico and was going to live in 
her father’s house free of charge. The court thus held that such 
compelling or exceptional circumstances, including domestic

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1. The wishes of the child’s parent or parents regarding the child’s custody. 
2. The reasonable preference of the child, if the court deems the child to be of sufficient 
intelligence, understanding, and experience to express a preference. 
3. The interaction and interrelationship of the child with the child’s parent or parents, the child’s 
siblings, and any other person who may significantly affect the child’s best interest. 
4. The child’s adjustment to the child’s home, school, and community. 
5. The mental and physical health of all individuals involved. 
6. The stability of the child’s home environment. 
7. The moral fitness of the child’s parents. 
8. The willingness and ability of each parent to facilitate a close and continuous parent-child relationship between 

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147 7. The moral fitness of the child’s parents. 
150 8. The willingness and ability of each parent to facilitate a close and continuous parent-child relationship between 
147 Id.
149 Id. at 772.
150 Id.
violence and economic necessity, made the child’s relocation to Puerto Rico permissible, even if that would deprive the father of regular and meaningful access to the child.

In another matter, where the wife sought to relocate with her child to Australia from the state of Arkansas, after getting divorced from her husband due to his alcohol problems, temper, and violence, the Arkansas Court of Appeals held that the trial court’s decision to allow the ex-wife to relocate to Australia with the child was not clearly erroneous.\textsuperscript{151} The wife provided substantial evidence by having several friends testify to the fact that the husband had alcohol and temper-related issues. She also informed the court that she felt that the child was in an unsafe environment in the husband’s house in Arkansas. In allowing her to relocate to Australia with the child, the court also considered factors such as the wife’s Australian citizenship, her minimal ties to Arkansas, the fact that she had a job in Australia, that she owned real and personal property in Australia, and that the child was too young to express a preference.

Moreover, identifying domestic violence as the sole or primary reason for international parental child abduction is correct. As reported by the Library of Congress:

\begin{quote}
\[A\]dvocates for signing the Convention and passing an Indian anti-child-abduction bill maintained in the run-up to the government’s decision that Indian policy makers were focusing too narrowly on the issue of “Indian women being abused,” instead of accepting that there are numerous reasons why parents abduct their children, and experts consider child abduction to be child abuse with long-lasting traumatic effects.\textsuperscript{152}
\end{quote}

The notion that domestic violence is not the primary reason for international child abduction is further supported by the Canadian Center for Child Protection which provides that,

\begin{quote}
A parent may make the decision to abduct their child(ren) for a number of reasons, including: Disagreement with a court decision about custody, Fear for the child(ren)’s safety, Desire to control or seek revenge against the other parent, Disregard for authority, Mental illness, Paranoia about the other parent.\textsuperscript{153}
\end{quote}


C. Overwhelming Changes in Socio-Economic Status and Immigration Statistics Concerning Indian Immigrants

It is important to consider the sea change in immigration and socio-economic statistics of Indian immigrants in countries such as the United States. The reported number of Indian immigrants in the United States has risen from a mere 206,000 (in the 1980s) to a staggering 2,709,000 (as of 2021).\(^{154}\)

Today, Indians have much higher incomes than the total foreign- and native-born populations.\(^{155}\) Thus, most Indian couples have the money and resources to seek the help they need if they decide to separate, but some choose not to.

Most of the immigrant couples make a well-planned and well-researched move to countries like the United States in search of greener pastures. They plan their families accordingly, and it is often on their agenda to give birth to and raise their child in America. When things get rough (as in many international marriages), one of the parents simply (perhaps in the heat of the moment) decides to take off with the child to their home country. However, in doing so, they choose not to pursue the available legal options and decide to take matters into their own hands.

There is a limited section of illegal immigrants who first try to obtain asylum in countries like the United States by painting a very radical picture of the Indian government, and then once they find it challenging to continue staying in the United States, they rush back to India and convey an equally untrue picture of lack of assistance from the “foreign authorities” in the United States and the unsympathetic attitude of foreign courts towards the Indian taking parent.

D. The Burden on the Indian Judiciary

It is important to mention the burden that unresolved (yet avoidable) custody disputes put on an already overburdened Indian judiciary. Once the taking parent is in India, it is difficult to predict how the situation might unfold. However, it is common for false cases to be filed under the infamous Section 498-A of the Indian Penal Code\(^{156}\) or for made-up domestic violence charges to

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\(^{154}\) Hoffman, supra note 3.

\(^{155}\) Id.

\(^{156}\) Indian Penal Code (the “IPC”), § 498-A, https://indiankanoon.org/doc/538436/.
be brought forward. While dealing with a false case initiated under Section 498A of the IPC, the Indian Supreme Court observed as follows:

There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision.\textsuperscript{157}

In some cases, the outdated petition for the restitution of conjugal rights is initiated.

Very recently, the Indian Law Minister reported to the Indian parliament that the backlog of cases in India has crossed the fifty million mark, with 50,039,981 cases pending before Indian courts, the highest number in any country worldwide.\textsuperscript{158}

The National Judicial Data Grid (NJDG) in India is a government-funded database of pending cases in India. It is updated on a near real-time basis and provides information relating to judicial proceedings and decisions of the Indian Supreme Court, all the High Courts, and all the computerized district and subordinate courts of the country.

The NJDG’s data establishes that as of August 4, 2023, about 44 million cases (44,407,204 cases) were pending before the lower-level (first instance) courts in India.\textsuperscript{159} Out of these 44 million, almost 28 million cases (i.e., 28,420,051) have been pending for more than a year.\textsuperscript{160}

If India were to sign the Hague Convention, it would provide both parents with a clear and structured path to follow in case of an international child abduction to (or from) India. The taking

\begin{itemize}
\item[(159)] The National Judicial Data Grid (NJDG), Pending Dashboard (Oct. 8, 2023) (India), https://doj.gov.in/the-national-judicial-data-grid-njdg/.
\item[(160)] Id.
\end{itemize}
parent would have an opportunity to oppose the return of the child by establishing one of the legal defenses161 provided under the Convention. On the other hand, the left-behind parent would feel assured that the system is fair, as opposed to the current structure where there is no defined legal recourse available for them. As a result, the left-behind parent often feels helpless and takes any and every step that might prove beneficial in exerting some kind of pressure against the other parent. The taking parent, on the other hand, ends up engaging in all the steps she feels necessary to prevent the left-behind parent from seeking the child’s return. This puts an additional burden of disingenuous and spiteful cases on an already overburdened judicial system.

E. Possible Future Difficulties for the Indian Taking Parent

When a child has been unilaterally removed by the taking parent, the left-behind parent can seek a temporary custody order requiring the child’s return from India to the country of his habitual residence. If the taking parent still defies such an order, he can be held in contempt, possibly leading to an imprisonment order.

Furthermore, as far as the United States is concerned, the offense of international parental kidnapping is a felony punishable by imprisonment of up to three years and a substantial fine.162 In addition, an Interpol “red notice” may be issued against the taking parent, and should he try to travel internationally again, he may be arrested in a foreign country (other than the United States) and then extradited to the United States.

VI. Conclusion

Indian emigrants not only settle in the United States, but also in other top destination countries, including the United Kingdom, New Zealand, Australia, and Canada. It is noteworthy that all these countries have signed the Hague Convention.

By choosing not to sign the Convention, India seems to be avoiding the problem. However, this could lead to significant issues in the future.

161 Hague Convention, supra note 1, art. 13.
Since India is the world’s fifth-largest economy and is projected to become the second-largest by 2075, it is crucial to address the issue of international parental child abduction. With Indians increasingly moving in and out of the country, this problem cannot be ignored.

While signing the Hague Convention may not entirely solve the various problems resulting from international child abduction, it is certainly a step in the right direction. And, once India embarks on this journey, there is always room for improvement.
Family Mediation: The International Context

by
Dr. Róisín O’Shea¹ and Dr. Sinéad Conneely²

Introduction

While there are many definitions of mediation, it is generally accepted to be a form of negotiation where a third-party neutral assists the parties to reach a mutually acceptable settlement of any issues in dispute, with the right of the parties to self-determine any outcome being a fundamental principle.⁴ At its heart, modern mediation is a continuation of ancient dispute resolution practices which vary greatly according to time, place, and cultural context, but all of which sought to restore individual and social harmony in situations of conflict and dispute. Mediation, as a local experience, is at the center of the growth in alternative dispute resolution, spreading the practice by word of mouth and supported by slowly building trust. Local courts are the forum from which mediation has emerged, the place of skill generation, of sharing and learning, and locations that reflect nuance and social norms or expectations. However, mediation is evolving from a movement that embodied a counter tradition to a set of structured legal forms, where practitioners look to law to access the benefits of regulation.⁴

The shift to legislate and regulate mediation on a national level is unsurprising in the context of mediation’s continuous expansion.

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³ Penelope McRedmond, Mediation Law 1 (2018).
The trend is reflected in Ireland with the passing of the Mediation Act 2017, which supports the creation of an emerging mediation profession and provides the framework for the intersection of mediation with the civil justice system. The Act enables the establishment of the Mediation Council of Ireland, which will set training standards for mediators, maintain a national register, prepare codes of practice for government-level approval, and promote public awareness of mediation. The law demonstrates a conception of mediation as a facilitative and voluntary process which is, at the same time, an alternative to court decisions and an intrinsic player in legal dispute resolution, with the hope that regulation will facilitate future growth. Significantly, mediated settlements in Ireland are legally enforceable at the instance of the parties. Law and mediation are not at war now, in this new accommodation; they are partners in the business of conflict resolution.

Legal regulation at a national level has not been an easy road in many jurisdictions. It may be controversial even within mediation, opposed by the legal profession or the judiciary, and even more likely, it may struggle to find space on a busy legislative agenda. It is by no means a completed project; yet another job of work is now pressing. Specifically, in the family context, increasing numbers of bi-national and bi-cultural relationships and marriages are a feature of globalisation; these families have a cosmopolitan identity that enriches the family, but when the relationship ends, matters may become legally complex because of multiple countries, norms, and sets of laws. Parties must not be discouraged from mediating, but facilitated to do so in an environment of legal clarity, in relation to enforceability of their agreement. In the absence of an international agreement or framework for family

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5 Mediation Act § 12(4) (Act No. 27/2017) (Ir.).
6 Mediation Act § 11(1) (Act No. 27/2017) (Ir.) “The parties shall determine – (a) if and when a mediation settlement has been reached between them, and (b) whether the mediation settlement is to be enforceable between them.” This provision of the Act dealing with the enforceability of a mediation settlement was noted by Penelope McRedmond, “The Act states that in s 11 that the parties shall decide if and when a mediation settlement has been reached between them, and whether the mediation settlement is to be enforceable.” McRedmond, supra note 3 at 226.
mediation, mediators and their lawyers must, on a case-by-case basis, assist international families to navigate the complexities of dealing with more than one jurisdiction, more than one type of legal system, identifying applicable laws, and any supra-national or international conventions that may apply, and ultimately understanding where and how any mediated settlement might be enforced. The onset of COVID-19 in 2020 had an immediate and significant impact on family mediation, both nationally and internationally. Unprecedented restrictions and lack of access to the courts resulted in a global shift to on-line mediation for families seeking resolution of disputes. The reality is that international families were already seeking mediation; the onset of Covid-19 merely accelerated the need for an international approach to family mediation and placed it in the spotlight.

This article will examine the trend towards national legal regulation as a support for mediation growth, with particular emphasis on the European position, as well as the current international legal framework and developments in the facilitation of family mediation for cross border family disputes. Part I of this article examines national legal frameworks for mediation within Europe and North America, and Part II provides an overview of international and supra-national legal frameworks that aim to facilitate the resolution of cross border disputes using mediation. Part III looks at the work of International Social Service (ISS) between 2010 and 2018 where they conducted a global program focussing on international family mediation and includes a case study of a cross border family mediation. The conclusion highlights the need for an internationally agreed framework for family mediations that traverse legal borders to assist international families and their lawyers in navigating the complexities of dealing with more than one jurisdiction.

I. National Legal Frameworks for Mediation

A. England and Wales

In England and Wales, regulatory frameworks for mediation have been historically driven by the profession itself and since the

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early 2000s, self-regulation of mediation is split under two councils. The Civil Mediation Council\(^9\) deals with civil, commercial and workplace mediation and the Family Mediation Council\(^10\) holds itself out as the home of regulated family mediation. Family mediation in the United Kingdom is now an approved pathway for the resolution of family disputes, officially endorsed and funded by the government, representing a fundamental shift away from the family courts.\(^11\) It was this shift in government policy, emphasizing family mediation as an alternative to litigation, that resulted in the coming together of six organizations to establish in 2007 the Family Mediation Council (FMC), which set about creating a single, qualified status of accredited family mediator within the industry.\(^12\) By the end of 2018, the key elements of the regulatory project had been successfully implemented and 1,100 mediators were registered with the FMC.\(^13\)

B. European Union

Across European Member States, there is an emerging trend towards regulation.\(^14\) Twenty Member States have some form of professional framework for mediators, ranging from a national register to full legal regulation. In ten of those countries, the regulatory framework for mediators is located within or under the auspices of a government body.\(^15\) Three have Mediation Councils: Latvia, Romania and Slovenia. Poland has an ADR Council, and the Netherlands has the Mediators Federation of the Netherlands (MFN). Three countries\(^16\) have “Commissions” established by a Ministry of Justice, tasked for the most part with monitoring the development of mediation

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12 Id. at 43.
13 Id. at 45.
14 This trend is moving beyond Europe. See Mediation Act 2023 (Act No. 32/2023) in India which promotes mediation, ensures enforceability of settlements, and establishes a register for mediators.
16 Croatia, Belgium, and Czech Republic.
and advising government. Three Member States\textsuperscript{17} have established
government bodies and five countries\textsuperscript{18} have direct oversight of,
at least, some aspects of mediation at government level. In eight\textsuperscript{19}
of the Member States, the Ministry of Justice maintains a national
register of mediators. Regulatory and legislative developments across
Europe, in recent years, indicate that mediation is no longer viewed
solely as an additional skill set for those offering another service. It
has evolved to become a professional activity, in its own right, with
mediation codes of conduct, and complaints processed by mediation
membership bodies, rather than any other professional body, of which
a mediator may be a member.

Experience across Europe is fragmented, but moving towards
the creation of a national, regulatory environment for family
mediation. However, those systems will always be varied, and
they pose a challenging work environment for a family mediator
who works across them. Philosophically, European countries are
going in the same direction, but this is unlikely to lead to the same
rules on, for instance, enforceability of mediated agreements.
International legal cooperation is required to address the issues of
the cross-border family, in law and in mediation.

C. \textit{North America}

The United States of America has no governing or regulatory
body for mediation; however, most states have developed
individual laws. In an effort to create uniform, domestic mediation
laws, two statutes have emerged. First, the Alternative Dispute
Resolution Act of 1998 requires all federal trial courts to implement
ADR and enables the court to direct a case to mediation.\textsuperscript{20} Second,
the Uniform Mediation Act (UMA) of 2001 was developed to
standardise the mediation process and to establish confidentiality
on a statutory basis and it has been enacted by thirteen states to
date.\textsuperscript{21} In Canada, like England and Wales,\textsuperscript{22} the profession itself has

\begin{flushright}
17 Malta, Portugal, and Greece.
18 Italy, Slovenia, Czech Republic, Slovakia, and Poland.
19 Austria, Czech Republic, Bulgaria, Greece, Croatia, Hungary, Italy, and
Slovenia.
22 Rachel Blakely, ‘Mediators’ Mediating Themselves’: Tensions Within
the Family Mediator Profession, 43 Legal Stud. 139 (Mar. 2023), https://
\end{flushright}
driven self-regulation, and the profession remains unregulated by the State, with mediators electing to adopt codes of practice as may be required by institutes such as the Canadian and Ontario ADR Institutes and other mediation organizations and membership bodies. The North American picture, like the European one, is of gradual movement towards regulation without uniformity of method. International regulation of family mediation will not emerge organically from national processes.

II. International Legal Framework

A. Singapore Convention

There are existing supra-national and international legal frameworks that aim to facilitate the resolution of cross border disputes using mediation. Perhaps the best known is the Singapore Convention on Mediation, which is a framework for international settlement agreements resulting from mediation. However, the focus of this Convention is on commercial matters, and it specifically excludes family, inheritance, and employment disputes. This exclusion represents the conventional wisdom that


family disputes involve complex and diverse questions of special sensitivity and family law varies widely between jurisdictions, in a way that represents unique cultural approaches to family life. It is an entrenched idea that ensures that cross border family mediation is addressed separately from other forms of civil mediation.\footnote{The recent Mediation Act 2023 in India states that where a dispute requires international mediation, the Act will only apply to commercial disputes and not to family disputes. The Mediation Act, 2023, Bill No. 32 of 2023, § 3(g) (Sept. 14, 2023).}

B. *EU Cross Border Directive*

The European Union (EU) Cross Border Directive on Mediation\footnote{Directive 2008/52/EC (May 21, 2008), https://bit.ly/3DDsCHb.} provides high level principles and recognizes that mediation can provide a cost-effective and timely resolution of disputes in civil and commercial matters.\footnote{Id. pmbl. (6).} The Directive, which must be transposed into national law, envisions that Member States will create their own mediation guidelines, in accordance with each Member’s statutory or regulatory framework. This Directive applies to civil and commercial matters, involving at least one party domiciled or habitually resident in a Member State. The range of disputes is broad, and significantly, includes cross-border family law matters. The European Commission’s Justice e-portal\footnote{Family Mediation, EUROPEAN E-JUSTICE, https://e-justice.europa.eu/372/EN/family_mediation (last visited Dec. 16, 2023).} provides information on cross-border family mediation between Member States. The Directive allows the parties to request that the mediated settlement be made enforceable as a court judgment or enforceable instrument and provides a mechanism for cross-border enforceability within the EU.\footnote{Directive 2008/52/EC supra note 26, pmbl. (19).} The Directive provides that the court may order that the proceedings be adjourned, wherever initiated within the European Union, and may invite the parties to use mediation to settle the issues in dispute. A stated objective in the Directive is to “facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.”\footnote{Id. art. 1.}
six years of entering into a mediation settlement, the parties may apply to the court concerned for an order making the agreement a rule of court, and enforceable against either of them. It also provides that, even where litigation was not initiated, a mediation settlement can be brought before court authorities to be enforced, unless contrary to national law. This Directive represents a great deal of progress towards achieving cross border enforceability of mediated agreements in the family sphere, from a European perspective. Where the mediating parties are in the European Union, the mediator is on solid ground. However, there are 16 million couples from non-EU countries living in the European Union, and this is why an international approach is also required.

C. The Hague Convention

The legal context of child abduction cases is the 1980 Hague Convention, a multi-lateral procedural convention, with 103 contracting states, that seeks to protect children from the harmful effects of wrongful removal and retention across international boundaries. The Convention provides that Hague countries shall take all appropriate measures to obtain the voluntary return of the child, with a clear direction in relation to the use of mediation. The 1996 Hague Child Protection Convention seeks to improve the protection of children in international situations, providing common rules on jurisdiction, applicable law, and recognition and enforcement on parental responsibility matters. It also establishes a system of cooperation between signatory States through their Central Authorities, to assist parents in resolving cross-border family disputes. Signatory

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31 Absent Britain which, since Brexit, may adopt European law but is under no obligation to do so.
32 Irish mediators are particularly impacted since the Irish diaspora tends to move within the English-speaking world; Britain, America, Australia, Canada and New Zealand, all non-EU countries.
34 Paul et al., supra note 7, at 16.
35 Hague Convention art. 10.
countries operate various forms of a child abduction mediation scheme, with mediators drawn from a wide range of ethnic and cultural communities, often conducted with the assistance of interpreters. Although the Child Protection Convention is narrow in focus, experience of the operation of Hague in this area is encouraging and illustrates the power and necessity of international co-operation. Use of mediation in the context of international child abduction demonstrates the breadth of family mediation’s offering, its versatility and usefulness.

D. Broader Framework

Mediation in the shadow of the law could be problematic in European cross border cases since family law remains within the exclusive legal purview of the Member States, but the European Union can legislate on family matters where there are cross-border implications. The legal context for cross border family mediation in the EU also includes: Council Regulation (EU) 2019/1111 dealing with jurisdiction, recognition and enforcement of decisions in matrimonial matters, parental responsibility and child abduction; and Council Regulation (EC) No 4/2009, as amended, which covers all maintenance arrangements arising from a family relationship, parentage, and marriage. The European Commission has assisted stakeholders to develop a voluntary European Code of Conduct for Mediators in 2004 and in 2018, the European Commission for the Efficiency of Justice (CEPEJ) adopted a voluntary European Code of Conduct for Mediation Providers.

37 Roberts & Moscati, supra note 11, at 207-08.
both codes to be used alongside CEPEJ recommendations, guidelines and other instruments on mediation.

A convention with broader international applicability is theConvention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, more commonly known as the “New York Arbitration Convention,”42 which, unlike the Singapore Convention,43 does not exclude family law disputes. Finally, Article 12 of the United Nations Convention of the Rights of the Child (UNCRC, 1989)44 is of key importance in any cross-border family mediation, setting out the rights of a child to express their views on any matter that affects them.

III. International Family Mediation

A family conflict becomes international when more than one country is involved. Those in dispute may be of different nationalities, the family may no longer be living in its country of origin, and the assets of the marriage may be located in different jurisdictions.

A. ISS Program

In 1924, International Social Service (ISS)45 was established and it has a presence in more than 120 countries. Between 2010 and 2018, ISS conducted a global program focusing on international family mediation, to facilitate access to competent and qualified international family mediators for families across national borders. An International Charter comprised of ten core principles was developed and the program hosted a website and offered a multi-lingual Guide to International Family Mediation, intended to be a reliable resource for families and professionals worldwide. The overall objective of the program was to highlight the legal complexity of cross border situations and to highlight the benefits

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of mediation as a clear professional means to resolve conflict and protect children, which can accompany, or be the alternative to, legal proceedings.46

The ISS General Secretariat published a Final Report in December 2018.47 The initiative involved consultations with 55 mediation practitioners from 23 countries. Feedback from this collaborative process indicated that, while most of those consulted see professionalisation and certification of international family mediators as important in the medium to long-term, it was premature to start work, ahead of professionalisation of mediators at the national level. Key issues identified included the inconsistency of training and qualification standards across the world and regions with low knowledge and practice of mediation. Solutions discussed were the development of a harmonized training model and the establishment of working groups, the inclusion of organizations from Muslim countries, and the promotion of adoption of culturally appropriate family mediation.48 A Review Board, comprised of six international organizations49 provided feedback, supporting the concept of a global family mediation network. The Review Board also saw merit in using such a network to find qualified mediation professionals, access resource documentation, and develop a charter or a model law on international family mediation.50 The Final Report concluded that, while it was too soon to start work on a formalised certification for international family mediation, a network serving the needs of mediators would provide the foundations needed for the work ahead. Appropriate funding to enable the project to continue was not secured and work was suspended.51

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48 Id. at 9.
49 The European Commission for the Efficiency of Justice of the Council of Europe, the European Parliament Coordinator on Children’s Rights, the Hague Conference on Private International Law, the International Academy of Family Lawyers, the International Hague Network of Judges, the United Nations Committee on the Right of the Child, as well as the University Integrated Center for Health and Social Services (CIUSSS Canada).
50 ISS General Secretariat, supra note 47, at 10.
51 Id. at 11.
B. Case Study

The author’s experience of mediating international family disputes is reflected in the following case study, which highlights the questions that must be considered, including:

- The jurisdiction of the Agreement to Mediate?
- Where does each party reside?
- Where do the children reside, and is the Hague Convention applicable?
- Where are the assets of the marriage, including property, savings, pensions?
- Where the parties intend that the mediation settlement is enforceable between them, is that possible under the relevant national/international legal systems?

The spouses were residing for the last eight years in Switzerland. The parties were in agreement that the marriage had ended and wanted to agree to the terms of their divorce in mediation. Both spouses intended to leave Switzerland after the children finished primary school, the following year. The husband was from a non-European Union country and intended to return to live there. The wife was from Ireland and intended to return to live there. Her solicitor proposed mediation. The two children had been born in England and attended schools in Switzerland. The spouses did not own any property in Switzerland, but jointly owned a property in England, and the wife held an interest in a property in the EU with her brother. The wife had an English pension and the husband had pensions through his employer in Switzerland, and savings in a non-EU country. It was agreed that the laws of Ireland governed the Agreement to Mediate, and the mediation was conducted on-line. The parties each secured a legal adviser in Switzerland and the wife had a legal adviser in Ireland. With the assistance of the mediators, a comprehensive mediation settlement was agreed, which was translated into German. The parties agreed that they would seek a divorce in Switzerland, which has a civil law legal system, with the applicable law being Swiss law. They filed a joint application, using the mediation settlement as the basis for that application.

The property in England was sold and the proceeds divided equally between them, the pensions and savings were equalized with funds transferred from the husband to the wife, and the wife
retained her interest in the Irish property which had been acquired before the marriage. The mediation settlement also set out that the children would reside in Ireland with their mother, their schools were mutually agreed, and child maintenance was agreed. The parties agreed that the children would be with their father in the non-EU country during summer holidays and they would spend other school holidays with him in England, with extended family members. The parties agreed to first return to mediation should any dispute arise, with the Irish courts having jurisdiction in relation to any dispute about parenting or child maintenance that could not be resolved between them. The court in Switzerland adopted the terms of the agreement reached between the parties and granted a divorce within two months of the joint application.

The case study illustrates the complexity that may be involved when dealing with an international family, including assets spread across several jurisdictions, child arrangements providing for visitation in more than one country, and choice of forum for divorce proceedings. Yet, it also shows that family mediation has huge potential to alleviate the complexity for international families, clarifying their plans, and providing pathways to enforceability in the event of future disagreement.

**Conclusion**

The world is getting smaller; globalization, international travel, instant communication and social media are bringing the human family together in new ways. One’s life partner may not have been born within walking distance of the home, as they would have been in the past, and people are all enriched by the ways that international families break down racial, cultural, and religious barriers. However, when families in conflict find themselves traversing legal borders, they encounter impediments to private ordering. Family law continues to be seen as embodying the distinctive culture of each society in a way that makes global harmonization an insurmountable goal. Progress has been made within regions, and on specific, pressing issues such as child abduction, but the shadow of the law will continue to be long for an international family mediator.

Progress has also been made in recognizing, supporting, regulating, and incorporating family mediation into national civil
justice systems, but not in a way that is likely to lead to global consensus, and it is taking time. In late 2022, an international family mediation initiative commenced, with international experts coming together to form a working group, with the aim of creating a form of international family mediation profession, dealing with international family law issues, creating good practices, and developing a protocol for more of this work internationally.

Mediation across borders can work with the cultural, linguistic, and geographical realities of international families, but they need to know that their mediation is located within a recognized framework that offers them security of outcome. This framework should be capable of adoption in any geographical location and adapted to the needs of national family law. The story of family mediation is one of dynamic change at local, national, and international levels, which gives every reason to be hopeful that this day will come.

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52 Prof. David Hodson OBE solicitor, mediator, arbitrator, part-time family court judge (UK); Dr. Róisín O’Shea, mediator, legal academic, Chair of the IPMO (Ireland); Andrew Davies, solicitor, mediator, arbitrator (Australia); Prof. Melissa Kucinski, family lawyer, mediator, professor lecturer in law at the George Washington University Law School (United States); Pascal Comvalius, mediator, visiting faculty member in mediation at MNLU Mumbai (Netherlands); Dr Margaret Connors, Washtenaw County Peacemaker and family law lecturer University of Michigan Law School (United States); Ischtar Khalaf-Newsome, mediator, family lawyer and Co-CEO and head of advisory services MiKK (Germany); Colm Branigan, Chartered Med-Arbitrator ADR Institute of Canada and guest lecturer Queen’s University, Osgoode Hall Law School and University of Toronto; Dr Chinwe Egbunike-Umegbolu, mediator, solicitor, barrister, part-time lecturer Law Dept. University of Brighton (UK) and the Hon. Judge Timothy P. Connors State Court Judge Washtenaw County, Michigan, United States.

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Mainland Judgments in Hong Kong and Family Cases (Reciprocal Recognition and Enforcement)

By Catherine Por and Calvin Lo*

I. Background

The Hong Kong Special Administrative Region (“Hong Kong”) was established as a special administrative region of the People’s Republic of China (“PRC”) on July 1, 1997 pursuant to the Constitution of the PRC. Pursuant to the Constitution, the National People’s Congress enacted the Basic Law of Hong Kong. The Basic Law is the constitutional document of Hong Kong, stipulating the basic principles and policies of Hong Kong. Notwithstanding its derivation from the Constitution of the PRC, the Basic Law maintains Hong Kong’s previous capitalist system and way of life which are to remain unchanged for fifty years, specifically confirming that the socialist system and its policies shall not be practised in Hong Kong. The often-cited principle “One Country Two Systems” is the most prominent feature of the Basic Law, putting Hong Kong in a unique position as the only territory in the PRC in which the common law system is practised and constitutionally guaranteed.

This article addresses an aspect of the relationship between Hong Kong and the PRC relevant to family law. This article introduces how a newly passed piece of legislation will provide relief

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1 XIANFA (宪法) [Constitution] art. 31 (1982) (China).
2 Id.
to families by recognising and enforcing matrimonial and family orders made in the two jurisdictions.

This article explores, in three parts, the aforementioned cross-border arrangement. In Part II, this article investigates the provisions and procedures in relation to divorces in “cross-border” marriages – the border being that of the PRC and Hong Kong. This article then goes into the history of this relationship in Part III to understand the need for such reciprocal recognition and enforcement in divorces. Finally, Part IV sets out the arrangement’s aims.

II. Marriages and Divorces

Given the proximity of Hong Kong to the mainland of the PRC (“Mainland China”), geographically and culturally, “cross-border” marriages have been commonplace. According to the statistics published by the Hong Kong Judiciary, cross-border marriages increased by 5% between 2009 and 2014.\(^4\) Between 2017 and 2019, approximately 18% of the 70,000 divorce cases in Hong Kong were related to marriages in Mainland China.\(^5\)

Courts in Hong Kong have jurisdiction in divorce proceedings if either party to the marriage was domiciled in Hong Kong, was habitually resident in Hong Kong throughout a period of three years before the date of the petition or application for divorce, or had a substantial connection with Hong Kong at the date of the petition or application.\(^6\)

Under the PRC legal system, couples can divorce either by agreement or court proceedings.\(^7\) The former is an embodiment of today’s no-fault divorce system because a marriage relationship is,


\(^6\) Matrimonial Causes Ordinance, Cap. 179, at 2-2, § 3 (2022) (H.K.).

as described by Xia Yinglan, a “covenant” made between two individuals, and can be terminated without proceedings. A divorce by agreement is an administrative procedure which occurs where both parties mutually consent to the divorce. As its description suggests, this method of divorce applies where the parties are in agreement in all matters pertaining to their divorce. Thus, as an “extrajudicial divorce,” divorce by agreement is handled by the civil affairs department instead of the courts. Further, pursuant to the Regulation on Marriage Registration, one of the three main conditions to be met when it comes to divorce is that the place of registration of marriage must be Mainland China. If such conditions are not fully met, divorce by agreement by way of the administrative procedure would not be available to the parties to the marriage who must then file for divorce with a court.

III. The Need For Reciprocal Recognition and Enforcement

Given the separate legal systems enshrined under the “One Country, Two Systems” principle, Hong Kong generally did not recognise or enforce judgments of Mainland China, such as those in matrimonial and family matters and vice versa. It was also

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9 Ethan Michelson, Decoupling: Marital Violence and the Struggle to Divorce in China, 125 AM. J. SOCIOLOGY 325 (2019), doi.org/10.1086/705747.
commonplace that courts in Mainland China did not deal with any of the parties’ assets situated outside Mainland China. Although some relief has been provided for couples having obtained a divorce in Mainland China to deal with assets in Hong Kong (provided conditions are met), mutual recognition and enforcement of matrimonial and family judgments of the courts of Mainland China and Hong Kong was lacking. For instance, a PRC maintenance order could not be enforced against a Hong Kong resident payer. Another unfortunate scenario concerns children wrongfully removed or retained in Mainland China despite a Hong Kong court having already granted custody to a parent in Hong Kong. These scenarios were clearly not only distressing, but also frustrating for the parties who, having resorted to the law, found themselves hamstrung by limitations in the law within the one country with two systems. The plethora of negative consequences highlighted the pressing need for a bilateral arrangement between Mainland China and Hong Kong to provide for reciprocal recognition and enforcement of judgments in matrimonial and family matters.

On June 20, 2017, Mainland China and Hong Kong signed the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of Hong Kong (“the Arrangement”). Mainland China introduced this arrangement in its jurisdiction by way of judicial interpretation. In Hong Kong, the Legislative Council passed the resulting Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill (“the Bill”) on May 5, 2021. On February 15, 2022, close to a five-year wait after the Arrangement and eleven years since negotiations began, the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance

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15 Consultation Paper on Matrimonial Matters, supra note 4, at 4.
Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance, Cap. 639, T-1 (2021) (H.K.)18 and the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Rules (Cap. 639A) (“the Rules”)19 finally came into effect, marking a milestone for enhanced cross-border legal cooperation between Mainland China and Hong Kong.

A. History

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<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
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<tbody>
<tr>
<td>201120</td>
<td>Government of Hong Kong initiated negotiations to seek an arrangement for reciprocal recognition and enforcement of matrimonial judgments with Mainland China.</td>
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<tr>
<td>June 27, 201621</td>
<td>Government of Hong Kong launched a seven-week public consultation as regards the proposed arrangements.</td>
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<td>June 20, 2017</td>
<td>The Supreme People's Court of PRC and Government of Hong Kong signed the Arrangement.</td>
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<tr>
<td>May 5, 2021</td>
<td>The Legislative Council of Hong Kong passed the Bill.</td>
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<tr>
<td>February 15, 2022</td>
<td>The Ordinance and the Rules came into effect.</td>
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B. Mechanism

The Ordinance established mechanisms for three types of applications in Hong Kong: (i) Registration in Hong Kong of Mainland Judgments Given in Matrimonial or Family Cases,22 (ii) Recognition in Hong Kong of Mainland Divorce Certificates,23  

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20 Background Brief, Background Brief on Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region, LEGISLATIVE COUNCIL 2 (Mar. 26, 2018), www.legco.gov.hk/yr17-18/english/panels/ajls/papers/ajls20180326cb4-762-5-e.pdf.
21 Id.
22 Cap. 639, supra note 18, at 2-2–36.
23 Id. at 3-2–6.
and (iii) Facilitation of Recognition and Enforcement in Mainland of Hong Kong Judgments Given in Matrimonial or Family Cases.\textsuperscript{24}

1. Registration of Mainland Matrimonial or Family Judgments in Hong Kong

In Hong Kong, parties can now seek recognition and enforcement of specified orders made in Mainland China. These orders fall into three main categories: care-related orders, status-related orders, and maintenance-related orders. Care-related orders involve children under the age of eighteen and include custody, guardianship, access rights, and protection from domestic violence. Status-related orders relate to divorce, annulment, and parentage issues. Maintenance-related orders cover child maintenance, property division (including a lump sum payment, property transfer, or declaration of ownership), and other related matters.

If a party to a care or maintenance-related order applies to the court in Hong Kong for registration, it will be enforceable in Hong Kong as if the Hong Kong court had originally made such order on the day of registration. However, a party can only take action to enforce a registered order after the expiration of the period during which the other party can make an application for setting aside the registration or after the disposition of the application for setting aside the registration.\textsuperscript{25} The Hong Kong court will only recognise a status-related order as valid upon registration after the time limit to apply for setting aside the registration has expired or after the disposition of the application for setting aside the registration.

To register such orders, the Hong Kong court must be satisfied that the Mainland China courts had made the orders on or after February 15, 2022, and the orders are effective in Mainland China. For the registration application, it is necessary for the original Mainland China court to issue a certificate to certify the above. The parties must make an application to the Family Court in Hong Kong, supported by an affidavit that sets out the details of the Mainland China order and exhibits the order and certificate issued by the Mainland China court. Generally, parties must make applications for care-related or maintenance-related orders within

\textsuperscript{24} Id. at 4-2–4.

\textsuperscript{25} Id. at 2-4, § 8(2).
two years. The applicant must serve the Mainland China order a notice of registration on all other parties.

It is possible to set aside the registration of a Mainland China order if the parties obtained the order by fraud or if the other party did not summon the respondent to appear according to Mainland China law, or if the respondent did not have a reasonable opportunity to make submissions or defend the proceedings. Setting aside the registration may also be possible if the recognition or enforcement of the specified order is manifestly contrary to the public policy of Hong Kong. If proceedings have already been instituted in Hong Kong or elsewhere, or a Hong Kong court or elsewhere has already given a judgment in respect of the same cause of action, the court may also set aside the registration. In cases involving a child under the age of eighteen, the Hong Kong court must consider the best interests of the child when deciding whether recognizing or enforcing the order is manifestly contrary to the public policy of Hong Kong.

2. Recognition in Hong Kong of Mainland Divorce Certificates

Hong Kong now recognizes divorce certificates issued in Mainland China if they meet certain conditions. If the Hong Kong Family Court is satisfied that the Mainland China court issued a certificate of divorce on or after February 15, 2022, and the certificate is valid in Mainland China, it can make an order to recognize it. To apply for recognition, the applicant must provide a supporting affidavit and exhibit documents, including a notarized copy of the Mainland China divorce certificate. The applicant must also serve to the other party of the divorce specified in the Mainland China divorce certificate a notice of the recognition.

Similarly, it is possible to set aside the recognition order under certain circumstances. For example, the certificate is invalid if the parties obtained the Mainland China divorce certificate by fraud, or the recognition of the certificate is manifestly against the public policy of Hong Kong. After the period within which parties may make a setting aside application has expired or after the disposition of the application, the divorce specified in the Mainland China divorce certificate is recognized as valid in Hong Kong.

It is important to note that the Hong Kong Family Court will only recognize a Mainland China divorce certificate if it is satisfied
that it is valid in Mainland China. This presumption exists if a notary public has notarized the certificate in accordance with Mainland China law. Parties seeking recognition of a Mainland China divorce certificate should also ensure that they comply with all other relevant legal requirements and procedures.

3. Facilitation of Recognition and Enforcement in Mainland of Hong Kong Judgments Given in Matrimonial or Family Cases

Parties can now apply to Mainland China courts for the recognition and enforcement of Hong Kong judgments in accordance with PRC law. To do so, a party to a Hong Kong judgment must apply for a certified copy of the judgment and a certificate certifying that the judgment is effective in Hong Kong. The party must make the application to the registrar of the court of final appeal, the court of appeal, or the district court that issued the Hong Kong judgment.

The Hong Kong judgment must contain orders set out in schedule three to the Ordinance, including orders related to divorce, maintenance, custody, declaration of parentage, adoption, and orders related to domestic violence as well as an order for the return or delivery of a child wrongfully removed from Hong Kong to Mainland China or wrongfully retained in Mainland China (other than in an international child abduction case).

The Ordinance provides clearer mechanisms and commitments from both jurisdictions to deal with child removal cases. This offers better safeguards for the interests of parties to cross-border marriages, their families, and children. It minimizes the need for parties to relitigate the same dispute in Mainland China and Hong Kong, saving time, costs, and emotional distress. It also enables parties to have timely and effective access to relief, with their rights better protected.

However, it is important to note that if the execution of a Hong Kong order is stayed pending appeal or for any other

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26 Id. at 3–2–4.
reason, the party can only make the application until after the expiration of that period. Parties seeking recognition and enforcement of Hong Kong judgments in Mainland China should ensure that they comply with all relevant legal requirements and procedures.

IV. Implications

The new Ordinance provides more efficient mechanisms for parties to protect their rights across both Mainland China and Hong Kong. This includes the ability to enforce Mainland China maintenance orders in Hong Kong, aiding payees who may otherwise struggle to enforce payments or recover arrears. The Ordinance also brings certainty that Mainland China can recognise and enforce divorce decrees obtained in Hong Kong, and vice versa, reducing uncertainty that previously existed.

It remains to be seen how effective the Ordinance will be in assisting parties in Mainland China seeking the prompt return of children who are wrongfully retained or removed from Hong Kong in breach of a Hong Kong custody order, since currently there is no standard procedure for locating and returning the child among the different provinces and cities in Mainland China.

What the Ordinance does is to restrict parallel proceedings in Mainland China and Hong Kong, minimizing the need for a jurisdiction race or litigation of the same issues separately in one jurisdiction after the other. This will save time, costs, and most importantly, reduce parties’ emotional distress.

V. Conclusion

The Ordinance represents a significant development and enhances collaboration between the courts in Mainland China and Hong Kong. By the provision of efficient mechanisms in the Ordinance, parties can have certainty in enforcing judgments and better protect their rights and interests.
Comment, U.S. Intercountry Adoption Policy: A Brief History

Introduction

While international adoptions are becoming less common, this area of international law and policy draws significant attention from legal scholars, elected officials, and the adoption community. The experience of family is shared by all people, and society is deeply rooted in the preservation and support of the family. The legal and political institutions that facilitate protection of family rely on a localized set of values that are unique to countries, regions, and communities.

The legal construction of the family has experienced globalization in this increasingly connected global society. For decades families have looked outside of their country of origin to adopt children, but these adoptions are influenced by international law, politics, and relationships. The United States is uniquely positioned to approach international adoption from a human rights perspective, with an increased recognition of cultural and economic inequalities that lead to international adoption.

This comment examines the history of intercountry adoption in the United States and the international agreements that are connected to international adoption, as well as the need for greater human rights protections. The first section introduces international adoption in the United States today, the international law that controls these adoptions, and frameworks that explain the cooperation responsible for legitimizing international adoption policy. The second section discusses the history of family, adoption, and intercountry adoption in the United States through the lens of legal and political identity. Then the third section illustrates the means of exploitation at the heart of the international adoption debate. This section describes the international political economy’s role in international adoption, and the exploitation of global
poverty that occurs in sending states. The final section discusses the reasons behind the overall decline in international adoptions, and the policy shifts leading states to implement prohibitions on intercountry adoption.

I. International Adoption in the United States

A. Intercountry Adoption Today

In 2022, a total of 1,517 children were adopted by American families. Of those children 235 were from Colombia, which represented the largest number of children from one nation.\(^2\) The Intercountry Adoption Act, enacted in 2000, establishes the Hague Convention in Respect of Intercountry Adoption (the Convention) as the controlling law on the matter of intercountry adoption.\(^3\) The explicit purpose of implementing the Convention is to protect the rights of children, birth families, and adoptive parents.\(^4\) In a statement released by the White House, President Clinton praised the efforts of the Hague Convention in Respect of Intercountry Adoption for better protecting the rights of children involved in intercountry adoption. Clinton emphasized the standardization that the Convention and the U.S. legislation brings to the process of intercountry adoption for all parties involved.\(^5\) The systems and processes developed by the Hague Convention establish protections for the fundamental rights of the child recognized in international law.\(^6\) The goals of the Hague Convention are accomplished by way of a country’s designated central authority that is given broad discretion in the regulation of international adoptions.\(^7\) The Department of State serves as


\(^3\) 42 U.S.C. § 14901.

\(^4\) Id.


\(^6\) 42 U.S.C. § 14901.

the Central Authority for the United States, giving this agency complete authority over international adoptions involving individuals from the United States, as well as diplomatic responsibilities.\(^8\)

A critical part of this international agreement is the recognition of principles developed in the United Nations Convention on the Rights of the Child (UNCRC) and the United National Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children.\(^9\) Under the Convention an entirely new family relationship can be created, establishing a legally permanent parent-child relationship. Yet, the Convention prioritizes that the child remains in the care of her family of origin. The child should grow up in a family environment, in an atmosphere of happiness, love, and understanding.\(^10\) The State of origin must give due consideration for placement of the child within that State.\(^11\)

The Convention requires adoption to take place only after the State of origin has made certain determinations. The child must be found to be adoptable, and the child must consent to the adoption. Consent by the parents must have been freely given without any compensation, and the State must have made efforts to place the child in her home country.\(^12\)

In the past three decades international adoption by U.S. families has grown exponentially, and then has been slowly decreasing. Reviewing the trends through the past two decades distinguishes the period of intercountry adoption in the United States at the height of adoptions per year, and the current period where international adoption is less accessible. Not only is this distinction between periods useful for statistical analysis, but it also contextualizes the political relationships between states. In 2003 a total of 21,180 children were adopted by U.S. families from abroad. According to the Department of State, a

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\(^{8}\) 42 U.S.C. § 14901.  
\(^{9}\) Id.  
\(^{10}\) Id.  
total of 6,857 of those adoptions were children adopted from China.\textsuperscript{13} By 2005 the number of adoptees from Ethiopia more than doubled. The United States did not have the presence or infrastructure at that time in Ethiopia to facilitate any more adoptions, but eventually the United States had a much more significant presence in Ethiopian adoption.\textsuperscript{14}

In the reporting period for 2008, April 1 through September 30, 2008, 8,251 children were adopted from abroad by U.S. families.\textsuperscript{15} Of those 8,251 children, 2,036 children were from China, and 1,031 of those children were from Ethiopia, respectively.\textsuperscript{16} It is in 2008 that China and Ethiopia become the largest sending states, a sharp increase for Ethiopia in a handful of years.\textsuperscript{17} In 2009 a total of 12,753 children were adopted by U.S. families.\textsuperscript{18} A total of 3,001 children were adopted from China, which represents the largest portion of children from a single nation in 2009. Also, in 2009, 2,269 children were adopted from Ethiopia by U.S. families. Both China and Ethiopia sent the greatest number of children to the United States by a significant margin, with most sending nations facilitating less than one hundred adoptions per year.\textsuperscript{19} A total of 8,668 children were adopted by U.S. families in 2013.\textsuperscript{20} Of those children adopted, 2,697 of those children were from China. In 2013 a total of 1,568 children were adopted from Ethiopia.\textsuperscript{21}

In 2015, a total of 2,354 children were adopted from China by U.S. families out of a total of 5,648 children adopted from abroad.\textsuperscript{22}

\begin{flushleft}
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Id.
\textsuperscript{21} Id.
\end{flushleft}
By 2015, the number of adoptions from Ethiopia significantly decreased from previous years. The total number of adoptions from Ethiopia in 2015 was 335.23

In 2020, The Department of State altered its format for the Annual Report on Intercountry Adoption to include a letter from the Secretary of State. This letter includes policy directives and goals for the Department and COVID-19 related notices. The Department has begun to include brief reports on specific challenges with specific sending nations, and the Department’s policy priority regarding the issue. The Department intends to continue intercountry adoptions with states that have instituted a prohibition on intercountry adoption. In the annual report the Department seeks to improve confidence in successful intercountry adoption with the United States.24

B. International Politics and International Adoptions

The international frameworks and relationships relevant to intercountry adoption are foundational to the exploration conducted through this comment. Policies are based on the system enveloping political actors where they are connected by common interests and values, and where they intend to be bound by a set of common rules in relationships and institutions.25

Relational control is used to define a particular group’s interest in promoting, ensuring, or stabilizing their dominance over other groups or the function of a social system. These relational theories attempt to define the social order mechanisms that shape the institutions that govern society and its foundations. The international relations and law theories that shape international agreements, relationships, and institutions exist within an anarchic state system motivated largely by rational cooperation and control.26 Beyond idealistic or altruistic motives, self-interested

26 T. Baumgartner, W. Buckley & T. Burns, Relational Control: The Human
states should find it in their best interest to create and participate in international institutions.

The international agreements that were developed in response to the growing practice of international adoption were the United Nations Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the Hague Convention.27 These organizations are not states but do operate in coordination with state actors by delegating the regulatory work to an entity with enforcement power.

The Hague Convention presents significant limitations for effective implementation. As scholars have noted, a greater burden is put on the sending state to determine whether the child is eligible for adoption.28 Some countries elect not to ratify the Hague Convention because they do not have the infrastructure to comply with the obligations required of sending states.29 The unbalanced dynamic between sending states and receiving states can be understood in part through the relational control theory where the more privileged nation attempts to control opportunities, outcomes, and attitudes for their interests.30

II. A History of Family, Adoption, and Intercountry Adoption in the United States

A. A History of Adoption in the United States

The emergence of adoption in the United States relied heavily on the changing social conditions following the Civil War. For orphaned children at that time their options were placement with family members or indentured service.31 Adoption statutes of the late nineteenth century were part of a larger socioeconomic modernization.32 The philosophy of saving

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28 Id. at 710.
29 Id.
30 Baumgartner et al., supra note 26.
32 Id. at 463.
orphaned or homeless children dates back to organizations like the New York City’s Children’s Aid Society that would “rescue” children by sending them into the west to work on Protestant farms. By 1892 this Children’s Aid Society sent 84,318 children to work as farm laborers.\(^{33}\)

The first modern adoption law, the Massachusetts adoption law of 1851, resembles adoption laws throughout the country. Massachusetts began a legacy of transferrable parental rights under judicial scrutiny where consideration is given to the welfare of the child and the qualifications of the potential adopters. Beginning in the early twentieth century progressive reformers concerned with child welfare — including social workers, truant officers, and police — were willing to remove children from their families to rescue the child from parents perceived to be unfit.\(^{34}\) During this time reformers invoked the legal conception of parens patriae, which asserts the state can act on behalf of parents when they fail to care for their children. Progressive reformers responsible for institutionalizing these child welfare practices recognized that children left in the custody of the state in orphanages, juvenile homes, or industrial schools were experiencing demoralizing conditions.\(^{35}\)

Adoption laws as they exist today were enacted in every state by the twentieth century. By 1970 adoption was more common than ever before and there were around 175,000 adoptions annually.\(^{36}\) Professor David Ray Papke suggests it is possible that the growth in adoptions sought in the United States may be connected to the culture of consumption that dominated in the mid-twentieth century.\(^{37}\) Open adoptions became the status quo of U.S. adoptions when the Child Welfare League of America embraced a recommendation that declared open adoption to be integral to adoption services.\(^{38}\) By 1999, private adoption agencies no longer only offered confidential adoption.\(^{39}\) In the United States today two-thirds of the private adoptions are open and permit post

\(^{33}\) Id. at 465.

\(^{34}\) Id. at 466.

\(^{35}\) Id. at 468.

\(^{36}\) Id.

\(^{37}\) Id. at 469.

\(^{38}\) Malinda L. Seymore, Openness in International Adoption, 46 COLUM. HUM. RTS. L. REV. 163, 177 (2010).

\(^{39}\) Id. at 178.
adoption contact between the two families. In cultural imagery the contemporary picture of the family includes a child, and adoption is a way to create this image of a successful family.\textsuperscript{40} The law has constructed adoption with wide discretion to determine which individuals can adopt, and which children are adoptable, thus constructing families.\textsuperscript{41}

As the rate of unplanned pregnancies decreased, the stigmas that deemed children of color “unadoptable” were reframed.\textsuperscript{42} The principal rule on the matter of adoption in the United States is that a child is not eligible for adoption unless she has no legally recognized or living parent.\textsuperscript{43} Principles fundamental to domestic adoption policy are rooted in the nineteenth and twentieth century approaches to child neglect and abuse, poverty, institutionalized children, and unwed mothers. Where adoption was once a commonly used resource for unwed mothers, in the twenty-first century an average of fewer than 2\% of single pregnant women chose to relinquish their children for adoption.\textsuperscript{44}

B. Fundamental Right to Family

The Supreme Court has interpreted the Constitution to endow a fundamental right to family under a wealth of case law. One of the building blocks of the constitutional right to family was \textit{Meyer v. Nebraska}, in which the Supreme Court found in the Fourteenth Amendment rights that have been enumerated through prior precedents that allow individuals freedom to marry, establish a home, and bring up children.\textsuperscript{45} In this opinion the Court states these fundamental rights are “essential to the orderly pursuit of happiness by free men.”\textsuperscript{46} Based on the foundation laid in \textit{Meyer}, in \textit{Alsager v. District Court of Polk

\begin{thebibliography}{99}
\bibitem{Papke}Papke, \textit{supra} note 31, at 469.
\bibitem{Zug}Marcia Zug, Brackeen and the ‘Domestic Supply of Infants’, 56 FAM. L.Q. 175, 184 (2022).
\bibitem{Id}\textit{Id.} at 427.
\bibitem{Meyer}Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923).
\bibitem{Id2}\textit{Id.} at 626.
\end{thebibliography}
County, Iowa, the U.S. District Court for the Southern District of Iowa concluded that there is a fundamental right to family integrity protected by the Fourteenth Amendment. Following that decision, the U.S. District Court for the Middle District of Alabama held that interpretations of the Alabama Code were unconstitutional in violation of family integrity because mothers were deprived of custody of their children where there was no showing of immediate or threatened harm. This decision establishes that termination of parental rights must only occur when the child is more likely to be harmed by staying with the parents than by permanently separating from them. The state has the burden of proving that a parent is unfit. The court found that all parents are entitled by the Constitution to a hearing on their fitness before their children are removed from their custody.

Institutionalized racial discrimination is resonant throughout U.S. history involving all racial minority groups including Indigenous, Black, Asian, Central American, and South American children. These distinct groups share an experience of legally sanctioned family separation.

Congress has an assumed responsibility to protect and preserve Indigenous tribes. In its enactment of the Indian Child Welfare Act (ICWA), Congress recognized that a high percentage of Indigenous families were separated by forced removal by nontribal agencies that was often unwarranted. The state recognized that the most vital element of the continued existence of Indigenous tribes is their children. Whether Congress intended to enhance tribal sovereignty, tribes regained the legally recognized control and care of their children under ICWA. ICWA demonstrates a clear policy goal to maintain family and cultural relationships. First, ICWA requires that prior to the involuntary termination of parental rights, efforts are made to provide services and rehabilitative programs to prevent

49 Id. at 779.
the dismantling of an indigenous family. The party seeking to terminate the parental rights must prove that the services provided have been ineffective. The second element required by ICWA before termination is evidence showing, beyond a reasonable doubt, that the child will likely be in serious emotional or physical danger if the parent continues to have custody. Finally, ICWA requires that adoption preference be given to the child’s extended family, then the child’s tribe, next to other tribal families, and finally to non-indigenous people.

ICWA determines that tribal courts maintain jurisdiction over all proceedings on the placement of a member of that tribe. The tribal courts are the most appropriate agents to carry out the best interests of tribal children, as opposed to a white middle-class standard that has a legacy of rejecting tribal families as proper placement for children. The integrity of ICWA depends on courts upholding the interests and benefits conferred by the statute. While family law is an area almost exclusive to state courts, the federal government has a distinct role in its relationship with the tribal organizations. In this relationship, Congress has deemed tribes to have the exclusive governing power of the welfare of tribal children, regardless of any state interest.

Before the enactment of ICWA, white social workers were removing Indigenous children at a rate substantially higher than any other demographic group. In the decade between 1958 - 1968 the Child Welfare League of America, the Bureau of Indian Affairs, and social workers across the United States collaborated on the “Indian Adoption Project” to remove children that were adoptable from the homes of their relatives on reservations. The child welfare organizations designated these children as at-risk partially due to a bias toward assimilation and an ignorance of Indigenous cultures.

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54 Id. at 643.
55 Id.
57 Atwood, supra note 52, at 675.
59 Atwood, supra note 52, at 603.
Indigenous children were commonly institutionalized in educational institutions in the name of child welfare. This became codified U.S. policy in 1819 in the Indian Civilization Fund Act that gave financial support to missionary groups for educating Indigenous children. The federal boarding school system maintained complete separation of Indigenous children from their tribes. These boarding schools operated by white colonizers in the 1800s intended to introduce Indigenous children to civilization. Indigenous children were targets of the colonial power’s cultural genocide that stripped children of their language, religion, and cultural practices. During the 1970’s the Association of American Indian Affairs documented the displacement of Indigenous children, estimating that one-third of all Indigenous children were separated from their families.

The duty of care exercised by the U.S. Congress in ICWA comes from its direct interest, created by the trustee relationship, in protecting the future interests of the tribes. It is the responsibility of the United States to promote the principles of ICWA to protect this realm of tribal self-determination. Without recognition by the courts, the tribe’s interest in the welfare of its children will go unheard. The legacy of family separation in Indigenous communities continues into the twenty-first century, as seen in South Dakota. In South Dakota Indigenous people make up 9% of the population, but Indigenous children represent 52% of the children in state foster care.

Bodily and family autonomy are experienced differently by Black Americans. Mothers who were slaves did not have any claim to their children under the law, and the white slave owner could remove the child from their parents, sell the child, or kill the child with impunity. Slaves did not have any right to engage in individual autonomous decision making. Following the Civil War, Black parents were not allowed custody of their children.

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61 Atwood, supra note 52, at 602.
62 Graham, supra note 60, at 24.
63 Atwood, supra note 52, at 675.
64 Zug, supra note 42, at 187.
because the white southerners in possession of their biological children claimed the Black children were better off than with their free biological family. The Freedmans Bureau in the 1860s documented the experiences of Black families attempts to reclaim family ties through extend caregiving networks.

The child welfare system and social services institutions have utilized coercive programming to exclude Black families from benefits, like the 1954 Social Security Act. States like Mississippi took further steps to target Black families by creating rules on “immoral” and “unsuitable” households. The Mississippi legislature even considered a bill to make giving birth to an illegitimate child a crime, which was specifically aimed at Black women. The Adoption and Safe Families Act (ASFA) was a progression of this legacy of separation among Black families. The ASFA intended to fix the foster care system by doubling the number of children adopted annually. By 2000, over 40% of the children in foster care were Black.

Black women’s reproduction in the 1980s to present day is often the sight of state intervention. At the center of the criminalization of parents for child abuse cases are Black women and poor women. The crack epidemic allowed the child welfare state to intervene in Black families by charging mothers who use drugs with crimes like child endangerment. The ACLU Reproductive Freedom Project reported high percentages of prosecutions against Black women. Studies published in 1990 show that in South Carolina, that of the eighteen women charged with either criminal neglect of a child or distribution of drugs to a minor, seventeen of those women were Black. In studies conducted by the South Carolina State Council on Maternal

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67 Id.

68 Barbara Stark, Toward a Theory of Intercountry Human Rights: Global Capitalism and the Rise and Fall of Intercountry Adoption, 95 Ind. L.J. 1365, 1395 (2019).

69 Stark, supra note 66, at 172. (In 1982 there were 262,000 children in foster care, but by 1999 the number doubled to 568,000.)

70 Id. at 173.


72 Id. at 172.
Infant, and Child Health in 1991, their own research found that Black women and white women use drugs at the same rate.

C. History of Intercountry Adoption in the United States

The orphan rescue missions from regions of military conflict, like the airlift of German and Japanese orphans at the end of the Second World War or following the Korean War, known as Babylift, were a political tactic by a State superpower to both extend good will and rescue children from Communism.\(^73\) In 1975 the U.S. government decided the only humanitarian thing to do was to bring 2,000 Vietnamese orphans to the United States as “Operation Babylift.”\(^74\) Their mothers took them to orphanages because they did not believe they would survive the war. The Americans operating orphanages in Vietnam did not speak the language, were isolated from the culture, and were unaware that adoption was an option within Vietnam. These orphanages did not consider how to integrate into the existing systems that promote child welfare or adoption. The individuals working at these orphanages said to the New York Times that they should not have been operating in a country that they knew nothing about with the objective of taking the children out of the country.\(^75\)

Around two dozen of these children had parents that came to the United States and were reunited with their family. The attorneys that brought the class action lawsuit on behalf of these Vietnamese families argued that the children had a constitutional right to due process, liberty, and freedom from illegal seizure.\(^76\) A grandmother and uncle sought a habeas corpus action for their four relatives to be returned to their care.\(^77\) The grandmother of the four boys brought by Operation Babylift based her right to custody on federal and international law which recognizes an interest in unity


\(^75\) *Id.*

\(^76\) *Id.*

and integrity of their natural family. The plaintiffs argue for relief under four federal laws including the Equal Protection and Due Process Clauses of the Fourteenth Amendment. This case and others brought on behalf of other families affected by the Babylift did not conclude with a reunification of these Vietnamese families.

In Huynh Thi Ahn v. Levi, the court estimated that hundreds of the children brought to the United States were not orphans. When the operation was over it became apparent to the state that some of the children were in fact not orphans, but the state continued to place them throughout the country. The lack of legal foundation in immigration law, family law, and international law in the case of this family demonstrates the necessity of an institutional policy approach to international adoption. The discrepancies between domestic and international law to address issues present in international adoption make it clear that additional legal policy and institutions must be developed to facilitate legal and safe adoption.

The adoptive parents of these Vietnamese children desperately wanted to keep the children in their families. Adoptive parents that organized against the class action lawsuit clearly expressed their opinions of the political situation in Vietnam as being a threat to their adoptive children, specifically the potential spread of communism. To make the situation more complicated, the Vietnamese people were under siege and the society was crumbling under the brunt of war. The United States was the most significant military force annihilating Vietnamese communities for years on end. The aggressive occupying force then exercised power and control over a vulnerable situation so that they removed allegedly orphaned children from their country of origin. It appears that the impetus of the Babylift was an exercise of U.S. hegemony, and the benevolence of U.S. adoptive families was an effect.

The presence of international adoption in U.S. culture presents a glaring contradiction in that the United States began international adoptions as an effort to help children orphaned by war, and now it is strictly prohibited to adopt refugees from

78 Id. at 629.
79 Id. at 627.
80 Johnston, supra note 74.
regions of war or natural disaster. U.S. intercountry adoption shapes families both within the United States and the country of origin. State and federal laws deliberately and irrevocably sever the ties of transnational adoptees to their families of origin to promote the interests of the adoptive family. U.S adoption framework prioritizes the unity of the adoptive family over maintaining connection to the child’s family and country of origin. Adoption is often perceived as an inherent good, but it realistically it is a conditional good that is based on family separation that creates loss and tragedy for relinquishing families and communities.

D. **UNCRC**

The United States has not meaningfully brought in internationally recognized theories and frameworks that would create more equitable conditions in domestic and international adoptions, thus helping to prevent an exploitative market. While the United States has become party to the Hague Convention, the United Nations Convention on the Rights of the Child is the foundation for the Hague Convention. The Convention on the Rights of the Child (UNCRC) is an aspirational framework that moved human rights forward to protect children as a distinctly vulnerable group. Based on the Declaration of the Rights of the Child, the Convention identifies children in need of special legal protection and care. The Convention aims to leverage international cooperation to better the conditions of childhood for children faced with exceptionally difficult circumstances The UNCRC provides principles and goals to inform policies that both protect and support children.

On the matter of intercountry adoption, the UNCRC prioritizes placement within the child’s country of origin. The UNCRC also contends that it is the state’s responsibility to take

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81 Martin, *supra* note 58, at 183.
85 *Id.* art. 21.
appropriate measures to prevent “improper financial gain” for any parties involved. Recognized in the UNCR is the right of a child to preserve her family relations and her nationality. The UNCRC recognizes identity rights as part of the panoply of legal human rights. In Article 8 the child is granted the explicit right to preserve their nationality, name, and family relationships without unlawful interference. This particular provision was proposed by Argentina in the aftermath of the Dirty War in Argentina when the children of political dissidents were taken from their families and put up for adoption. Additionally, a child that is deprived of their identity should be offered assistance to reestablish their identity. Though international agreements direct that domestic adoption take precedence over international adoptions, the Hague Convention allows for a less strict application of the primacy of domestic adoption. The UNCRC recognizes the special legal protection that indigenous communities require. Specifically, the child cannot be denied the right to be in a community with her group, and to enjoy her own culture.

The UNCRC is the most ratified international human rights treaty. The United States is the only member state that has not committed to the child protections set out in the UNCRC. The UNCRC was adopted in 1989, and 196 member states have ratified. The national campaign for the United States to ratify the UNCRC has been opposed by some theosis because of concerns that it would infringe on U.S. sovereignty, but the United States could benefit from advancing the basic standard of care provided to children. Proponents are not seeking to immediately restructure systems or child welfare institutions but instead have a theoretical framework to work towards better conditions for children. Not only were U.S. researchers and advocates involved

86 Id. art. 8.
87 Seymour, supra note 38, at 200.
in the Convention’s formation, but polls have shown that four out of five people in the United States favor the ratification of the UNCRC.\textsuperscript{91}

E. \textit{China and the U.S. Intercountry Adoption}

The United States began international adoptions in East Asia following World War II.\textsuperscript{92} International adoption in China was a dual action solution to move children out of the overcrowded child welfare institutions and provide support for these institutions through required and voluntary orphanage donations.\textsuperscript{93} The intercountry adoption program was not implemented in China until more than ten years after the enactment of the one child policy.

Since the beginning of the intercountry adoption program, more than 100,000 children have been adopted from China. The largest number of Chinese children adopted by U.S. families in a single year was 8,000 children in 2005.\textsuperscript{94} Since 1993, China has been significantly influential in intercountry policy because its program sends the largest number of adoptees abroad. Between 2005 and 2009, though, there was a steady decline in adoptees from China globally, from around 14,500 to 6,000.\textsuperscript{95}

Domestic adoption has existed in China and could have met the needs of abandoned babies. In 1991, 61 children from China were adopted by U.S. families, and by 1995 that number rose to 2,130.\textsuperscript{96} In 2000, 5,058 children were adopted from China.\textsuperscript{97} Until 1999, domestic adoption in China was limited to couples that did not have children and were at least thirty-five years old.\textsuperscript{98} The government viewed domestic adoption as a bypass of the population control policy. In 1999, the adoption laws changed significantly to allow couples to adopt multiple

\textsuperscript{91} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 52.
\textsuperscript{94} \textit{Id.} at 46.
\textsuperscript{95} \textit{Id.} at 50.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at 57.
children, giving incentives to adopt orphaned children.\textsuperscript{99} Prior to the passage of the expansion of adoption options around 7,000 domestic adoptions occurred annually.\textsuperscript{100} In 2000, domestic adoptions increased to 56,000. Countries like China, Japan, and South Korea have seen significant decreases in fertility in recent decades.\textsuperscript{101}

F. \textit{Ethiopian and the U.S. Families}

Ethiopia is another nation that has been significantly present in intercountry adoptions with the United States. The high rates of adoptions from Ethiopia were closely related to catastrophic domestic events that caused widespread death, famine, and extreme poverty for the country. The decision to create avenues of international adoption between Ethiopia and other countries was a poor policy attempt to address serious human rights and political issues. More than 15,000 Ethiopian children have been adopted in the United States.\textsuperscript{102} The most significant rise in adoptions from Ethiopia were between 2000-2010. The AIDS crisis in Ethiopia in the early twenty-first century was covered in U.S. media as a dire humanitarian cause. An estimated one million children were orphaned by the AIDS crisis in the country.\textsuperscript{103} The U.S. Ambassador to Ethiopia warned the media attention would lead to an increase in interest for international adoptions, and as a result domestic actors looking to profit from the increased demand.\textsuperscript{104}

The number of licensed adoption agencies grew in Ethiopia along with the rate of intercountry adoption. In the capital city of Addis Ababa institutions were holding themselves out as orphanages but were temporary facilities where children were kept until they were delivered to adoptive

\textsuperscript{99} Id. at 58.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 16.
\textsuperscript{102} Casey Quackenbush \textit{Ethiopia Has Banned All Foreign Adoptions Amid Concerns over Abuse}, Time Mag., Jan. 11, 2018, https://time.com/5098300/ethiopia-foreign-adoption-ban/.
\textsuperscript{103} Bunn, \textit{supra} note 27, at 702.
\textsuperscript{104} Bunn, \textit{supra} note 27, at 702.
parents. Investigations by the government revealed that such orphanages did not have beds, clothes, or food storage, and children were held for a few hours to one day before they were transferred to a different location. The Ethiopian government and U.S. adoption partners began investigating suspicious activity in 2008 to discover that organizations were openly buying and selling children for international adoption. Unlike other countries with similar corruption, the United States did not halt adoptions from Ethiopia because it wanted to continue this relationship. The government took action to slow down the processes for international adoption and the United States worked with the Ethiopian government to implement a Pre-Adoption Immigration Review to investigate whether individual children can be legally adopted. Ethiopian children, particularly orphans, are still incredibly vulnerable to exploitation, despite the progress that has been made in reducing poverty.

III. Exploitation and Poverty

A. Poverty and Adoption

U.S. domestic welfare policy has demonstrated a disdain for impoverished homes and has used the child welfare system to separate children from their poor parents. The national consciousness has worked to move away from punishing families for poverty, but this development of sensitivity for families experiencing poverty has yet to extend to international families. Where domestic policy has moved away from targeting specific communities and removing children from their families, these changes have not been seen in the U.S. approach to international adoptions.

B. Global Adoption Market

105 Id. at 704.
106 Id.
The regulatory processes designed for intercountry adoption aim to protect against exploitation of children and their families. The long history of international adoption shows that exploitation has occurred and will continue to occur if the safeguards that are currently in place do not adapt to changing needs. The market for adoptable babies on an international scale is largely responsible for the violence and harm that has occurred in the context of international adoption.

Global capitalism has been prioritized higher than human rights, thus significant means of exploitation have been developed through these systems. The international system of states is one organization that functions within the global society, but global capitalism has created a distinct network of actors and interests that significantly impact policy taken on by state actors. The United States holds a significant position in both the international state system and the system of global capitalism. The conditions experienced by the global society as a result of U.S. political and economic hegemony is the responsibility of the United States to correct when there are human rights violations and exploitation. Due to the frequency of international adoptions involving the United States as the receiving state, the way that the United States carries out intercountry adoption influences the global system of international adoption.108

While the intercountry adoption program in China has been recognized as a model for process, child welfare institutions in China were exposed after the Hunan Adoption Scandal in 2005.109 Investigations discovered that the Hengyang Social Welfare Institute and other Chinese orphanages were purchasing children from intermediaries. Population control officials took children from their original families for the purposes of selling them to orphanages for intercountry adoption. Orphanages were incentivized by the compulsory donation program to participate in the trafficking of children.110 Though China has been party to the Convention, there were opportunities for

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109 Smolin, supra note 91, at 60.
110 Id. at 62.
private actors to take advantage of children and their families for profit.

In the legal adoption process in Ethiopia, there were opportunities for self-interested actors to manipulate the process. Police officers were incentivized to be complicit in falsified infant abductions. Family members were bribed to provide false testimony at hearings. Illegal actors were corrupting the critical process of determining whether the state or the orphanage could take custody of the child.111

The Department of State issued several notices to U.S. agencies about the Ethiopian government’s pause on intercountry adoption, but these agencies continued to make requests for Ethiopian intercountry adoption. Prospective families are required to pay fees for working with adoption agencies, and sometimes even provide financial support to the child before the adoption.112 The Department of State had to release additional notices because these agencies were submitting requests to collect fees from prospective parents, though it would not be possible to carry these adoptions out. Adoptive families are increasingly setting out for the birth parents of their adopted children. This issue has created a distinct industry created by companies that assist adoptive parents in finding the birth family.113

C. Coercion and Abuse in International Adoptions

It is not coincidental that the families experiencing the most severe poverty are the most vulnerable to exploitation in the international market for adoptable children. Families that are the most vulnerable, should be the most protected. Scholars have posed the analysis of the effectiveness and appropriateness of intercountry adoption through the lens of international human rights law, which is founded upon principles of fundamental dignity and equality. The current state of international adoptions functions on a market system that does not promote principles of dignity or equality but severely damages the rights of individuals by exploiting their vulnerability to adopt their children.114

111 Steenrod, supra note 104, at 5.
112 Bunn, supra note 27, at 708.
113 Seymore, supra note 38, at 184.
114 Smolin, supra note 105.
The correlation between successful adoption stories in a specific nation with increased press coverage of the atrocities occurring in that nation creates an interest for western families to adopt outside of their borders. Prospective U.S. families' increased interest in foreign adoptions can be characterized as demand for the supply of children in need of homes. The trend for many years now has been that the supply of adoptable children has decreased, while the demand from the United States has stayed the same. This creates a capitalist market response to increase the cost to adopting families and increase the supply of adoptable children.\(^{115}\) In the under resourced countries that are sending children to the United States, like Ethiopia, the adoption governing agencies do not have the resources to regulate every individual involved with these adoptions.

The international community does not have sufficiently clear policies on child laundering or trafficking to create consistent accountability.\(^{116}\) Ethiopian and U.S. officers began investigating adoptions from Ethiopia. Adoption agencies were found to have bribed families to relinquish their children, falsified documentation, and paid intermediaries for the buying and selling of children.

The United States lobbied in favor of delegating central authority functions to private entities because the adoption community in the United States likely would not ratify if the international adoptions were only conducted by public entities. Many countries elected to have exclusively public entities implement Hague Convention functions.\(^{117}\) Prior to the implementation of the Hague Convention, members of Congress expressed the importance of protecting the children’s interest by federal regulations and monitoring of adoption service providers.\(^{118}\)

The international community has responded to the increased need for protections for children and families particularly in the case of international adoption, and exploitation of poverty is the greatest threat. In 1966, the General Assembly adopted a resolution containing the International Covenant on Economic,

\(^{115}\) Steenrod, supra note 104, at 5.
\(^{116}\) Id. at 4.
\(^{117}\) Smolin, supra note 105, at 1060.
\(^{118}\) Id. at 1063.
Social and Cultural Rights. Set forth in this Covenant are rights emanating from “the inherent dignity of the human person.” 119 The Covenant recognizes the heightened need for protection of families, specifically mothers and children. The economic justice provisions of this convention are largely aspirational for the United States and most other countries, but they are critical justice goals to pursue. 120 President Carter’s administration worked to implement the Covenant on Economic, Social, and Cultural Rights in 1979, but the Senate has not taken any further action to ratify it. 121

U.S. foreign policy and civil society are reluctant to accept that economic and cultural rights should be taken seriously and pursued as a policy objective. The United States has categorically denied the existence of economic, social, and cultural rights for decades in policy, rhetoric, and culture. 122 U.S. policy is inconsistent with the Covenant on Economic, Social, and Cultural Rights in the obligations set forth in articles 11-14. These sections emphasize the right to food, housing, health care, and education, which in the United States are not recognized as a guaranteed rights. 123 The Convention requires that states work in cooperation with one another to achieve these goals “to the maximum of its available resources” which would require the U.S. government to fund programs that provide common good resources but have been politically controversial and charged. Where state actors are limited in their ability to regulate international adoptions, there has been devastating harm to families in sending and receiving nations alike. Within the anarchic state system, there is no central authority that can command change, but international tools have the potential to influence state actors.

120 Id.
122 Id. at 367.
123 Id. at 369.
Changes in International Adoption

Globally international adoptions have decreased dramatically, largely in response to the exploitation of children and families. The United States has been very concerned with resuming these adoptions in countries that have prohibited international adoption. Governments have shown preferences to domestic adoptions, and the result has been significantly fewer international adoptions.

Beginning with the repeal of the one child policy in China, intercountry adoptions have decreased significantly. The Chinese government has stopped the processing of intercountry adoption as a COVID regulation. China has significantly scaled back its participation in the international adoption market because of societal pressure against intercountry adoption. Countries that were sending the most children to the United States have taken steps to develop systems to take care of orphaned children within the country of origin.

The Ethiopian parliament removed the existence of adoption by foreigners from the Revised Family Code, essentially banning the practice. In 2017, the Ethiopian Prime Minister’s Office announced it was immediately suspending all intercountry adoptions. At such point Ethiopian officials were issuing notices to cases in progress that they were no longer going to carry out these adoptions. Then in 2018 the Ethiopian Parliament passed legislation that banned all intercountry adoptions effectively.

The Ethiopian government argued that the vulnerable children living in Ethiopia should be cared for by state services. Political observers have witnessed this policy change by the Ethiopian government come at a time of increased nationalistic policy, and political instability. The political sentiment from people involved in family welfare services is that nationality is not replaced by money. While implementing an effective ban on international adoption the government is also working toward a greater budget for facilities like orphanages to have more capacity.

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124 Martin, supra note 58, at 186.
125 Bunn, supra note 27, at 707.
126 Id.
127 Id.
128 Quackenbush, supra note 100.
129 Id.
In 2013 an American couple were imprisoned for the death of their adopted Ethiopian daughter and abusing their adopted Ethiopian son.131 Ethiopian and U.S. authorities reduced the number of adoptions from Ethiopia to the United States by 90% the same year.132 Advocates against intercountry adoptions from Ethiopia identify the disadvantages that women have in Ethiopian society. The pressure to give up their children can come from a cultural stigma against having children out of wedlock, or a lack of contraception and reproductive care.133

The following section takes into account the scholarly work on the matter of prohibition. Though this comment does not seek to take a position on whether a prohibition on international adoption is correct or not, the perspectives offered by the wealth of international law and human rights scholars demonstrate the tense political positions. Both proponents and opponents of intercountry adoption are commonly concerned with children that would be in need of a family in the absence of intercountry adoption.134

Proponents of international adoption argue that the best interest of the child is promoted through these adoptions. Where children would be either institutionalized or living on the streets, proponents believe that the superior living environment for the child is in an adopted family. Other supporters argue that international adoptions promote tolerance and cultural awareness to bring children from different cultural backgrounds to the United States.135 Intercountry adoption supporters argue that “children without families” should be seen and treated as a collective issue that the global community should address.136

Proponents approach the human rights principles in intercountry adoption by questioning first whether the institutionalization of children, where adoption is possible, is a violation of the human rights principles.
This question asks whether children have a right to a family, as well as a right to be protected from the harms of institutionalization. The scholars, state officials, and other actors that advocate for the proliferation of intercountry adoption attempt repeatedly to address the issues surrounding exploitation. One criticism from proponents is that there is an undeserved negative treatment of the benevolent U.S. families that are seeking a legitimate and equally beneficial means to expand their family.\textsuperscript{138}

A strategy to deflect criticism from intercountry adoption is to remove the concept of a “market” of children from the discussions around intercountry adoption, even though the reality is U.S. families are spending exorbitant amounts of money in intercountry adoptions.\textsuperscript{139} While families are paying private and public agencies to carry out the adoption process, those agencies are being sufficiently compensated for their services. The adoption service providers are incentivized by their profit motivations to continue providing the logistical services necessary to conduct an intercountry adoption.

Critics of intercountry adoption are concerned with the imperialist implications where the actors from the more powerful nation remove a child from their home country and force the child to assimilate to a new, argued as better, way of life. This is distinct from past forms of colonialism that introduced a set of values to a new country with the objective of extracting resources. Opponents of intercountry adoption often argue that children are the most significant resource of any nation.\textsuperscript{140}

Professor David Smolin’s call for a moratorium on intercountry adoption addresses the ethical principles that are violated in intercountry adoption. Smolin speculates that a partial moratorium may not suffice in providing legitimate protections, and may create discriminatory practices largely based on political relationships and international norms.\textsuperscript{141} The shift in perspective demonstrated in Smolin’s article is based on the overwhelming evidence that exploitation and violations of international human

\begin{flushright}
\textsuperscript{137} Id. at 199.
\textsuperscript{138} Id. at 205.
\textsuperscript{139} Id. at 216.
\textsuperscript{140} Martin, supra note 58, at 185.
\end{flushright}
rights standards are more prevalent in intercountry adoption than previously recognized.\textsuperscript{142}

The U.S. policy on adoption is an exclusivist model that removes the legal relationship between the adopted child and their birth parents.\textsuperscript{143} The consequence of exporting this legal philosophy to nations participating in intercountry adoption with the United States is abundant exploitation because the idea of relinquishment is not transferable to all cultures. Families that are relinquishing their children under dire circumstances may have the expectation that their child will remain legally tied to their family and community identity.\textsuperscript{144} The right of the child to identity and culture relies heavily on their perception of their birth family. In compliance with the UNCRC and The Hague Convention, there should be openness in adoptions to connect adopted children to their country of origin.\textsuperscript{145}

The opposing sides of the intercountry adoption debate are primarily concerned, on the one hand, with the prevention of extreme poverty and abandonment of children globally, and on the other hand concerned with the imperialist implication of developed nations taking children from their home countries that have fewer resources.\textsuperscript{146} Proponents of intercountry adoption believe, at times rightfully so, that children's lives are being saved and horrible exploitation like child prostitution, pornography, or forced labor are being avoided. The analysis of proponents views the reality of institutionalized children as more important than cultural identity or baby selling.\textsuperscript{147} This evaluation is based on a framework that separates the history of colonialism, imperialism, and global capitalism from the individual rights of children who deserve safety and even a family. A contradiction exists between the best interests of the child and the nation's right to possess its children. However, this contradiction does not consider that children should have a right to possess their culture.

\begin{itemize}
\item \textsuperscript{142} Id. at 524.
\item \textsuperscript{143} Smolin, supra note 83, at 443.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Seymore, supra note 39.
\item \textsuperscript{146} Smolin, supra note 83, at 181.
\item \textsuperscript{147} Id.
\end{itemize}
Conclusion

The U.S. policy approaches to international adoption have often resembled relational control theory where international relationships are exercised as a means to further the country’s hegemonic agenda. The global capitalist approach to international adoptions is a product of past colonial and imperialist policies that have an enduring legacy in states with fewer resources. The highest rates of adoptions are closely related to catastrophic domestic events that caused widespread death, famine, and extreme poverty in nations like Ethiopia, China, and Vietnam. The decision to create avenues of international adoption with children flowing to nations where there are abundant resources is an inherently flawed policy attempt to address pervasive human rights and political issues.

Participation in international agreements and adherence to agreed upon frameworks is crucial to equitable international relationships that are free from exploitation. While the international community is concerned with economic justice and the dehumanization of poverty, the United States has not ratified the UNCRC or the International Covenant on Economic, Social, and Human Rights. While these tools do not come with means of enforcement, and are largely aspirational, these agreements will hold U.S. foreign policy to a higher standard of care. As established in this Comment, the United States holds a great deal of influence on the experiences of thousands of people looking to build their families. The expectation of this government should be to provide the greatest level of protection from exploitation to the most vulnerable communities.

Saba Deutschmann
Comment, Across Oceans, Across Hearts: International Family Reunification

I. Introduction

The United States has been the most popular destination for migrant families, whether due to aspiration, opportunity, a promise of better life, or its diverse palette of cultures and nationalities. Specifically Caribbean migrants move to the United States because of the increased economic hardship and disenchantment they face. The growing economy, high wages, and employment opportunities, of the United States were also incentivizing factors leading to their migration. However when they migrated they had the ability to choose from four migration forms. The parent could chose to migrate to the country of their choice for up to six months at a time to work in the country. This is categorized as seasonal migration. Additionally, the parent could chose to migrate either with their spouse or alone with the intention of sending for the rest of their family at a later date, which is a serial migration. Or the parent could migrate for a defined time or indefinitely but still have no intention of having their children live in the overseas

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1 Anna Fleck, Migration: The Countries That Attract the Most Migrants, Statista (last updated Sept. 13, 2023), https://www.statista.com/chart/30815/top-destination-countries-for-international-migrants/#:~:text=The%20United%20States%20has%20been,than%2050%20million%20in%202020.
3 Id.
5 Id.
6 Id.
This would be parental migration. The last form of migration is family migration where the parents migrate with their entire family. The most common form of migration for Caribbean migrants is parental migration. Although the parents intend to retrieve the child at some point in the future to bring them into the United States, this process may not always happen the way they expected. Sometimes due to economic factors or legal barriers, another family member may be in a better position to bring the child into the United States. In this circumstance, they would seek reunification of the family through adoption.

Adopting family members who are residents of Caribbean countries while being a U.S. citizen is an issue that is not widely discussed but impacts migrant families from a number of countries. This comment focuses on the adoption procedure that families are expected to go through in both the United States and the respective Caribbean countries. In Part II, the comment will begin by outlining the different paths a family can take to bring the family member into the United States, particularly focusing on the Non-Convention Process and the Family-Based Petition process. In Part III, it will discuss the requirements and qualification for an adoptive parent to adopt a child in Caribbean countries.

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7 Id.
8 Id.
9 Id.
12 Kathleen M. Tana, A Recent Trend in International Adoptions, LEGAL INTELLIGENCER, July 12, 2016, at 1, https://plus.lexis.com/apipermalink/4a39d26c-6e88-4086-a891-b3a9ef3a3ab/?context=1530671. Additionally in some states, like Pennsylvania, this is referred to as “kinship” adoption. Id. See also infra discussion in text at notes 177-188, where other countries refer to it as “kupai omasker.”
13 Id.
Part IV focuses on the barriers that families face when attempting to comply with domestic and overseas adoption laws. Some of the challenges include residency, finances, and family disputes.

Adoption is not a new concept; however, in more recent years people increasingly have started to consider international adoptions before domestic ones. Adoption is one of the main ways for families who are separate by oceans to seek reunification. The word “family” can be defined either in the physical/biological sense or based on geography.

[F]amily is broadly defined to include, the spouse of the claimant, or any parent, child, brother sister, grandparent, grandchild, son-in-law, or daughter-in-law of the claimant or the claimant’s spouse, including step, foster and adoptive relationships, or any guardian or person with whom the claimant has assumed reciprocal rights, duties, and liabilities of a parent-child, or a grandparent-grandchild relationship, whether or not the same live in a common household.

A family also includes those with or without child, an elderly family, a near-elderly family, a disabled family, and a single


16 Id. Additionally the international adoption process varies from the domestic adoption process, where it includes an application, a complete home study by a state licensed agency, and a dossier of the applicant’s documents that the other country would need, followed by the adoptive parent seeking permission from the U.S. Citizenship and Immigration Services (UCIS). Once the UCIS gives its preliminary approval, the agency chosen by the adoptive parent will handle the foreign country’s adoption process. The adoptive parent and agency’s representative will travel to meet the child’s family. The adoptive parent will get a visa for the child from the U.S. embassy and then will be required to perform their state’s adoption process. Id.


19 Id. See also 25 U.S.C.S. § 4103(5) (noting that a person is considered elderly if they are at least 62 years old).
person. Courts have also ruled that under compelling circumstances, a minor child of the claimant that requires care and supervision and for whom there is no reasonable alternation is family.

When defining family based on geography, courts consider a spouse, child, parent, sibling, or a person who regularly resided in the same household to be family. In some cases, people who are not blood relatives but who live together and occupy a single house-keeping unit with single culinary facilities are considered family. The general definition of family is distinct from that of an immediate family which is defined by *Black’s Law Dictionary* as, “(1) A person’s parents, spouse, children, and siblings; (2) A person’s parents, spouse, children, and sibling, as well as those of the person’s spouse.” Stepchildren and adopted children are usually also considered to be immediate family members. Additionally, certain states have broadened the definition of immediate family to include any dependent relatives who reside in the individual’s household.

As briefly indicated, a family can get separated for numerous reasons. If the family lacks access to resources, their abilities to obtain a visa or have opportunities to migrate into the United States are much lower than that of working class persons. The method of migration often depends on the economic status of the family. It might be cheaper to move to a foreign country alone because the immigrant fee for the United States is $220, and the only way to bypass the additional fees for children is if they are entering the United States as an orphan or under the Hague adoption program. Families with fewer economic resources would not be able to afford the immigrant fees on top of securing housing for their family once they get into the United States, especially if they are entering unemployed and the first of their family to be in the

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22 S.C. Code Ann. § 16-3-1900(4).
25 Id.
States. This financial barrier can cause families to separate in the hopes that one person can start building a life for their family who will soon join them in America. On average, most Caribbean immigrants obtain lawful permanent resident status in the United States through family reunification or humanitarian channels. However, when a family member or parent moves abroad, it can take them anywhere between two to ten years or more to satisfy the legal, financial, and immigration requirements of countries that allow them to bring their family over. The separation between the parent and the children during this period categorizes the child as a “barrel child.”

Dr. Crawford Brown coined this term to be used for children who are waiting to reunite with their migrant parents. Originally the term was interchangeable with “barrel pickney” and was used as a curse word to ridicule children who were separated from their migrant parents.

A family may seek to adopt a relative to combat the detriments a “barrel child” might face. The family would need to proceed with intercountry adoption because the child is not a citizen of any U.S. State or territory. Intercountry adoption is the process of adopting a child from a country other than one’s own through permanent legal means. The child will then be brought into the United States and reside in the state where the adoptive parent has residency and live with the parent permanently. (“Parent” can


31 Id.


be used to refer to biological caregiver as well as an upbringer, meaning any person who cares for, nurtures, and establishes a close, enduring relationship, attachment, or bond with the child.\(^{35}\) Intercountry adoption is important because parental migration, or any of the other forms of migration besides family migration, can cause children to face issues of grief, loss, and attachment.\(^{36}\) The long separation could also give rise to depression, emotional distress, and behavioral disorders.\(^{37}\) Intercountry adoption offers children not only the ability to be reunited with their family but to grow up in a loving home.\(^{38}\) In some circumstances when the children that were left behind remain with their relatives overseas, they do not receive the same care, and allowing intercountry adoption provides another pathway for children to get that care, security, and love from their immediate family abroad.\(^{39}\) The Preamble in the Hague Adoption Convention states that for a full and harmonious development of the child’s personality they should grow up in a family environment in an atmosphere of happiness, love, and understanding.\(^{40}\) It is important to acknowledge that sometimes this suitable family cannot be found in the child’s country of origin.\(^{41}\) If the families are able to reunite, the child would return to living in a permanent, stable routine in a loving home.\(^{42}\) This would increase their chances of being successful in school and social settings.\(^{43}\) The reunification would also promote better mental


\(^{36}\) Pottinger & Brown, supra note 4, at 3.

\(^{37}\) Jokhan, supra note 35.


\(^{39}\) Id.


\(^{41}\) Id.

\(^{42}\) Reunification: The Ultimate Goal of Foster Care, NEBRASKA CHILDREN’S HOME SOC’Y (NCHS) (Dec. 8, 2022), https://blog.nchs.org/reunification-the-goal-of-foster-care.

\(^{43}\) Id.
health, reduce anxiety, and allow the children to live happier lives. Researchers have found that having the support system of family nearby enables children to be more resilient and overcome the challenges they might face of adjusting to life in a new country.

II. Methods Available for Reunification

U.S. immigration law provides three different processes through which a child may immigrate to the United States on the basis of intercountry adoption. However, to adopt a child and bring that child into the United States, the individual must be eligible to adopt under U.S. federal and state law. The individual must be a U.S. citizen. If they are unmarried, they need to be at least twenty-five years old. However if they are married, the child must be jointly adopted. This is applicable to couples who are separated and not divorced, and both individuals must be U.S. citizens. The adopting individual(s) must also meet the requirements in their criminal background check, fingerprinting, and home study.

Nonetheless because adoption law is a subsection of family law, it is primarily governed by statutes law, which permits each state to establish specific regulations and statutes. These requirements can

44 Id.


48 Id.

49 Id.

50 Id.

51 Id.

52 Id.

vary from the U.S. federal adoption requirements. For instance, in Maryland the adoptive parent must be twenty-one years or older to adopt. In New York the adoptive parent must be at least eighteen years old. And in Idaho, the adoptive parent has to be either at least twenty-five years of age or fifteen years older than the child they are adopting. Additionally, every state can change the marital status requirement for adoption. Maryland allows any adult to adopt, and if they are married, spouses will be required to jointly file to adopt the child. For New York the adoptive parent can be an unmarried person, a married couple, or two unmarried adult intimate partners. Idaho does not have a marriage requirement for adoption. In contrast to some Caribbean countries, all fifty U.S. states allow same-sex couples to adopt.

Once the individual is eligible to adopt, they can proceed by choosing one of the ways offered in the United States for reunification. After the individual applies with the United States Citizenship and Immigration Services (USCIS), they will need to file either Form I-800A or I-600A. The parent will choose either Form 1-800A or I-600A depending on the country they are adopting from. People in countries that are a party to the Hague Adoption Convention use the I-800A form, while people in countries that are not a party to the Hague Convention will file an I-600A form. The family member can choose to proceed with the

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56 Idaho Admin. Code § 16.06.01.762 (2023).
61 Id.
62 Id.
63 Id.
Convention Process, the Non-Convention Process, or the Family-Based Petition Process.

A. Non-Convention Process

The Non-Convention Process is also known as the “orphan” process. This requires that the child qualify as an orphan under U.S. immigration law. The adoptive parent would need to file both Form I-600A, an application for advance processing of an orphan petition, and Form I-600, a petition to classify an orphan as an immediate relative. The first form must be filed before the child’s sixteenth birthday unless the adoptive parent already has adopted the child’s birth sibling who immigrated or will immigrate as either an orphan or an adopted child. In that case, the forms must be filed before the child’s eighteenth birthday.

B. Family-Based Petition Process

The Family-Based Petition process, unlike the Convention and Non-Convention process, can only be used by a parent to adopt their son or daughter. Children who are unmarried and under the

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66 Id.


69 Id.


71 Id.

age of twenty-one are eligible to be adopted under this process. Siblings seeking to adopt their sibling can also use this avenue for reunification. Under the family-based petition, the child must be adopted while under the age of sixteen or be a natural sibling of a child who was adopted by the same parent while under the age of eighteen. The child must also be in the legal and physical custody of and reside with the adoptive parents for at least two years before the adoptive parent files an I-130 petition. This is not the case if the child is being adopted from a country that is a party to the Hague Convention. In that case, the two-year legal and physical custody period must be satisfied outside of the United States for the Form I-130 to be approved. The two-year period does not need to be continuous and may be counted in the aggregate. It may also be waived if the child being adopted is being abused.

In addition to intercountry adoption, family members could try to bring their families into the country through family-based immigration. Under this concept, the person seeking to live permanently in the United States would be required to have an immigrant visa (IV). They would need to be sponsored by an immediate relative who is at least twenty-one years old and a U.S. citizen. Immigration law also allows the immediate relative to be a U.S. lawful permanent resident (LPR). Although this is another avenue that separated families can explore, the immediate relative visa and the family preference visa have their own restrictions and requirements. If a family member chooses to proceed with an immediate relative visa, as a U.S. citizen they are only allowed to file

73 Id.
74 Id.
76 Id.
77 Id.
78 Id.
79 Family-Based Petition Process, supra note 72.
80 Id.
82 Id.
83 Id.
84 Id.
a visa petition for their spouse, son or daughter, parent, or brother or sister. On the other hand, if the family member chose the family preference visa, the lawful permanent resident can only file for their spouse or unmarried son or daughter. The major difference between these two visas is that the immediate relative visa is not subject to any yearly limitation, while the family preference visa is capped at 23,400 visas a year.

Both visas ultimately leave individuals who may not fall under either category without resolution. These provisions do not allow for siblings who may not meet the requirements under an intercountry adoption to seek reunification under a family-based visa to bring their sibling into the country. The same issues will be faced by aunts and uncles who seek to bring in their nephews and nieces under these visas. Children of a certain age may also have the opportunity to seek reunification through a work visa or an education visa. Although these methods of reunification are temporary, they do allow the child to be with their parents for a certain period. The duration of the visa depends on the specific conditions tied to it. For instance, a school visa concludes upon the completion of the child’s education, while work visas expire either when the child ceases employment or after a span of three years.

Nonetheless the process for these visas can be highly competitive and extremely expensive. U.S. immigration offers several types of

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85 Id.
86 Id.
green cards,\textsuperscript{90} all which have varying eligibility, filing requirements, availability, and associated fees.\textsuperscript{91}

\section*{III. Overseas Procedure for Reunification}

One of the issues Caribbean families may face when seeking reunification is the inability to adopt from the country where their family is. Although there are only thirteen Caribbean countries out of 193 countries,\textsuperscript{92} several of these islands ban American citizens from adopting there. This may result in people having to think of other ways to reunify their family. It is astonishing that Caribbean countries would stop American citizens who are more than likely originally from that island from adopting their relatives and bringing them into the United States. There are 4,494,000 Caribbean immigrants in the United States.\textsuperscript{93} Of that population, 17.2\% are Jamaican, 30.3\% are Cuban, 26.0\% are Dominican (Dominican Republic), 15.6\% are Haitian, 4.7\% are Trinidadian, 4.7\% are Bajan, 1.2\% are Bahamian, 0.8\% are Dominican (Dominica), 0.7\% are Grenadian, 0.4\% are Vincentian, and the rest are from some island in the West Indies.\textsuperscript{94} Additionally, these countries set different requirements for applicants when considering their eligibility for intercountry adoption. These requirements can vary; some may be very specific and significant, while others might be more general and not the sole determinants in a case.\textsuperscript{95}
A. Marital Status

Whether the parent or relative is married, single, divorce, or separated in some countries will impact their eligibility to adopt. Jamaica\(^96\) and the Dominican Republic do not recognize same-sex marriage. The Dominican Republic furthers its adoption law by restricting heterosexual couples from adopting by requiring them to have been married for at least five years prior to adopting.\(^97\) It also does not allow single applicants to adopt children from the Dominican Republic.\(^98\) Similar to the length of marriage restrictions, Haiti only allows couples who have been married ten years to adopt.\(^99\) St. Vincent and the Grenadines allow single and married individuals adopt\(^100\) as long as they are compliant with the age requirement.\(^101\)

B. Income

Some countries like the Bahamas will consider the income of the applicant but do not have a required earning amount in place for eligibility.\(^102\) Similarly in Dominica, the adoptive parents are required to be employed and have means to support the child.\(^103\)


\(^97\) Dominican Republic Adoptions, Agape Adoptions, https://agapeadoptions.org/dominican-republic#:~:text=One%20adoptive%20parent%20must%20be%20a%20US%20citizen.&text=30%20%2D%2060%20years%20old%20and%20child%20you%20plan%20to%20adopt.&text=Only%20heterosexual%20couples%20who%20have%20adopted%20from%20the%20Dominican%20Republic (last visited Oct. 31, 2023).

\(^98\) Id.


\(^101\) Id.

\(^102\) U.S. Embassy Nassau, supra note 95.

C. Residency

The adoptive parent will be a resident of the United States, but some Caribbean countries ask them to visit the country for a specified amount of time or frequency. Generally Barbados does not require applicants to reside in the country but if the applicant chooses to have the adoption take place in Barbados as opposed to the United States, they will be required to reside on the island for at least eighteen months. If they want to complete the adoption in the United States, they would only need to go to Barbados for a few weeks to attend the High Court hearing for their adoption license. Meanwhile other countries actually require the adoptive parent to be a resident of the country. For instance, Grenada does not allow non-residents or individuals not domiciled in Grenada to adopt from Grenada.

D. Age

The most common requirement for intercountry adoption is the age of the applicant. The age requirement can be either a minimum age or an age difference. In Dominica the adoptive parents must be twenty-five years old. St. Vincent and the Grenadines set their minimum age to adopt at twenty-one years old. The Bahamas requires adoptive parents to be twenty-five years old or at least twenty-one years older than the child. The exception to this requirement is if the applicant is related to the child and then they must be at least eighteen years old. And in Haiti the adoptive parent

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105 Id.
107 Dominica, supra note 103.
108 Saint Vincent and the Grenadines, supra note 100.
109 U.S. Embassy Nassau, supra note 95.
110 Id.
must be older than thirty-five if they are single. But if they are married, only one of the parents must be older than thirty-five.

E. Others

A few Caribbean countries look at other variables when considering adoption from a U.S. citizen in their country. Haiti requires the married couple to be childless in order to adopt. The Dominican Republic (DR) sets its education requirement for adoption to be at least a high school diploma or an equivalent. The DR also reviews the adoptive parents’ criminal violations. For adoption in the Dominican Republic criminal violations cannot have occurred within the last ten years prior to adoption. And if prospective adoptive parents have any history of domestic violence, sexual abuse, or child abuse, they would not be allowed to adopt.

In St. Vincent and the Grenadines the child and the adoptive parent are required to meet prior to the finalization of the adoption. The Bahamas considers whether the person applying for the adoption of the child is the mother or father; if they are neither they must be at least eighteen years old and a relative of the child.

The adoption laws of some Caribbean countries are more nuanced about whether U.S. citizens can adopt. In Cuba the law does not specifically prohibit foreigners from adopting children, but adoptions by U.S. citizens are extremely rare and ultimately unsuccessful. However, some of the adoption laws in Caribbean

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112 Id.
113 Id.
114 Dominican Republic Adoptions, supra note 97.
115 Id.
116 Id.
117 Id.
119 U.S. Embassy Nassau, supra note 95.
countries plainly state they do not allow U.S. adoptions. In the case of Grenada, this means that a U.S. citizen originally a resident of Grenada, now residing in a U.S. state would not be able to adopt anyone from Grenada regardless of whether they are relatives or not. It is almost a reversing effect and would call for the family to migrate back to the country and reunify there instead of the United States. One of the problems this poses is some Caribbean countries face a great deal of political uprising and it might be the reason the individual migrated and sought out a method to bring their family into the United States.

While some countries are opposed to U.S. adoptions, other Caribbean countries are open to the idea. For instance Trinidad and Tobago will match the U.S. citizen with a child. This means they will refer the adoptive parent to a child, not necessarily allow them to pick a specific child in the country. Then the family will decide whether they will be able to meet the needs of the child and provide permanent family placement for the referred child. If they are able to meet the needs of the child, according to Trinidad and Tobago’s adoption law, during the probationary period the country will grant the adoptive parents temporary custody of the child. The adoption board will closely supervise the child and monitor how the child reacts with the family.


How to Adopt from Trinidad and Tobago, Adoption, https://adoption.com/wiki/How_to_Adopt_from_Trinidad_and_Tobago (last visited Oct. 31, 2023).

Id.

Id.

Id.
concern with intercountry adoption is the effects of removing the child from the country in which they were born and reared and placing them in a new country with different cultures and societal standards. The adoption law in Trinidad and Tobago embodies the heart of adoption; it favors adopting children to put them in a better off position and environment than the ones they were in. Joyce A. Ladner, in a study observing biracial adoption (whites adopting black babies), highlighted that many people adopt because they want a child, they want to expand their family, or they are incapable of conceiving naturally. By not restricting who gets adopt, Trinidad and Tobago helps to eliminate the number of children who remain in its public system and allow everyone an equal chance to adopt. It may be disappointing for a family seeking to adopt their specific relative, but there may be other avenues available for them to reunite.

Caribbean countries that are party to the Hague Convention are not necessarily opposed to U.S. adoption, but they will attempt to place the child with a family in the country before determining if they qualify for intercountry adoption. For instance the Dominican Republic is a party to the Hague Convention and will try placement in the country before internationally. On the hand, Trinidad and Tobago is not a party to the Hague Convention and requires the consent of the parents or a death certificate of parents before they allow the child to be eligible for intercountry and at-home adoption.

Intercountry adoption requires the family member to comply with the adoption laws of the country they are adopting from in addition to their U.S. state and federal adoption laws. Caribbean countries vary as to who is allowed to adopt in their country and

128 Hollinger, supra note 34, at § 10.01.  
129 See In re Dependency of J.S., 46 P.3d 293 (Wash. Ct. App. 2022) (holding that it was in the child’s best interest to remain with the parents that reared him (and be adopted by them) rather than be placed in the custody of his biological parents because the child was observed to be happy and healthy in their care).  
132 Id.  
133 Who Can Be Adopted from Trinidad and Tobago, supra note 126.
who can be adopted. For instance, Jamaica has residency, age, and marriage requirements. First, the U.S. citizen must seek either an adoption license or an adoption order. The adoption license will allow the child, who is a Jamaican citizen, to be taken into the United States (identified as a “Scheduled country”) and continue their adoption process in the United States. If this is the route desired by the family, they are generally expected to travel to Jamaica at least twice a week to meet the Child Development Agency (CDA) and apply for a visa. They are not required to reside in Jamaica or to attend the court hearing. The Jamaican court does reserve the right to request the adoptive parents’ presence in court. The benefit of the adoption license is that it is available for U.S. citizens who are adopting a relative. There are some rare cases where a U.S. citizen can have dual citizenship in another country and if they identify as such they would need to seek an adoption order for a Jamaican adoption. Under an adoption order, the adoptive parent is required to reside in Jamaica with the child under the supervision of a social worker for at least three months. This residency requirement is waived if the prospective parents are, first, Jamaican nationals, and second, adopting a relative. When a U.S. resident is adopting a relative (i.e., brother, sister, niece, or nephew), they are required to be at least eighteen years old. A family may choose to ask family friends to take the role of adoptive parents and seek intercountry adoption of the child and in this situation the prospective parent must be twenty-five years old or older because they are not related to the child they are adopting.

134 Jamaica, supra note 96.
135 Id.
136 Id.
137 Id.
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Adoption, The People’s Law Library of Maryland, https://peoples-law.org/adoption (last visited Oct. 31, 2023). For example, in Maryland, a parent who is trying to adopt a child through intercountry adoption would not be in compliance with Maryland state law because the state only permits adults who are not the child’s natural parent to petition the court for adoption. Id.
144 Jamaica, supra note 96.
Although Jamaica does not ban single adoptive parents from seeking adoption in Jamaica, they do not allow people in same-sex marriages to adopt. Jamaica will therefore deny any same-sex couple an adoption order or license regardless of whether they are a relative of the adopted child. Alternatively, they do not have an income requirement for the adoptive parents and will consider their medical condition when evaluating the eligibility to adopt.

Similar to the United States, Caribbean countries place restrictions on who can be adopted from their country. In Jamaica the child must meet all the requirements to be eligible for adoption, which is assessed by the CDA. The CDA conducts the visits to the child’s place of residence, and undertakes interviews and counseling with the child and their parents (whether that be legal guardian or the one who reared them) and the prospective adoptive parents. Conducive to any adoption, the parent must relinquish their parental rights or have their rights separated by the state. If not, they would need to provide consent to the adoption before it is finalized. This is the process for adopting children between six weeks and eighteen years old. Jamaica does not allow adoption of children younger than six weeks. If the child is of the required age, they will undergo a medical examination in Jamaica before the adoption order or license is approved. Jamaica is, however, one of the Caribbean countries that does not have an abandonment or waiting period for adoptions.

IV. Barriers to Reunification

There are several moving pieces for families who seek to reunify using intercountry adoption. Some countries prohibit adoption altogether and others only prohibit international

145 Id.
146 Id.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
155 Id.
156 Hollinger, supra note 34, at § 10.01. See also Family-Based Petition Process, supra note 72 (stating that if the family chooses to do the family-based
adoption.\textsuperscript{157} Countries that do allow international adoption typically have laws and regulations that present serious difficulties for the adopting parent.\textsuperscript{158} In addition to those difficulties, the parents must comply with the U.S. government’s legal restrictions on international adoption and the barriers that prevent people from adopting become ones that only the privileged can overcome.\textsuperscript{159} The different laws can also cause families to encounter timeline issues. For instance, although in Jamaica only children between six weeks and eighteen years old can be adopted,\textsuperscript{160} the adoptive parent under U.S. adoption law must file the proper form before the child’s sixteenth birthday.\textsuperscript{161}

The age restriction placed on adoption in Caribbean countries is also a barrier, particularly if a relative is trying to adopt their sibling. Apart from the state specific age requirements, a country may have a different age requirement which can cause the adoptive parent to be in compliance with their state adoption laws but not with the country’s.\textsuperscript{162} It becomes tricky if the child they are adopting is turning sixteen soon and they must file before their sixteenth birthday in American, but the adoptive parent is not of age to adopt in the respective country. In the Dominican Republic, an adoptive parent needs to be at least fifteen years older than the child they plan to adopt.\textsuperscript{163} Barbados on the other hand has two different age requirements depending on if the adoptive parent is related to the child.\textsuperscript{164} If related, they need to be at least eighteen years old.\textsuperscript{165} However, if they are not related, one parent needs to

\begin{footnotesize}
\\textsuperscript{157} Hollinger, supra note 34, at § 10.01.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Jamaica, supra note 96.
\textsuperscript{161} Id.
\textsuperscript{162} U.S. Embassy Nassau, supra note 95. For example, in Bahamas, once the parents are related to the child they are seeking to adopt, they can be eighteen years old or older, but there are only six out of fifty states in the United States that would allow the U.S. citizen to complete an intercountry adoption at eighteen years old. Who May Adopt, Be Adopted, or Place a Child for Adoption? Summary of State Laws, CHILD WELFARE INFORMATION GATEWAY 2, https://www.hopscotch-adoptions.org/pages/pdfs/Who_May-Adopt.pdf (last visited Oct. 31, 2023).
\textsuperscript{163} Dominican Republic Adoptions, supra note 97.
\textsuperscript{164} Barbados, supra note 104.
\textsuperscript{165} Id.
\end{footnotesize}
be twenty-five years old and at least eighteen years older than the child.

Ladner reports on interviews with Vicky and Harold. They live in a suburb outside of an eastern city and have no biological children of their own. Vicky at the time of the interview was twenty-seven, a Catholic and adopted. Harold was thirty-six at the time of the interview and Jewish. The couple adopted four children, Pam, Charles, Judy, and Barbara. Although this was not an intercountry adoption, when they went to adopt their first child, they were barred from adoption because although Harold was over twenty-one, Vicky was only twenty. In some states this would not be an issue because one of the adoptive parents has met the required age, but in some states this is not the case. Vicky had to wait until she was of the statutory age in her state to proceed with the adoption.

Satisfying the age requirements for who can adopt, who can be adopted, and when to file with the U.S. Immigration is a difficult combination of conditions. In an ideal world, a family with average financial standing could proceed with the adoption process and face no issue. But, in the real world, the requirements for adoption abroad and at-home share very little overlap. Families may be placed in situations where they need to reside in the country for months at a time just to be able to proceed with the adoption, but this time off means they may be away from work which would result in lower wages earned. It becomes a never-ending cycle where to move forward, families find themselves moving backward.

Likewise, despite the understanding between parents who conduct parental migration and the relatives left to care for the child, that the child will eventually migrate too, the latter may still feel less than happy when the child prepares to leave their custody. Some rare occasions present themselves where the parents that reared the child are functioning parents; under those

166 Ladner, supra note 130, at 12. These are not the names of the actual interviewees, changed for Ladner’s publication purpose. Id.
167 Id.
168 Id.
169 Id.
170 Id. at 13-17.
171 Id. at 13.
172 Id.
circumstances the child would not be categorized as abandoned or surrendered and as a result would not be eligible for adoption.\textsuperscript{173} This can slow down the adoption process because adoption starts with the consent or termination of the parental rights;\textsuperscript{174} otherwise, the child will not qualify as being adoptable.\textsuperscript{175} The rearing parent may have the child’s best interest in mind and think the child should stay with them because removing them from the country, to a new country with a various cultures and racial and ethnic characteristics, may do more harm than good.\textsuperscript{176}

Consider the case of \textit{In re Adoption of D.J.F.M.} where an aunt and uncle sought adoption of their ten-year old nephew.\textsuperscript{177} The nephew was from Honduras but had been living in the United States for five years under the care of his aunt and uncle.\textsuperscript{178} His mother brought him into the United States with a nonimmigrant visa\textsuperscript{179} to get his leukemia treated.\textsuperscript{180} During the early days of his stay, the probate court granted his aunt temporary guardianship.\textsuperscript{181} After his doctor informed them that he would need to stay in the United States for continued monitoring and treatment, his parents relinquished their parental rights allowing the aunt and uncle to adopt him.\textsuperscript{182} However, the trial court denied the petition to adopt because under Honduran adoption law the aunt was unable to

\begin{thebibliography}{99}

\bibitem{173} Hollinger, \textit{supra} note 34, at § 10.01.
\bibitem{174} John Gregory et al., \textit{Understanding Family Law} 211 (4th ed. 2013). Termination of rights can be either consensual or involuntarily. Involuntary includes statutory grounds for termination under abandonment, child abuse, neglect, or dependency, non-support, incarceration, or mental illness. Some exception to termination of parental rights is if the adoptee is an adult or the child is an orphan. \textit{Id.}
\bibitem{175} \textit{Id.}
\bibitem{176} Hollinger, \textit{supra} note 34, at § 10.01.
\bibitem{177} \textit{In re D.J.F.M}, 643 S.E.2d 879, 880 (Ga. Ct. App. 2007).
\bibitem{178} \textit{Id.}
\bibitem{179} See generally \textit{Requirements for Immigrant and Nonimmigrant Visas}, U.S. Customs and Border Protection, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas (last visited Nov. 1, 2023) (defining nonimmigrant visas as visas that are issued to foreign nationals that want to enter the United States on a temporary basis for tourism, business, medical treatment, or certain types of work).
\bibitem{180} \textit{D.J.F.M.}, 643 S.E.2d at 880.
\bibitem{181} \textit{Id.}
\bibitem{182} \textit{Id.}
\end{thebibliography}
adopt the nephew.\textsuperscript{183} Honduran adoption law requires the parent of the adoptive child to be dead; surrendering their rights while living would not be valid for adoption.\textsuperscript{184} The trial court also examined federal adoption law, highlighting that the nephew did not have a valid visa and the aunt and uncle failed to comply with certain requirements established by the U.S. Bureau of Citizenship and Immigration Services.\textsuperscript{185} On appeal the court found that the trial court erred in applying the intercountry adoption statute instead of the relative adoption statute.\textsuperscript{186} Under the Georgia statute § 19-8-7,

\begin{quote}

a child who has any living parent or guardian may be adopted by a relative who is related by blood or marriage to the child as a grandparent, great-grandparent, aunt, uncle, great aunt, great uncle, or sibling only if each such living parent and each such guardian has voluntarily and in writing surrendered to that relative and any spouse of such relative all of his or her rights to the child for the purpose of enables that relative and any such spouse to adopt the child.\textsuperscript{187}
\end{quote}

The court reversed the ruling of the trial court under this statute and held that Honduras’s law is irrelevant for matters of relative adoption in Georgia, as well as the child’s immigration status.\textsuperscript{188} By having a relative adoption statute, Georgia understands the dilemmas families might face when they are trying to reunite, but the law calls for a specific type of abandonment, surrender, or relinquished right.

Another barrier parties might run into for intercountry adoption is the cost associated with the adoption process. Filing the I-800A or I-600A form can cost the adoptive parent \$775.\textsuperscript{189} This fee only covers the application for the visa and is non-refundable,\textsuperscript{190} which means if a family is denied at any point during the

\textsuperscript{183} Id.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id. at 881.


\textsuperscript{188} D.J.F.M., 643 S.E.2d at 882.

\textsuperscript{189} \textit{IR-3 Visa (Children Adopted Abroad)}, \textsc{TotalLaw}, https://total.law/us/family/ir3-visa/#:~:text=Overall%2C%20you%20will%20most%20likely,Hague%20Convention%20countries)%3A%20%24775 (last visited Oct. 31, 2023).

\textsuperscript{190} \textit{Frequently Asked Questions}, US. Dep’t of State, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions.html#:~:text=The%20fee%20that%20you%20paid,application%20was%20processed%20to%20conclusion (last visited Oct. 31, 2023).
adoption process, they will have to cover the fee again and again until they are successful. The adoptive parent is also responsible for obtaining an immigrant visa for the child once they are eligible for immigration. In addition to conducting a medical examination in the child’s country, the family will be required to pay for an additional medical examination for the immigrant visa. Families adopting from certain Caribbean countries may have to pay for housing or lodging depending on the residency requirement for adoption. In the Dominican Republic, U.S. citizens must cohabit with the child in the country anywhere between thirty to sixty days prior to adoption depending on the age of the child.

V. Conclusion

Intercountry adoptions are governed by U.S. federal law, U.S. state law, and the laws of the adoptive child’s country. Families that are unaware of the complexity of intercountry adoption often try to adopt their family members relying only on personal experience, secondhand experiences, and what they can find on the internet. Most adoptive parents do not know there are also barriers on the side of the country from which they are seeking to adopt. It becomes difficult for an average person to make it through the intercountry adoption process. For this reason Caribbean countries ask or require families to work with a licensed U.S. adoption agency. An adoption agency is more likely to be knowledgeable on the required paperwork as well as the adoption laws of the selected country. On the other hand, agencies will cost families additional money, which can vary from $15,000 to $40,000 depending on the agency, the type of intercountry adoption, and the U.S. state. While

191 Jamaica, supra note 96.
192 Dominican Republic, supra note 131.
195 Id.
197 Tana, supra note 12, at 1. See also Hollinger, supra note 34, at § 10.01.
198 Berfanger, supra note 15, at 1.
some Caribbean countries are working with the U.S. Embassy and attorneys in that respective country to help families navigate the adoption process, the solution might not be immediate.

When a parent leaves their child behind to create a better life for them, they do not understand how difficult it will be to reunite with their children, sibling, or family. If they knew, it is reasonable to assume most families would stay in their respective country or choose a family migration instead. It is not impossible for domestic adoption laws and international adoption laws to be reconciled.\footnote{Barbados, supra note 104. Barbados does not have any additional restrictions on who can be adopted as long they are an orphan under U.S. law. Id.} For example, every state can try to implement a statute like the relative statue adopted by Georgia.\footnote{D.J.F.M, 643 S.E.2d 879.} Alternately, the Hague Convention was proposed internationally for similar reasons (to make intercountry adoption law more uniform); however, not every country has adopted the convention.\footnote{Ahlers, supra note 193, at 23.} For the countries that are not a party to the Hague Convention, the navigation of two legal systems with different requirements only makes the length of separation even longer. Most families get denied in their requests for intercountry adoption because of small mistakes or filling out the wrong form. Some are unaware that fees are due when they file or immediately after filing and must start the process over. Reunification is important because when a family moves miles away, they do not stop being family; but instead, they try to bring their family to where they are.

\textit{Ashley Segnibo}
Comment, Gender-Affirming Care for Transgender Adolescents: A Comparison of Approaches Among Countries

I. Introduction

One of the most critical factors in an adolescent’s development comes from the support and care of family, friends, and community. Support from the community is especially important for pre-teens and teenagers experiencing the internal turmoil and discomfort that comes from simply feeling like they are not situated in the right body – a condition known as gender dysphoria. The best environment for these teens, as recommended by healthcare professionals, is a collaborative space for decision-making between the youth, family, and healthcare providers.\(^1\) Decisions and treatment regarding this discomfort in a supportive environment have been proven to be much more catered towards the health and safety of the minor than those where the minor is lacking familial support.\(^2\)

Many reports have shown that lack of support and feelings of unacceptance have deep and strong negative effects on a teen’s emotional development and mental state, causing the adolescent to experience increased thoughts of suicide, anxiety, and depression.\(^3\) As an individual experiences disagreement and lack of acceptance of their gender identity from close relationships and their community or state, suicidal ideation, anxiety, and depression increase.\(^4\) These negative consequences from societal disapproval are greater in transgender adolescents who are going through a pivotal time in their development into adulthood.\(^5\) However, where transgender


\(^2\) Id.


\(^4\) Id.

\(^5\) See generally Catherine Schaefer, et al., *Discriminatory Transgender Health Bills Have Critical Consequences for Youth*, CHILD TRENDS, Apr. 21, 2022,
adolescents are accepted and given support to transition in a positive and caring environment, suicidal ideation rates drop and an increased sense of connectedness with oneself is experienced.  

The statistics regarding the mental health of transgender youth are concerning and require special attention to find methods of support that help. According to the Substance Abuse and Mental Health Services Administration, 4.9 percent of adults in the United States experienced suicidal ideation in 2020 and 0.5 percent of those adults attempted suicide. In comparison, roughly 82 percent of transgender individuals experienced suicidal ideation in 2020 and 40 percent of these transgender individuals made a previous suicide attempt. The numbers are even greater among transgender youth in the United States with the threat of gender-affirming care bans on the rise with a finding of 86 percent of transgender youth reporting suicidal ideation or being at risk of suicide and 56 percent of transgender youth reporting a previous suicide attempt.

These percentages are striking considering the number of transgender youth in the United States. According to the Williams Institute, nearly 300,000 youth in the United States identified as transgender in the year 2022. Considering this number in light of the rate of suicide, this means that more than 250,000 transgender youth in the United States experience suicidal ideation and over 160,000 transgender youth in the United States have attempted suicide in the past. The statistics of the high risk of suicide among transgender teens provide enough evidence that transgender


[9] Id.

adolescents must be provided sufficient support from their community to lower the rates of suicidality among transgender youth.

This Comment will discuss the overall experiences and treatment of gender-diverse and gender-nonconforming adolescents and the many social and legal challenges they face that further isolate them from their community when they try to obtain gender-affirming care. The treatment of these adolescents will be examined by an international comparison among several countries and regions that differ in values, laws, and political structure from the United States. For instance, the responses to gender-affirming care have ranged from capital punishment resulting in the death penalty, as in Afghanistan, to gender-affirming care focused on the need of the patient in Europe. Countries are even further divided when the issue is viewed in light of minors seeking gender-affirming care. The vastly different views reflect the drastic differences in motivation behind the policies enacted regarding the treatment of gender-diverse youth.

This Comment is divided into five sections, each providing further understanding of the treatment of transgender youth and insight into the varying approaches to gender-affirming care for adolescents and the motivations that drive this treatment. Section I dives into the terminology necessary to understand gender-nonconforming individuals’ needs for gender-affirming care. Section II will discuss the United States’ approach to gender-affirming care, examining the drive behind anti-trans policies in the United States and the challenges transgender adolescents are facing in the country due to this legislation. This section will also take a look at the constitutionality of gender-affirming care bans implemented through legislation and their effects on the rights of the transgender adolescent, parents, and physicians.

Section III will review approaches taken by European countries and their guiding concerns; specifically, the section will look at the trend among European countries to pull back from the liberal policies that were in place years prior. The motivating concerns of these policies and pullbacks will be discussed, as well as the view of outlier European countries showing no intention of implementing restrictions on gender-affirming care among adolescents.

Section IV will break down the approaches taken by several other countries with established laws that are the most restrictive on gender-affirming care for youth and adults. This section will discuss the effect these laws have had on transgender adults and adolescents and the lengths to which individuals who do not conform with the heteronormative must go to live in conformity with their experienced gender identity.

Finally, this Comment will discuss the medical profession’s outlook on gender-affirming care for adolescents. In particular, Section V will dive into the recommendations by medical professionals and associations and how legislation can be used to support gender-nonconforming youths.

II. The Context and Importance of Gender-Affirming Care

Gender identity is described as an individual’s “internal sense” of gender; this is the deep connection felt as a boy, girl, both, or neither. 12 A sense of one’s gender identity begins early in life, around ages two to four years and matures around adolescent years. 13 In many instances, boys are told and shown what being a boy entails and girls are taught how girls normally behave, dress, and talk. There is a clear demarcation between the two, allowing no room for youth to grow into their internal sense of gender identity. The classifications shown through blue and pink baby blankets and limitations on attire is termed “the gender binary.” 14 The gender binary has dominated societal norms to create a foundational ordering principle that instructs the population that gender is concretely divided into two classifications: a person assigned male at birth must identify as a boy and display masculine traits and a female assigned

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13 Id.
14 See, e.g., Cynthia Lee, The Trans Panic Defense Revisited, 57 AM. CRIM. L. REV. 1411, 1497 (2020) (“The terms ‘binary gender’ and ‘gender binary’ are used to describe the fact that most people tend to think of sex and gender in binary terms – one is either a man or a woman or is female or male – with nothing in between.”).
at birth must identify as a girl and develop into womanhood, with no room for any more gender categories in between.\textsuperscript{15}

Gender-diverse and transgender individuals do not fit into this model of the gender binary. Instead, their lived experiences indicate that gender is more complex than the gender binary comprehends. Many individuals, but not all, who are gender-diverse or transgender experience a condition known as gender dysphoria.\textsuperscript{16} Gender dysphoria involves a feeling of emotional distress from a lack of harmony between the individual’s sex assigned at birth and their personal sense of male, female, or other.\textsuperscript{17} This lack of harmony between one’s assigned sex at birth and gender identity can cause intense distress and unease.\textsuperscript{18}

Many, but not all, transgender and gender-nonconforming individuals experience some form of gender transition, whether it is a social transition or a medical transition.\textsuperscript{19} A social transition involves the process of changes in the individual’s name, pronouns, clothing, hairstyle, and appearance.\textsuperscript{20} This transition does not involve any medical procedure or treatment affecting the physical nature of the individual; instead, such a transition requires support from friends and family and a respect for the gender-diverse individual’s wishes as to name change, identity presentation, and preferred pronouns. This is the only transition that takes place prior to puberty.\textsuperscript{21}

A further treatment for gender dysphoria for gender-nonconforming teenagers may be through medical treatments during or after puberty.\textsuperscript{22} Medical treatments available to adolescents come

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\textsuperscript{16} Diane Chen et al., \textit{Multidisciplinary Care for Gender-Diverse Youth: A Narrative Review and Unique Model of Gender-Affirming Care}, 1.1 TRANSGENDER HEALTH 117, 117 (2016).
\textsuperscript{17} Id.
\textsuperscript{19} Claire Houston, \textit{Respecting and Protecting Transgender and Gender-Nonconforming Children in Family Courts}, 33 CAN. J. FAM. L. 103, 105 (2020).
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\end{flushleft}
in multiple forms, such as puberty blockers and gender-affirming hormones. These provide adolescents with the ability to further transition and separate from their disconnected biological sex, improving the mental and physical discomfort of gender dysphoria.

Puberty blockers are an FDA approved treatment that are reversible and have minimal side effects. Ultimately puberty blockers stop the body’s natural ability to make sex hormones, including testosterone and estrogen. These hormones affect the sexual organs present at birth and the physical changes in the body that typically appear with puberty, such as breast development and facial hair. Puberty blockers, known as GnRH analogues, slow down growth of facial and body hair, prevent the voice from deepening, and limit the growth of sexual organs that develop during the stages of puberty for males; in females, GnRH limits breast development and prevents menstruation. Overall, these changes in an adolescent caused by puberty blockers simply pause the physical changes that naturally occur at puberty, but they are not permanent physical changes, allowing the teen the space to explore and understand more about their gender identity.

Gender-affirming hormones are a prescription medication that allow transgender and gender-nonconforming adolescents to develop certain physical characteristics that align with their gender identity. The hormones prescribed include estrogen or testosterone, which allow gender-nonconforming adolescents to naturally develop these characteristics. For transgender girls, estrogen therapy allows changes that include the softening of skin, reduced muscle bulk, breast growth, decreased growth of body hair, and reapportionment of body fat. For transgender boys, testosterone therapy promotes increased muscle bulk, pause in menstruation, voice deepening, and the growth of facial and body hair.

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23 Id.
25 Id.
26 Id.
27 Id.
28 Get the Facts on Gender-Affirming Care, supra note 20.
29 Davidge-Pitts, et al., supra note 12.
30 Id.
31 Id.
development and voice deepening are irreversible effects and are generally safe for adolescents seeking gender-affirming care.\textsuperscript{32}

Specialists in gender-affirming care have found that these treatments are beneficial for transgender adolescents in many ways. One of the concerns noted by parents and medical providers is the heightened risk of self-harm among transgender adolescents associated with certain changes in the body that naturally occur during puberty.\textsuperscript{33} As puberty approaches for these adolescents, anxiety regarding the changes that are to occur increases.\textsuperscript{34} Parents of transgender youth have relayed conversations they have had with their child who has had extreme anxiety about puberty.\textsuperscript{35} Specific stories have discussed how a transgender boy mentioned the desire to cut off his breasts that would develop in puberty because they did not match his gender identity.\textsuperscript{36} One parent shared their experience with their child’s pubertal-focused anxiety, noting that the transgender boy refused to eat to prevent the growth of breast and body fat.\textsuperscript{37} This type of anxiety leads to increase rates of suicidal ideation since the adolescent is unable to prevent changes in their body that do not match their gender identity. Gender-affirming care prevents the developmental changes that occur at puberty and eases the anxiety that may be detrimental to the child.

\section*{III. The United States’ Approach}

The United States has left the issue of gender-affirming treatment of transgender teens to the states to determine.\textsuperscript{38} This includes not only decisions of what treatments will be permitted in gender-affirming care to individuals, but also the determination of criminal penalties for physicians administering gender-affirming care to minors and for parents as supporters of gender-affirming

\begin{thebibliography}{99}
\bibitem{note1} Id.
\bibitem{note2} Id.
\bibitem{note3} Id.
\bibitem{note4} Id.
\bibitem{note5} Id.
\bibitem{note6} Id.
\bibitem{note7} Id.
\end{thebibliography}
care for their children.\textsuperscript{39} This has left gender-nonconforming adolescents as pawns in a political and culture war that is dividing states.

The United States’ approach to gender-affirming care has largely been influenced by political views and moral beliefs about what is acceptable.\textsuperscript{40} Conservatives in the United States often oppose gender-affirming treatment for all individuals and especially for treatment of minors, based on historic societal gender norms and the embrace of the gender binary.\textsuperscript{41}

A wave of conservative state legislation swept the United States around 2020 to prevent the use of gender-affirming care for youth.\textsuperscript{42} By September, 2023, 142 bills were introduced by lawmakers in 37 states to restrict gender-affirming care for transgender and gender-nonconforming individuals.\textsuperscript{43} As of September 2023, 23 states in the United States have complete bans on gender-affirming care for minors.\textsuperscript{44} These anti-transgender bills banning gender-affirming care for minors share a few common themes, including religious beliefs, child abuse, and scare tactics focused on medically-unsupported information of the long-term effects of gender-affirming care for minors.\textsuperscript{45} Many of these bills claim to be motivated by the impulse to protect children and cite authority regarding the state’s interest in its protection of children; however, many of these bills are contrary to scientific findings and the opinions of medical professionals.\textsuperscript{46}

In Texas, although not enacted, HB68 and HB1339 were introduced to add gender-affirming care of minors to the state’s definition of child abuse and to prohibit malpractice insurance

\textsuperscript{39} Scott J. Schweikart, \textit{What's Wrong with Criminalizing Gender-Affirming Care of Transgender Adolescents?}, 25 AMA J. Ethics 414 (2023).
\textsuperscript{40} Id.
\textsuperscript{42} Kraschel, et al., \textit{supra} note 38.
\textsuperscript{44} Davis, \textit{supra} note 41.
\textsuperscript{45} Id.
\textsuperscript{46} Kraschel, et al., \textit{supra} note 38.
providers from providing coverage for any damages related to
gender-affirming care for minors.\textsuperscript{47} Governor Greg Abbot signed
an executive directive in 2022 which ordered an investigation into
parents and medical providers who allowed healthcare for trans-
gender minors.\textsuperscript{48} HB68 placed a total ban on gender-affirming care
for minors in the state and added gender-affirming care to the stat-
utory definition of child abuse.\textsuperscript{49}

Alabama enacted Senate Bill 184 which prevented the nec-
essary medical care to anyone under the age of nineteen seeking
gender-affirming treatment and threatened possible criminal pros-
ecution, resulting in jail time for anyone, including doctors and par-
ents, who allowed the gender-affirming care to occur.\textsuperscript{50} Alabama
makes it a class C felony to provide certain types of care to trans-
gender youth.\textsuperscript{51} A violation of S.B. 184 may result in the penalty of
up to ten years of prison time and a fine of up to $15,000.\textsuperscript{52}

In West Virginia, Governor Jim Justice signed into law a pro-
ahmection on administering hormone therapy and puberty blockers
to transgender youth.\textsuperscript{53} This law does contain an exception, allow-
ing pubertal modulating and hormonal therapy in cases where the
treatment is medically necessary to treat the minor’s psychiatric
symptoms and to limit self-harm.\textsuperscript{54} This exception requires paren-
tal consent from both parents and a recommendation from two
medical providers.\textsuperscript{55}

In Missouri, H.B. 33 was introduced in 2021 but later failed;
it would have dictated that medical professionals providing such
gender-affirming care to adolescents may face possible medical li-
cense revocation.\textsuperscript{56} Further, though the introduction of the Save
Adolescents From Experimentation (SAFE) Act in 2022, which

\begin{flushleft}
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Justice Department Challenges Alabama Law that Criminalizes Medically
Necessary Care for Transgender Youth, OFFICE OF PUBLIC AFFAIRS, U.S. DEP’T
OF JUSTICE (Apr. 29, 2022), https://www.justice.gov/opa/pr/justice-department-
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Davis, supra note 41.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Kraschel, et al., supra note 38.
\end{flushleft}
failed that same year, Missouri sought to disallow the use of public funds to any organization or individual providing gender-affirming care to transgender minors and creating a civil claim against medical professionals providing this care to transgender minors.\textsuperscript{57}

Although only a few cases have specifically targeted the constitutionality of these bills, cases that have challenged these laws provide some suggestions as to when these laws are unconstitutional. Cases in Alabama and Arkansas have challenged the constitutionality of the anti-transgender bills as violating the constitutional rights of the transgender minor, parents, and physician providing the gender-affirming care.\textsuperscript{58}

In Brandt v. Rutledge, a federal district court in Arkansas held that Act 626, the Arkansas state version of anti-transgender legislation, violated the Equal Protection Clause of the Fourteenth Amendment, the parents’ rights to substantive due process, and the First Amendment.\textsuperscript{59} Act 626 prohibits a physician from providing gender-affirming care to a minor under the age of eighteen and making a referral for a minor to receive gender-affirming care from another physician.\textsuperscript{60} Specifically, Act 626 provides:

“Gender transition procedures” means the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex, and may involve social, legal, or physical changes; (6)(A) “Gender transition procedures” means any medical or surgical services, including without limitation physician’s services, inpatient and outpatient hospital services, or prescribed drugs related to gender transition that seeks to:

(i) Alter or remove physical or anatomical characteristics or features that are typical for the individual’s biological sex; or
(ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual’s biological sex, including without limitation medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition.\textsuperscript{61}

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{61} Id.
The Act includes a provision for a private right of action for a violation or threatened violation of the statute.\textsuperscript{62} The court in \textit{Brandt} found that Act 626 violated the Equal Protection Clause of the Fourteenth Amendment because it discriminates on the basis of sex.\textsuperscript{63} According to this decision, transgender individuals fall under a quasi-suspect class due to the understanding that a minor’s assigned sex at birth determines whether the minor can receive certain types of medical care.\textsuperscript{64} The court also found that the Act discriminates against transgender people because it prohibits medical treatment that is specific for transgender individuals.\textsuperscript{65} The court noted that under this act, a minor assigned male at birth is permitted to receive testosterone treatment or other gender-affirming care so long as his gender identity aligns with his sex assigned at birth, while a minor assigned female at birth cannot; the basis on which a minor can receive care is dependent on the biological sex of the minor patient.\textsuperscript{66}

In evaluating the substantive due process claim, the court found that the Act violated the Substantive Due Process clause of the Fourteenth Amendment.\textsuperscript{67} The court determined that parents have a right to direct their child’s medical care, found in the fundamental liberty interest of parents in the “care, custody, and control of their children,” in directing their child’s medical care.\textsuperscript{68} Finally, the \textit{Brandt} court held that Act 626 violates a physician’s First Amendment right to freedom of speech by providing that a physician is prohibited from making a referral of an individual under eighteen years old for the purpose of receiving gender-affirming care.\textsuperscript{69}

These cases are just the beginning of the United States’ recognition of adequate gender-affirming care for minors. With the controversies surrounding a minor’s ability to transition and parents’ restrictions on supporting their children’s social and medical decisions, psychological and physical attacks on transgender

\textsuperscript{62} Id.
\textsuperscript{63} \textit{Brant}, No. 4:21CV00450 JM.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at *36.
\textsuperscript{68} Id., quoting Troxille v. Granville, 530 U.S. 57, 66 (2000).
\textsuperscript{69} \textit{Brant}, No. 4:21CV00450 J, .. at *37.
adolescents have increased within the states. Violence has transpired as misconceptions about gender-affirming care for minors has spread. In 2022, twenty children's hospitals were named and targeted in online harassment campaigns. The social media accounts spreading this harassment and stigma strive to incite violence and stop the spread of resources and gender-affirming care for transgender adolescents. These online attacks led several hospitals and clinics to temporarily stop services or shut down completely. Other hospitals and clinics were forced to pull information and resources from their websites for the safety of their patients due to these threats. Specifically, claims were made online that Boston Children's Hospital was performing hysterectomies on minors, advocating for the hospital to be shut down. The Boston Children's Hospital reported multiple bomb threats, causing the hospital to go on temporary lockdown and evacuation from the building.

After the mass shooting at an LGBTQ+ club in Colorado Springs, the founder of an anti-transgender hate group, Gays Against Groomers, stated on the Trucker Carlson Network that “shootings like the one at Club Q in Colorado Springs, Colo., would continue until the ‘evil agenda’ of gender-affirming health care was put to an end.” This type of harassment culminating in violence has furthered extremist views on gender-affirming care for minors and furthered a negative mission to stop the necessary treatment for transgender minors. Threats and harassment of this kind force medical providers to pull the necessary resources and treatment for minors experiencing gender dysphoria and further political agendas unrelated to the actual health, care, and safety of the minor.

71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Id. at 2.
77 Id.
78 Id.
79 Id.
The United States’ approach to gender-affirming care has allowed an array of views and legal action to occur within the region. Although the overall approach of the United States may seem liberal compared to conservative nations, transgender adolescents are regularly threatened in their ability to receive gender-affirming care. The push for complete bans on gender-affirming care for minors and the push on the other side for complete allowance for full access has caused a constant concern of families that the limited access granted to transgender minors will be pulled. Although the United States may be considered lax in its approach to gender-affirming care, with the wide array of views, some individuals may be concerned that the United States will follow the models of more restrictive countries.

IV. European Countries’ Approaches

Although European countries have taken a different approach than the United States, they have been somewhat divided on the appropriate care for transgender youth. Many European countries previously implemented liberal gender-affirming care policies; however, several larger countries in the continent have begun pulling back on gender-affirming policies. Medical care providers in the Netherlands were the first to treat adolescents with puberty blockers in 1998. The United Kingdom established the Tavistock Centre in 1990s, which has assisted thousands of transgender adolescents since its opening. In the year 2011, Tavistock received 250 referrals; comparatively, in 2021, Tavistock received over 5,000 patient referrals. Policies implemented regarding gender-affirming care among European countries have primarily been based on the recommendations of medical professionals.


83 *Id.*
While political agendas may be a partial motivator, the primary focus has been on the health and safety of the patient.

A. United Kingdom

In 2020 England’s National Health Service (NHS) led an independent review of gender-affirming care for transgender youth. An interim report, released in 2022, offered advice from specialists, suggesting that gender-affirming care should be provided with only the most focused attention on the health and development of the child. This interim report was implemented based on several findings: (1) there has been a sharp rise in referrals to the Gender Identity Development Service (GIDS); (2) there has been a dramatic change in the mix of referrals; (3) there is a lack of evidence to support clinical decision making; and (4) long waiting times for the initial assessment showed operational failures in the previous model.

The new NHS healthcare guide for transgender youth got rid of the previous gender-affirming care model and takes the position that most children seeking gender-affirming care need psychoeducation and psychotherapy before receiving any transitional care. The new NHS guidance maintains that even social transitioning is strongly discouraged and should only be implemented, with informed consent, to relieve clinically significant amounts of distress or where there is significant impairment in social function due to a finding of gender dysphoria. Based on NHS’s recommendations, general practitioners are encouraged to collaborate with gender specialists before prescribing hormone therapy to adolescents.

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86 Interim Service Specification for Specialist Gender Dysphoria Services for Children and Young People, NHS ENGLAND (Oct. 20, 2022).
87 The NHS Ends the “Gender-Affirmative Care Model” for Youth in England, Soc’y for Evidence Based Gender Med. (Oct. 24, 2022).
88 Id.
The United Kingdom, although pulling back on gender-affirming care, has fallen in line with the recommendations and advice made by the NHS. The U.K. has focused the primary considerations regarding gender-affirming on the health and wellness of the patient, instead of focusing on a political agenda. The U.K. has made few decisions on the rights of parties involved in the treatment of gender dysphoria for adolescents; however, the leading cases in the United Kingdom have provided greater legal protection for transgender minors.

In 2021, *Bell v. Tavistock* held that persons under the age of sixteen years old experiencing gender dysphoria can provide legal consent to be prescribed puberty-blockers where the child is competent to understand the impact of the treatment. Before 2011, puberty-blockers were made unavailable for those under the age of sixteen. Puberty-blockers became available to those between the ages of 12-15 years old as part of a research study in 2011. At the time *Bell v. Tavistock* was decided, there were two types of endocrine clinics: one that provided services for children under the age of fifteen and one for children over fifteen years old. The service specification permits puberty-blockers to be prescribed to children under the age of twelve years old only if the child is established in puberty.

In the *Bell* case, the Gender Identity Development Service (GIDS) stated that it would only refer an adolescent for puberty-blockers if it determines the patient is competent enough to give consent. In the U.K., people aged sixteen and older are presumed competent to provide consent to treatment unless evidence suggests otherwise. For children under the age of sixteen, the U.K. has created a method of determining an individual’s ability to provide consent through the *Gillick* competency test. The test was developed

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90 See generally Health and Care Act 2022 (Nov. 4, 2022).
91 Bell v. Tavistock and Portman NHS Foundation Trust [2021] EWHC 1363, 1 (Eng.).
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
98 Id.
in the case of *Gillick v. West Norfolk and Wisbech Health Authority*. In *Gillick*, the court decided that a child under the age of sixteen could be considered competent to provide consent to treatment if a court finds that the child has enough intelligence, competence, and understanding to completely grasp the impact of their treatment. If *Gillick* competency is not shown, consent may be provided for the child by someone with parental responsibility.

*Bell v. Tavistock* held that the determination of whether a minor is *Gillick* competent should not be made in a blanket legislative or judicial rule, but doctors should have the discretion to determine a minor’s competency in this area on a case-by-case basis. The U.K. has commissioned its public health authority to conduct an ongoing independent review of gender identity services for minors to find out more about gender dysphoria and determine the best way to provide care for these individuals. The court stated that given the experimental nature of gender-affirming care for minors, it is unlikely that an adolescent under the age of thirteen would meet the requirements to be deemed *Gillick* competent. The court further stated that it would be extremely difficult for an adolescent under the age of sixteen to provide evidence that they are *Gillick* competent. These determinations in individual cases are steered by the conclusions of medical professionals rather than have legislatively-created blanket rules influenced by political forces like the United States. In Europe, policy approached are due primarily to the concern of medical professionals in mental and medical treatments for transgender youth. The medically-informed approach in the European Union is mirrored in laws there: 25 of the 27 E.U. member states provide legal procedures of gender recognition.

B. **Sweden**

Sweden’s National Board of Health and Welfare (NBHW) has altered its view about prescribing puberty blockers and hormone

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100 Id.
101 Id.
102 *Bell*, EWHC (Admin) 1363.
103 *Davis*, *supra* note 41.
104 Id.
105 Id.
106 Id.
treatment with strong recommendations to only prescribe such treatment in exceptional circumstances.\textsuperscript{107} In 2022, the NBHW made the determination that the risks of puberty blockers and treatment with hormones currently outweigh the possible benefits for minors.\textsuperscript{108} Now, the NBHW provides that only a small number of minors experiencing gender dysphoria will be considered for treatment with hormonal medications.\textsuperscript{109} Those who will be considered to receive puberty blockers in Sweden are people with “‘classic’ childhood onset of cross-sex identification and distress, which persists and causes clear suffering in adolescence.”\textsuperscript{110} For those whose gender dysphoria appeared during or after puberty, the treatment available includes psychiatric care and gender-exploratory psychotherapy.\textsuperscript{111} The doctors may prescribe hormonal treatment to people with gender dysphoria during or after puberty in limited circumstances.\textsuperscript{112} Sweden has also stated that fewer highly specialized centralized care centers will be available, reducing the number and availability of clinics that provide pediatric gender-affirming care.\textsuperscript{113}

The NBHW has prioritized gender-affirming care for youth using non-invasive interventions.\textsuperscript{114} The Board has stated that non-invasive interventions will be the primary recommendation to allow the child to continue to mature and for their gender identity to fully form.\textsuperscript{115} The goal of the Board currently is to mirror the “Dutch protocol,” and administer invasive treatments in research settings only.\textsuperscript{116} This Dutch protocol includes a prerequisite

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\textsuperscript{108} Jennifer Block, Gender Dysphoria in Young People Is Rising – and So Is Professional Disagreement, BMJ Investigation 1, Feb. 23, 2023, https://www.bmj.com/content/380/bmj.p382.
\textsuperscript{109} Summary of Key Recommendations, supra note 107.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\end{flushleft}
for hormonal treatment of youth of prepubertal onset of gender dysphoria that persists into adolescent years and has caused clear suffering. The gender dysphoria must have been long-lasting, meaning the child must have experienced the gender dysphoria for a minimum of five years. Further restrictions of the Dutch protocol include allowing puberty blockers only in extreme circumstances to adolescents with post-pubertal onset of gender dysphoria and the presence of a history of gender dysphoria in the adolescent.

C. Finland

Finland issued guidelines similar to those of Sweden through its monitoring agency for public health services, the Council for Choices in Healthcare. The Finnish Health Authority called for psychological support as the first line of treatment, rather than the use of puberty blockers and hormone treatments. Finland also follows the Dutch protocol and has issued new guidelines after a finding from a systematic review of studies that the evidence for pediatric transition was inconclusive. The Finish guidelines stated concern over the uncertainty of the irreversible effects of gender-affirming treatment for people twenty-five and under. Similar to other European countries, Finland became concerned with the surprisingly sharp rise in adolescents reporting gender dysphoria.

Finland conducted a study which found that adolescents who classified as high functioning prior to receiving cross-sex hormones did well post-treatment; however, the study found that adolescents who had underlying psychiatric needs or problems with school

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117 Id.  
118 Care of Children and Adolescents with Gender Dysphoria, supra note 116.  
119 Summary of Key Recommendations, supra note 107.  
120 Block, supra note 108.  
121 One Year Since Finland Broke with WPATH “Standards of Care,” Soc’y for Evidence Based Gender Med. (July 2, 2021), https://segm.org/Finland_deviates_from_WPATH_prioritizingPsychotherapy_no_Surgery_for_Minors.  
122 See supra discussion in text at notes 106-108.  
123 One Year Since Finland Broke with WPATH “Standards of Care,” supra note 121.  
124 Id.  
125 Id.
and social life continued to have issues.\textsuperscript{126} Finland’s approach to gender-affirming care for adolescents is primarily focused on the long-term health and safety of the minor.

V. Australia’s Gender Affirming Care Model

Australia has generally allowed gender-affirming care among minors with some restrictions to ensure the minor receives gender-affirming care in a supportive environment and is confident in their decision.\textsuperscript{127} Australia’s approach to gender-affirming care has been focused on the various types of treatment an adolescent may receive.\textsuperscript{128} Australia views gender-affirming care in two (2) stages.\textsuperscript{129} Stage one (1) involves the administration of puberty suppressers, or blockers.\textsuperscript{130} Stage two (2) involves the administration of the gender-affirming hormones estrogen or testosterone.\textsuperscript{131} These two stages involve no surgical intervention.\textsuperscript{132}

Prior to 2013, Australia required a minor seeking any stage of gender-affirming care to accompany their parents in requesting judge authorization for the care.\textsuperscript{133} In 2013, the Australian high court decided in \textit{Re Lucy}\textsuperscript{134} that adolescents could receive stage 1 puberty blockers without first obtaining court authorization.\textsuperscript{135} Australia kept court authorization as a requirement in allowing adolescents to receive stage 2 gender-affirming hormones as affirmed in 2013 in the case of \textit{Re Jamie}\textsuperscript{136} due to the finding that some of the effects of stage 2 cross-sex hormone treatment were not reversible.\textsuperscript{137}

\begin{thebibliography}{9}
\bibitem{fn126} One Year Since Finland Broke with WPATH “Standards of Care,” supra note 121.
\bibitem{fn127} Under 18S, TRANS HUB. https://www.transhub.org.au/under-18s
\bibitem{fn129} Id.
\bibitem{fn130} Id.
\bibitem{fn131} Id.
\bibitem{fn132} Id.
\bibitem{fn133} Legal, PARENTS OF GENDER DIVERSE CHILDREN. https://www.pgdc.org.au/legal.
\bibitem{fn134} \textit{Re Lucy}, [2013] Fam CA 518.
\bibitem{fn135} Id.
\bibitem{fn136} \textit{Re Jamie}, [2013] Fam CAFC 110.
\bibitem{fn137} Id.
\end{thebibliography}
Following *Re Jamie*, more than sixty cases came before the Australia Family Court, and stage 2 cross-hormone treatment was allowed in all cases that came before the court.\(^{138}\) Petitioners seeking gender-affirming hormones waited an average of eight months from the time the treatment was recommended by clinicians and when the case came before the Family Court.\(^{139}\) During this waiting period, many adolescents reported increased rates of anxiety, depression, and self-harm.\(^{140}\) Other difficulties were that the cost of petitioning to the court for authorization for gender-affirming hormones was significant and burdensome for families.\(^{141}\) These concerns were part of the court’s consideration in the case of *Re Kelvin*.\(^{142}\)

In 2017, Australia repealed the requirement for court authorization before an adolescent may receive stage 2 gender-affirming hormones in the case of *Re Kelvin*, and the country now allows a minor to be provided with gender-affirming care where the minor is found to be *Gillick* competent and where the treatment is therapeutic.\(^{143}\) Courts determined that where the treatment by use of gender-affirming hormones is therapeutic and the minor is found to lack *Gillick* competency, court authorization will still not be required for gender-affirming hormones.\(^{144}\) Instead, the minor may receive gender-affirming hormones even where there is no finding that the minor is *Gillick* competent so long as the parents provide consent for the treatment and the parents and medical provider agree to the method of treatment.\(^{145}\) Court authorization will only be required for an adolescent’s treatment of gender-affirming hormones where there is dispute or controversy as to the treatment, for instance where the parents and medical providers disagree.\(^{146}\)

The ruling in *Re Kelvin* was affirmed in the case of *In Re Imogen*.\(^{147}\) *Re Imogen* further clarified the rule guiding gender-affirming care for minors in finding that people under eighteen may receive gender affirming care beyond a social transition where the

\(^{138}\) *Id.*
\(^{139}\) *Id.*
\(^{140}\) *Id.*
\(^{141}\) *Id.*
\(^{142}\) *Id.*
\(^{143}\) *Id.*
\(^{144}\) *Id.*
\(^{145}\) *Id.*
\(^{146}\) *Id.*
\(^{147}\) *Re Imogen* (No. 6) [2020] Fam CA 761.
parents, medical provider, and the adolescent are in agreement as to the care.\textsuperscript{148} If the adolescent desires stage 2 hormone treatment, the parties must not dispute the \textit{Gillick} competence of the adolescent, the diagnosis of gender dysphoria, or the treatment plan.\textsuperscript{149} The majority opinion in \textit{Re Imogen} determined that psychotherapeutic treatment as the sole form of treatment is risky and not backed by sufficient evidence to be a proven treatment.\textsuperscript{150}

Australia’s view of gender-affirming care for minors varies in a significant way from most European countries and the United States. Australia’s guidelines value the mental health of the minor and attempts to provide gender-affirming care so long as it is in the best interest of the minor. Under the finding that psychotherapeutic treatment is not adequate care for many adolescents with gender dysphoria, Australia views puberty blockers and hormone therapy as a necessary treatment with many benefits. Australia has found that there are greater benefits for a minor with gender dysphoria to be treated with puberty blockers and gender-affirming hormones than psychotherapeutic treatment. Australia has expanded access to gender-affirming care for minors, citing a priority for the minors’ current and future distress.

VI. Other Countries

A. Japan’s Approach

The law in Japan has generally not given much recognition to the rights of transgender individuals. Japan has neglected to recognize the fluidity of sexuality and gender, thus resulting in laws that severely restrict transgender individuals to socially, physically, and legally transition. In 2004, Japan enacted the Gender Identity Disorder Special Cases Act.\textsuperscript{151} For transgender individuals’ gender identity to be legally recognized, this act requires transgender individuals to undergo gender reassignment surgery and have no functional reproductive glands.\textsuperscript{152} Additionally, this act has required

\begin{footnotesize}
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\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Gender Identity Disorder Special Cases Act, Act No. 111, art. 2 (2003).
\end{itemize}
\end{footnotesize}
that the individual cannot have underage children or be married, and must be at least eighteen years of age.153

The Supreme Court in Japan used outdated and offensive concerns, such as concerns that transgender men could become pregnant and that any program of allowing gender transitions “may cause confusion in society,” to uphold this law in the years since its enactment.154 The Supreme Court, however, showed progress in its recognition of transgender individuals in October of 2023 by ruling a portion of this act to be unconstitutional.155 The court struck the requirement of sterilization for transgender adults seeking to legally transition.156 This requirement violated Japan’s constitutional guarantees of freedom from invasion into individual’s bodies against their will.157 Advocates of the sterilization requirement continue to argue that the absence of sterilization may confuse society and allow men posing as transgender women to invade women-only bathrooms.158

Japan’s step towards positive gender-affirming care and legal recognition of transgender individuals is just one small piece of a much bigger picture. The Gender Identity Disorder Special Cases Act is still enforced and after the Supreme Court’s recent decision, still states that a legally recognized transgender individual in Japan cannot be under eighteen years of age, be married, have underage children, or have genitals resembling those of their biological sex.159

The Gender Identity Disorder Special Cases Act in Japan also creates great hurdles for transgender adolescents. As stated in the Act, individuals under age eighteen are without legal recognition for their transgender identity, even if the adolescent meets all other requirements of the act.160 Teenagers in Japan report that the mandated sex reassignment surgery for legal gender recognition pressured them to undergo sex reassignment surgery before

153 Id.
154 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Kuhn, supra note 155.
adulthood to allow them to attend university or apply for jobs according to their gender identity.\textsuperscript{161}

Further, there is little discussion in Japan of the gender-affirming care treatments for adolescents with gender dysphoria. Many schools in the country enforce strict male/female school uniform policies that often do not allow children to change uniforms without a diagnosis of Gender Identity Disorder.\textsuperscript{162} Junior high and high school students have reported experiencing extreme anxiety due to a requirement of the diagnosis.\textsuperscript{163} This has led to an increase in both quantity and length of school absences, and has increased the amount of dropouts among preteens and teens.\textsuperscript{164} These policies do not allow a social transition by the adolescent to explore their gender identity. Japan's approach to gender-affirming care and legal gender recognition is outdated, discriminatory, and coercive in prohibiting legal gender recognition for anyone under the age of eighteen.

B. Middle Eastern Countries

Countries in the Middle East have enacted laws restricting and banning access to gender-affirming care and legal gender recognition.\textsuperscript{165} These laws are influenced by conservative religious views and the countries' narratives of protecting societal values.\textsuperscript{166} For example, in 2003, Egypt banned doctors from providing gender-affirming care and allowed legal gender recognition and appropriate healthcare only for individuals with intersex characteristics.\textsuperscript{167} This has caused a spike in underground surgeries where ill-equipped clinics provide risky surgeries and care and the sources of hormones are unknown.\textsuperscript{168}

\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
The country of Turkey has continued to further these narratives of protecting societal values by placing restrictions on transgender individuals. Article 41 of Turkey’s constitution provides that the family is the foundation of Turkish society. The Constitution grants the State of Turkey the authority to take any measure deemed necessary to protect this foundation and ensure the “peace and welfare of the family, especially the protection of the mother and children.”

The Constitutional Commission of Turkey’s Grand National Assembly approved Bill No. 2/4779 in 2023, which, if passed, would amend Article 41 of the Constitution to implement a more concrete definition of marriage to mean a union only between a man and a woman. Further, this amendment would define family as consisting only of a man, a woman, and children. Turkey’s president recently stated that he did not “recognize LGBT” and made a vow to combat “perverse” trends that threaten to destroy the institution of family. Bill No. 2/4779 is just one attempt to stifle the rights of transgender individuals within Turkey.

Transgender individuals in Turkey are viewed as having a psychological illness which many psychologist and psychiatrists in the country attempt to cure. Gender reassignment surgeries are allowed by law and stated in Article 40 of the Turkish Civil Code with several conditions, including that the individual must be eighteen years of age, cannot be married, and must be infertile. The Turkish government heavily supervises sex-reassignment surgeries by allowing them in a very limited number of hospitals throughout the country.

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169 Const. Republic of Turkey, ch. 3. § I. art. 41 (last visited Dec. 12, 2023), https://www.refworld.org/docid/3ae6b5be0.html.

170 Id.


172 Id.


174 Turkey, LGBTI Equal Rights Ass’n for Western Balkans and Turkey (last visited Dec. 3, 2023), https://lgbti-era.org/countries/turkey/.

175 Id.

176 Id.

Under the belief that transgender identity is an illness, Turkey does not provide much protection for socially transitioning transgender individuals.\(^{178}\) Although doctors and physicians may legally assist adolescents in socially transitioning or providing other gender-affirming care, not including sex-reassignment surgeries, these physicians are severely shamed for providing such gender-affirming care to minors.\(^{179}\) Turkish physicians have studied the benefits of gender-affirming care for minors who experience gender dysphoria and treat patients according to those findings; however, many Turkish citizens and groups attack this form of treatment, alleging that the doctors are performing sex-reassignment surgery and hormone therapy on children.\(^{180}\)

Turkish physicians stated concerns for transgender adolescents in their attempts to combat the lack of access to treatment by taking unprescribed hormonal medication.\(^{181}\) These physicians were concerned that inappropriate hormone use can be problematic for transgender adolescents by possibly deteriorating their overall health and potentially leading to physical and mental problems.\(^{182}\) With the restrictions enforced by Turkish officials that limit the number of clinics authorized to provide gender-affirming care, an increase in the number of adolescents taking unprescribed hormonal medication threatens the country of Turkey.\(^{183}\) In a recent study, Turkish physicians found that an increase in healthcare centers for transgender adolescents could increase parental awareness about gender dysphoria and increase access to treatment.\(^{184}\)

VII. Medical Professionals’ Opinions

Medical professionals in many regions agree that gender-affirming care for minors is important and should be provided,

\(^{178}\) See generally Turkey, supra note 174.

\(^{179}\) Pro-gov’t. Newspaper Targets Turkish Doctors over Scientific Article on Gender Dysphoria, supra note 177.

\(^{180}\) Id.


\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) Id. at 283.
whether that care is a social transition, puberty-blockers, or hormone treatment. Medical associations such as the World Professional Association for Transgender Health (WPATH), the Endocrine Society, the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association have all supported gender-affirming care for transgender youth as medically necessary care.

WPATH is a multidisciplinary professional association that operates on an international scale with a stated mission to promote care, education, research, public policy, and support in transgender health that is evidence-based. As one of the leading institutes for transgender health, WPATH provides a standard of care for health care professionals to provide the safest and most effective care in treating transgender adults and adolescents. WPATH’s standard of care supports the use of a patient-centered care model in the use of gender-affirming interventions, allowing for a holistic approach to address the patient’s social, mental, and medical health needs with importance placed on the affirmation of the adolescent’s gender identity. WPATH encourages gender-affirming interventions in the form of puberty suppression, hormone therapy, and gender-affirming surgeries. In this model, WPATH’s standards encourage gender-affirming intervention based on the needs of the individual patient and strongly discourage reparative or conversion therapy for individuals experiencing gender dysphoria.

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188 Id.

189 Id. at S7.

190 Id. at S100.

191 Id. at S7.
WPATH explains that pubertal suppression does not cause permanent damage to the adolescent’s reproductive functions.\textsuperscript{192} There are risks, however, in the case of invasive procedures that may have permanent effects on the adolescent.\textsuperscript{193} WPATH cites to the Dutch approach about the general appropriate care for certain ages, that pubertal suppression can be considered at age twelve, gender-affirming hormone treatment can be considered at age sixteen, and gender reassignment surgery can be considered at age eighteen.\textsuperscript{194} The WPATH standards suggest that gender-affirming hormone treatment may be initiated prior to age sixteen to avoid prolonged pubertal suppression.\textsuperscript{195} The concern is that prolonged pubertal suppression at a time of peak bone mineralization can lead to decreased bone mineral density.\textsuperscript{196}

Generally, these standards of care implemented by WPATH are followed by many medical professionals. There has, however, been an increase in countries breaking away from the WPATH standards of care and instead following gender-affirming care standards developed by their own leading physicians. The creation of these new standards of care is partially due to the rise in adolescent patients seeking gender-affirming care in the form of puberty blockers and gender-affirming hormones.\textsuperscript{197} This spike in patients has caused a number of countries to question the appropriateness of the WPATH model and has prompted a push for more research into these drugs.\textsuperscript{198}

Part of the concern among these countries is the permanency of the treatment, often citing to the potential bone health concerns of delaying puberty.\textsuperscript{199} Many doctors believe transgender adolescent patients will recover from the loss of bone density once they are off the puberty blocker; however, two recent studies found that for many patients. Their bone density does not rebound after coming off of puberty blockers and their bone density is often lesser.

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\textsuperscript{192} Id. at S157. \\
\textsuperscript{193} Id. at S65. \\
\textsuperscript{194} Id. \\
\textsuperscript{195} Id. \\
\textsuperscript{196} Id. \\
\textsuperscript{198} Id. \\
\textsuperscript{199} Id. 
\end{flushleft}
than that of their cisgender peers. The lack of sufficient bone density may lead to a heightened risk of debilitation fractures at an age earlier than normal and risks greater harm for patients with already weaker bone density.

Although the medical community may partially disagree on the timing of treatment in the form of medication and surgery, medical professionals agree that acceptance and affirmation is key to gender-affirming care and addressing the concerns of the transgender adolescents’ health and safety. Legislation that prohibits gender-affirming care in the form of puberty blockers imposes greater discomfort on transgender and gender-nonconforming youth and fosters discrimination by individuals uneducated on the issue of gender-affirming care and its positive effects. It is important for transgender individuals to have a supportive backing of family, friends, medical professionals, and their community.

VIII. Recommendations and Conclusion

On an international scale, transgender and gender-nonconforming adolescents commonly experience transphobia and stigmatization. The implementation of transphobic policies furthers this stigmatization and prevents transgender adolescents from receiving necessary medical care. These policies create a further divide between the already vulnerable minor group of transgender individuals and the remainder of society and can lead to discrimination, marginalization, and hate crimes against transgender individuals. This can cause what is known as minority stress. Minority stress increases rates of depression, suicidality, and self-harm in transgender and gender-nonconforming adolescents. Given these increased rates of suicidal ideation, government agencies and lawmakers must use their authority to ensure the protection of transgender adolescents.

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200 Id.
201 Twohey & Jewett, supra note 197.
202 Coleman, supra note 187.
203 Id. at S6.
204 Id.
205 Id.
206 See supra text at note 9.
The passing of legislation allowing gender-affirming care to minors illuminates a debate between the balancing of outdated morals and science. Policymakers must be careful to align new legislation with the best interests of transgender adolescents and the recommendations and research of medical professionals. Government authorities should allow room for medical professionals to determine the best treatment for transgender youth. Implementing policies that are discriminatory and based on outdated beliefs and principles is detrimental to the care of these adolescents. Legislation that is based on the idea that transgender individuals suffer from a mental illness or are “deviants,” as believed by Turkey’s president, does not align with fundamental human rights. Criminalizing the treatment of such individuals to promote the overall care and safety of the individual is against public policy and leads to greater issues such as back alley gender-affirming treatment, marginalization, and the increase of a divide between a vulnerable class and the majority of society.

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International Issues in Family Law: An Annotated Bibliography

Allen Rostron*

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International Adoption

Benefits

Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. Am. Acad. Matrim. Law. 181 (1996) (analyzing barriers to international adoption, arguing that the best interests of children should be the determinative issue shaping policies on international adoption, and challenging the view that international adoption should be opposed because it takes away children from their racial, cultural, or national group of origin).

Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 Buff. Hum. Rts. L. Rev. 151 (2007) (discussing why human rights activists and organizations like UNICEF are critical of international adoption, arguing that this criticism is misguided, and asserting that international adoption is partial but good solution for the problems of homeless children of the world).

Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y. L. Sch. L. Rev. 781 (2010-2011) (arguing that international adoption should be a vital part of ensuring that all children receive early, permanent, and nurturing parenting).

Mary Landrieu & Whitney Reitz, *How Misconceptions About International Adoption Lead to a Violation of Human Rights Against Unparented Children*, 22 Tul. J. Int’l & Comp. L. 341 (2014) (discussing five major misconceptions about international adoption, arguing that international adoption is one of several powerful tools for protecting children living without family care or in danger of losing family care, and supporting the passage of proposed federal legislation that would require the government to prioritize the importance of permanent families for all children).

Concerns

Alexandra Doner, *International Adoptions and the Border Crisis: Do Sufficient Protections Exist for Children and Their*
Natural Parents?, 30 Transnat’l L. & Contemp. Probs. 89 (2021) (reviewing concerns expressed in news reports and social media that immigrant children separated from their families at the United States border might be permanently adopted by American families without their parents’ knowledge or consent, finding that current laws provide adequate measures to prevent this from occurring, but noting that those protections may not be properly enforced in all circumstances).

Elizabeth Long, Note, Where Are They Coming from, Where Are They Going Demanding Accountability in International Adoption, 18 Cardozo J.L. & Gender 827 (2012) (discussing concerns about international adoption, including the risk of human trafficking and coercion, and arguing that the United States should permit international adoptions only from countries that have adopted the Hague convention on international adoption).

Ronald V. Ludlow, Note, Walking the Mine Field: The Moral Issues of International Adoption, 9 J. L. & Fam. Stud. 401 (2007) (examining the moral considerations that support international adoption, such as the interest in providing care for children, as well as the potential for conflicts between the moral values of adoptive parents and the values of the originating country, and arguing that adoptive parents should consider making financial contributions to support the host country’s ability to provide care for children).

Johanna Oreskovic & Trish Maskew, Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption, 14 Buff. Hum. RTS. L. REV. 71 (2008) (challenging Elizabeth Bartholet’s arguments in favor of international adoption, questioning whether private adoption agencies and existing legal regulations provide sufficient protection against abuses, and discussing the human rights community’s concerns about children’s heritage, culture, and identity).

Katie Rasor et al., Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States, 55 N.Y. L. SCH. L. REV. 801 (2010-2011) (explaining how the Intercountry Adoption Act is supposed to allow federal prosecutors to address international adoption fraud, such as when children are taken from their parents and put up for adoption as orphans, but arguing that the Act has flaws that reduce its effectiveness for prosecutors).


Ann Smith, Note, *We Have the Right Tools: An Examination and Defense of Spending in International Adoption*, 58 Harv. Int’l L.J. 485 (2017) (examining the benefits and potential disadvantages of money for orphan care or other humanitarian aid that flows overseas through the international adoption system, including the risk that this money creates incentives for taking advantage of women and children, and arguing that the benefits of the aid outweigh the risks but nuanced steps should be taken to protect child welfare).

Glenys P. Spence, *Singing Songs in a Strange Land: The Plight of Haitian Children in the Space of International Adoption*, 15 Scholar: St. Mary’s L. Rev. Race & Soc. Just. 1 (2012) (discussing how the international adoption process favors the wealthy and how immigrants from the developing world face difficulties in trying to arrange to adopt children who are relatives of the immigrants and have lost their parents).


*Examination or Comparison of Particular Countries*

L. 323 (2013) (exploring the origins of international adoption and analyzing the effectiveness of legal regulation of it, with a focus on comparison of rules imposed by China and South Korea).


David Poveda et al., *Professional Discourses on Single Parenthood in International Adoptions in Spain*, 36 PoLAR: POL. & LEGAL ANTHROPOLOGY REV. 35 (2013) (finding that psychologists and social workers involved in the international adoption process in Spain view a heterosexual couple as the standard for parental and family relations and portray single parenthood in negative terms).


Brian H. Stuy, *Open Secret: Cash and Coercion in China’s International Adoption Program*, 44 CUMB. L. REV. 355 (2013-2014) (questioning the effectiveness of the legal controls on international adoption and describing abusive practices in China’s international adoption program, including baby-buying at Chinese orphanages, confiscation of children by population control officials, and falsification of information about teenagers in order to make them eligible for international adoption).

Lisa M. Yemm, Note, *International Adoption and the “Best Interests” of the Child: Reality and Reactionism in Romania and Guatemala*, 9 WASH. U. GLOBAL STUD. L. REV. 555 (2010) (discussing how legislative changes effectively halted international adoptions of children from Romania and Guatemala, which were previously two of the largest providers of internationally adopted children, and questioning whether the elimination of international adoptions from these countries promotes the best interests of orphaned or abandoned children).
Proposed Reforms


Halley Cody, Note, *America’s Hidden Citizens: The Untold Stories of the Unconscionable Deportations of Its International Adoptees*, 47 SEATTLE U. L. REV. 227 (2023) (arguing that immigration laws should be amended to help people who came to the United States as children through international adoptions, but never became United States citizens through naturalization, and as adults now face the possibility of deportation if they have a criminal conviction).

Deleith Duke Gossett, *If Charity Begins at Home, Why Do We Go Searching Abroad? Why the Federal Adoption Tax Credit Should Not Subsidize International Adoptions*, 17 LEWIS & CLARK L. REV. 839 (2013) (arguing that the federal tax credit for adoption was intended to encourage the adoption of children who are in foster care in the United States and should not apply to international adoptions).

Joseph M. Isanga, *Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards*, 27 BYU J. PUB. L. 229 (2012) (describing the increase in international adoptions of children from Africa and arguing that the regulatory framework governing such adoptions is both overly restrictive and ineffective).

Mario LoPiccolo, Note & Comment, *You Don’t Have to Go Home, but You Can’t Stay Here: Problems Arising when SIJS Meets International Adoption*, 33 WIS. INT’L L.J. 194 (2015) (analyzing flaws in federal immigration statutes concerning undocumented minors who are adopted by American families and are eligible for Special Immigrant Juvenile Status and arguing for expanded application of the best interests of the child principle in these situations).

Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163 (2015) (considering the trend toward openness in domestic adoptions, with more adoptive families wanting...
to know the identity of the birth mother and maintain contact with her, and arguing that increased openness in international adoptions is required by international human rights and beneficial for adopted children as they develop their sense of identity).

Lynn D. Wardle, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 Regent U. L. Rev. 209 (2013-2014) (suggesting that the number of domestic and international adoptions may decline if lesbian, gay, bisexual, and transgender people are allowed to adopt children and proposing a compromise to avoid this problem by allowing “sideways” adoptions in which the partner of the adopting parent has the status of an uncle or aunt rather than a parent).

**Symposium**


**International Child Abduction and Custody Disputes**

*Advice for Attorneys*


at 66 (providing advice for lawyers about bringing or defending against a case under the Hague Convention on international child abduction).


Robert E. Rains, *The Need for Speed in International Child Abduction Cases*, Fed. Law., Sept./Oct. 2020, at 48 (discussing how Hague Convention cases about international child abduction can take several years to move from filing to resolution and proposing ways to reduce these delays).

**Applying the Hague Convention**


Abigail Leann Heeter, Student Article, Monasky v. Taglieri: The Supreme Court’s Interpretation of Habitual Residency and Its Impact on International Child Abduction, 18 Loy. U. Chi. Int’l L. Rev. 95 (2021) (discussing the Supreme Court’s interpretation of what it means for a place to be a child’s habitual residence and arguing that the Court has failed to adequately account for many challenges faced with international family relationships, including situations involving domestic abuse).

Elena J. Hildebrandt, Note, Cultural Considerations and Capabilities of the Habitual State: American Jurisprudence Fails to Protect Victims in International Child Abduction Cases, 109 Iowa L. Rev. 377 (2023) (explaining how courts assess whether a child faces a grave risk if returned to their country of habitual residence, arguing that the cultural considerations and the potential for ameliorative or protective measures should never outweigh the risk in situations where domestic violence or child abuse has already occurred, and proposing that the Department of State should provide specialized training for judges for international abduction cases).

Hannah Loo, Comment, In the Child’s Best Interests: Examining International Child Abduction, Adoption, and Asylum, 17 Chi. J. Int’l L. 609 (2017) (discussing how the need to consider the best interests of a child can be reconciled with the requirements of the Hague Convention on the Civil Aspects of International Child Abduction, including lessons that can be drawn from how the child’s best interests principle is applied in situations involving international adoption and asylum for refugees).

Lauren Mayell, Note, Supreme Court Overreach Through Broad Discretionary Consideration of Ameliorative Measures in International Child Abduction, 12 Global Bus. L. Rev. 1 (2023) (criticizing the Supreme Court for giving judges the discretion to consider protective measures that might ameliorate the risk of abuse if a child returns to their country of habitual residence, comparing the approach of European courts, and proposing a structure for analysis of grave risk and ameliorative measures).

Molshree “Molly” A. Sharma, Golan v. SAADA: Protecting Domestic Abuse Survivors in International Child Custody Disputes, 56 Fam. L.Q. 251 (2022-2023) (reviewing the Supreme Court’s decision about the extent to which courts should consider whether
ameliorative measures can reduce the risk of harm to a child in being returned to a parent who may be abusive).


Tine Van Hof et al., To Hear or Not to Hear: Reasoning of Judges Regarding the Hearing of the Child in International Child Abduction Proceedings, 53 Fam. L.Q. 327 (2020) (discussing the child’s right to be heard in international child abduction cases, empirical data about the extent to which judges in European courts hear from the child in such cases, and the reasons given by judges who decline to hear from the child).

Examination or Comparison of Particular Countries

Brenna Atwood, Student Work, Addressing the Problem of Implementing the Hague Abduction Convention on the Civil Aspects of International Child Abduction Between the U.S. and Mexico, 4 Penn. St. J. L. & Int’l Aff. 790 (2016) (examining the problem of countries failing to comply with the Hague Convention’s requirements, with a focus on children abducted between the United States and Mexico).


Emily C. Dougherty, International Child Abduction and the Hague Convention: Inconsistencies Between the United States and the United Kingdom – A Call for Amendments, 24 Willamette J. Int’l L. & Dis. Resol. 297 (2017) (examining the challenges created by inconsistencies in the application of the Hague Convention, with a focus on the approaches of the United States and the United Kingdom, and proposing amendments to the Convention that would provide guidance in cases when a child is abducted to a country that has not adopted the Convention).

Alexandra Galdos, Note, When a Stranger Isn’t the Danger: International Child Abduction and the Necessity of Mandatory Preventative Measures in the European Union, 49 Geo. Wash. Int’l L. Rev. 983 (2017) (examining measures that the United Kingdom has adopted to reduce the risk of international child abduction, including tipstaff orders and port alert systems, and explaining how the European Union could adopt similar measures).

Yoko Konno, Comment, A Haven for International Child Abduction: Will the Hague Convention Shape Japanese Family Law?, 46 Cal. W. Int’l L.J. 39 (2015) (discussing how Japan’s ratification and implementation of the Hague Convention has affected international custody disputes involving Japan, from the perspective of a law student who immigrated from Japan, was a victim of domestic violence, and was falsely accused of attempting to abduct her child to Japan).

Jurisdiction and Conflict of Laws Issues

Nicole Clark, Note, Putting the “Remedy” Back in the International Child Abduction Remedies Act – Enforcing Visitation Rights for the Left Behind Parent, 89 St. John’s L. Rev. 997 (arguing that federal courts have jurisdiction over claims for enforcement of parental visitation rights under the Hague Convention).
Sam F. Halabi, *The Hague Convention on the Civil Aspects of International Child Abduction and the Latent Domestic Relations Exception to Federal Question Jurisdiction*, 41 N.C. J. Int’l L. 691 (2016) (discussing whether federal courts should have jurisdiction over “domestic relations” issues in international abduction cases, such as claims seeking enforcement of access or visitation rights).

Zadora M. Hightower, Student Comment, *Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases*, 22 Mich. St. Int’l L. Rev. 637 (2014) (examining whether the principle of comity should extend to foreign court orders and judgments in international child abduction cases, particularly if the foreign court is in a nation that has not adopted the Hague Convention).

Nicole Su, Comment, *The International Custody Battle: Conflict of Law Between the Hague Abduction Convention and U.S. Asylum Law*, 39 Hous. J. Int’l L. 433 (2017) (discussing the conflict of law that arises in situations where a parent seeks to have a child return to another country but the child wants to remain in the United States as a refugee seeking asylum).


Proposed Reforms


Cassandra Erler, Comment, *Far from Now-Settled: The Supreme Court’s Decision in Lozano v. Montoya Alvarez as a Violation of Substantive and Procedural Due Process Under the International Child Abduction Remedies Act*, 26 Am. U. J. Gender...
Soc. Pol’y & L. 793 (2018) (arguing that a parent’s due process rights are violated if the one-year filing period for a claim under the Hague Convention and the International Child Abduction Remedies Act cannot be extended through equitable tolling during time when the child’s location is concealed from the parent seeking the child’s return).


**International Enforcement of Alimony and Child Support Orders**


Gary Caswell, Making Long-Distance Parents Pay Up, Fam. Advoc., Fall 2000, at 52 (assessing problems with international enforcement of support orders and urging attorneys to support United States involvement in the development of a new Hague international support convention).

Michael S. Coffee, International Child Support Issues with a U.S. Element, Fam. Advoc. Fall 2020, at 30 (discussing international child support issues that a U.S. attorney may face, including how to
establish a child support order in the United States involving people outside the United States, how to establish a child support order in a foreign country involving people within the United States, how to enforce a U.S. order in a foreign country, how to enforce a foreign order in the United States, and how to obtain a modification of a foreign order in the United States or a modification of a United States order in a foreign country).


Elisha D. Roy, *Enforcement of International Foreign Judgments, Is That Even a Thing?*, 33 J. Am. Acad. Matrim. Law. 459 (2021) (explaining that there is no uniform mechanism for enforcing a foreign judgment in the United States and reviewing the variety of different mechanisms for enforcing foreign judgments concerning child custody, child support, and alimony).


**International Perspectives on Families and Children**


relocation of separated parents and how it affects children, finding that the results of the research are mixed with some studies finding detrimental effects and other research finding beneficial effects, and observing that the evidence from research has not yet been absorbed by judges and scholars examining relocation issues).

Richard A. Warshak, *Stemming the Tide of Misinformation: International Consensus on Shared Parenting and Overnighting*, 30 J. AM. ACAD. MATRIM. LAW. 177 (2017) (describing the Warshak Consensus Report, which found that young children are not harmed by having their time evenly divided between both parents or by spending nights in each parent’s home, and arguing that the Report’s conclusions continue to be supported by scientific findings and an international consensus of experts).

**International Surrogacy**

*Advice for Attorneys*


Sara R. Cohen & Mathilde Foucault, *Who Goes on the Child’s Birth Certificate for International Two-Dad Families When a Child Is Born Through Surrogacy in the United States?*, Fam. Advoc., Fall 2020, at 44 (discussing issues that can arise about who should be listed as parents on a birth certificate when a child is conceived through an international surrogacy arrangement and two men will be raising the child, with advice from lawyers in ten countries about which names to put on the birth certificate).

Stephen Page & Brian Esser, *Think Global, Act Local: 10 Must-Knows About International Surrogacy*, Fam. Advoc., Summer 2015, at ii (presenting ten rules that attorneys should share with their clients to help them understand the complexities and difficulties that can arise in international surrogacy journeys).
Richard F. Storrow, “The Phantom Children of the Republic”: International Surrogacy and the New Illegitimacy, 20 Am. U. J. Gender Soc. Pol’y & L. 561 (2012) (discussing the widespread disapproval and legal obstacles faced by European parents who seek to have a child through international surrogacy arrangements, exploring how this represents a new form of hostility to “illegitimate” children, and reflecting on the implications of this bias for attorneys representing couples seeking to have a child through international surrogacy).

American Bar Association

Alex Sidwell, Comment, Protect All Parties: Opposing the American Bar Association’s Position Statement on Regulation of International Surrogacy Arrangements, 49 Cumb. L. Rev. 125 (2018-2019) (describing how the American Bar Association adopted a resolution that opposes regulation of international commercial surrogacy and is favorable to the interests of businesses that profit from international surrogacy arrangements, exploring the motives behind the resolution, and arguing for regulation that protects the rights of all parties involved including the children).

Richard B. Vaughn, Ending Border Battles: ABA Resolution on International Surrogacy, ABA SciTech Law., Summer 2016, at 27 (explaining the American Bar Association’s resolution on international surrogacy, which asserts that individual countries should be allowed to regulate surrogacy as they see fit, without being limited by international agreements concerning surrogacy).

Citizenship Issues

Rachael Curtin, Note, Suspension of Citizenship: Ethical Concerns in International Commercial Surrogacy and the Legal Possibility of Stateless Children, 55 Vand. J. Transnat’l L. 805 (2022) (describing how gaps in parentage laws create the possibility that a child born through international commercial surrogacy arrangements will not be a citizen of any state and proposing an ethics-based solution that protects the interests of children and ensures no child will be stateless).

Yasmine Ergas, Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial
Surrogacy, 27 Emory Int’l L. Rev. 117 (2013) (discussing the legal and diplomatic struggles faced by a German couple who entered into a surrogacy agreement with a woman in India, using that example to illustrate the risk that a child could wind up stateless and parentless, and arguing that a comprehensive solution to the dilemmas created by international surrogacy will require new thinking about filiation, citizenship, and human rights).

Charles P. Kindregan & Danielle White, International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements, 36 Suffolk Transnat’l L. Rev. 527 (2013) (discussing how international surrogacy can lead to children who are not citizens of any nation, expressing doubts about whether international agreements will solve the problem, and suggesting that countries need to do more to warn people about the potential dangers of cross-border surrogacy arrangements).

Tina Lin, Born Lost: Stateless Children in International Surrogacy Arrangements, 21 Cardozo J. Int’l & Comp. L. 545 (2013) (examining how the variation and lack of coordination in laws concerning international surrogacy has created the possibility of stateless children who are not citizens of any country, assessing proposed legislation in India that could serve as a model for other nations, and discussing whether an international convention or domestic adjudication can effectively address the problem).

Rutuja Pol, Note, Proposing an International Instrument to Address Issues Arising out of International Surrogacy Arrangements, 48 Geo. J. Int’l L. 1309 (2017) (examining issues arising from international surrogacy, including the problem of stateless children who have citizenship in no country, and comparing the laws of countries that take more restrictive or more permissive approaches to commercial surrogacy).

Examination or Comparisons of Particular Countries

becoming the most important location for international surrogacy, until scandals and abusive practices resulted in a ban on international surrogacy in Thailand, and arguing for regulation that would improve international surrogacy rather than banning it).

Ashley Hope Elder, Comment, Wombs to Rent: Examining the Jurisdiction of International Surrogacy, 16 OR. REV. INT’L L. 347 (2014) (emphasizing the importance of understanding the laws of every jurisdiction connected to an international surrogacy arrangement and analyzing the laws on surrogacy of the United States, the United Kingdom, India, and Ukraine).


Erin Nelson, Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy, 41 J.L., MED. & ETHICS 240 (2013) (comparing Canada’s approach to international surrogacy to that of the United Kingdom, Australia, and the United States and suggesting that domestic regulation may be more effective than international measures).

Margaret Ryznar, International Commercial Surrogacy and Its Parties, 43 J. MARSHALL L. REV. 1009 (2010) (evaluating the law and policy issues surrounding international commercial surrogacy, with a particular focus on surrogacy in India, and proposing frameworks for thinking about surrogacy that are focused on the interests of women and children).

surrogacy arrangements involving intended parents in the United States and surrogate mothers in India should be prohibited because they raise too many ethical concerns and legal uncertainties about parentage and citizenship).

Richard F. Storrow, *International Surrogacy in the European Court of Human Rights*, 43 N.C. J. Int’l L. 38 (2018) (discussing how commercial surrogacy arrangements are prohibited in many European countries, which forces couples seeking to become parents to seek surrogates abroad, and which then leads to difficult legal issues when the parents bring the child back to their home country).


Regulation


Jamie Cooperman, Comment, *International Mother of Mystery: Protecting Surrogate Mothers’ Participation in International Commercial Surrogacy Contracts*, 48 Golden Gate U. L. Rev. 161 (2018) (analyzing the problems that can arise from the lack of uniform international laws regarding commercial surrogacy, including questions about the citizenship of the child, the rights of the intended parents, and the interests of the women who serve as surrogates).

of the reproductive tourism industry, including international surrogacy agreements).

Laura Rose Golden, Note, Regulating International Surrogacy Arrangements Within the United States: Is There a Conceivable Solution?, 47 GA. J. INT’L & COMP. L. 169 (2018) (proposing better communication standards and other regulatory changes the United States can implement to overcome the problems created by the lack of international agreements on commercial surrogacy arrangements).

Daniel Gruenbaum, Foreign Surrogate Motherhood: Mater Semper Certa Erat, 60 AM. J. COMP. L. 475 (2012) (discussing legal definitions of motherhood, considering how nations that prohibit surrogacy should treat children born through surrogacy that occurs abroad, and arguing that it is sensible to allow the intended parents to adopt the child born through a surrogacy arrangement).

Bruce Hale, Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?, 36 Suffolk Transnat’l L. Rev. 501 (2013) (examining how issues about international surrogacy, such as stateless children and exploitation of women, expose underlying flaws in the international private law rules concerning the acceptance of parentage documents from other countries and suggesting that these flaws can be addressed under international agreements that are not specifically about surrogacy).


Seema Mohapatra, Adopting an International Convention on Surrogacy – A Lesson from Intercountry Adoption, 13 Loy. U.
(comparing the attempts to develop an international convention on surrogacy to previous efforts to generate an international convention on adoptions).

Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 Geo. L.J. 2249 (2012) (explaining the core principles that should apply to regulation of international surrogacy, including that commercial surrogacy contracts should be tolerated, the parental rights of the intended parents should be guaranteed, citizenship issues for the child should be resolved before insemination occurs, and a central agency should be established in each nation to implement regulations of surrogacy).

Sophia Shepherd, *Regulating International Commercial Surrogacy: A Balance of Harms and Benefits*, 32 U. Fla. J.L. & Pub. Pol’y 293 (2022) (arguing in favor of moderate regulation of international commercial surrogacy, to address concerns like exploitation of surrogate mothers or abandonment of surrogate-born children, but also to avoid excessive regulation that might discourage the practice and eliminate the benefits that can come from it).


surrogacy and suggesting that a non-governmental organization should be established to create norms for surrogacy and certify clinics that follow appropriate standards).

Reproductive Justice

Seema Mohapatra, Achieving Reproductive Justice in the International Surrogacy Market, 21 Annals Health L. 191 (2012) (exploring concerns about international surrogacy from a reproductive justice perspective, suggesting that regulation may be a slow and ineffective way to address these concerns, and arguing for an international analysis of race, gender, and class to determine how best to achieve reproductive justice in international surrogacy arrangements).


Issues for Attorneys Handling International Family Cases


Ann Laquer Estin, International Divorce: Litigating Marital Property and Support Rights, 45 Fam. L.Q. 293 (2011) (introducing the complex issues that arise in international divorce cases, including jurisdictional and procedural issues, questions about what law covers marital property and support rights, and problems with cross-border enforcement of marital property and support orders).

Ann Laquer Estin, Marriage and Divorce Conflicts in International Perspective, 27 Duke J. Comp. & Int’l L. 485 (2017) (reviewing the provisions concerning marriage and divorce in the Restatement (Second) of Conflict of Laws, examining subsequent social and legal changes such as the widespread availability of
no-fault divorce and the increasing number of international marriages and divorces, and suggesting how these changes should influence the preparation of the Third Restatement of Conflict of Laws).

Alena Geffner-Mihlsten, Note, Lost in Translation: The Failure of the Interstate Divorce System to Adequately Address the Needs of International Divorcing Couples, 21 S. Cal. INTERDISC. L.J. 403 (2012) (examining how laws treat interstate divorces within the United States, assessing how the interstate system handles international divorce cases, and arguing that the interstate system produces inconsistent and unfair results for the characterization of marital property and for dealing with concurrent international divorce proceedings).

Susan Myres, Increasing Your Knowledge of Jurisdictional Issues in International Divorce Cases, ASPATORE, Oct. 2012 (providing advice for attorneys about the most difficult challenges in handling international divorce cases, such as complex jurisdictional and procedural problems, difficulties in obtaining enforcement of agreements or court orders, misguided advice that may be given to parents by staff of foreign embassies, and different cultural norms about matters like honesty, finances, or the role of extended family members).

Bryce D. Neier, International Military Divorce, FAM. ADVOC., Fall 2020, at 42 (discussing important considerations for attorneys handling military divorce cases, including benefits issues, international child custody and child abduction issues, and problems with international service of process).


Peter M. Walzer, International Prenups, FAM. ADVOC., Fall 2020, at 6 (providing advice for attorneys drafting prenuptial agreements with international aspects).
Rhonda Wasserman, *Family Law Disputes Between International Couples in U.S. Courts*, Fam. Advoc., Fall 2020, at 22 (discussing important issues for family attorneys handling international cases in American courts, including jurisdiction of the courts, choice of law rules, enforcement of choice of law agreements, and recognition of foreign divorces).

**Mediation of International Family Cases**

Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. Miami Inter-Am. L. Rev. 49 (2008) (arguing that mediation should not be banned in situations involving international child abduction and allegations about domestic violence, but discussing how mediators and attorneys must carefully handle the mediation to ensure that it provides a fair and non-coercive mechanism that protects victims of domestic violence and victims of parental kidnapping).

Colby Berman, Note, *Crossing the Border or Crossing the Line? Why Alternative Dispute Resolution Is the Best Route to Reunite Families of Immigrant Children Separated at the U.S.-Mexico Border*, 21 Cardozo J. Conflict Resol. 465 (2020) (proposing the use of mediation, rather than long and costly litigation, to resolve immigration issues and reunite families separated when attempting to cross the border between the United States and Mexico).

Eric M. Bernal, *A Dual-Role Bilingual Mediator Is Inefficient and Unethical*, 13 Scholar 529 (2011) (discussing ethical problems that can arise when a lawyer serves as both the interpreter and the mediator for a matter involving non-English speaking parties).

Elizabeth Cunha, Note & Comment, *The Potential Importance of Incorporating Online Dispute Resolution into a Universal Mediation Model for International Child Abduction Cases*, 24 Conn. J. Int’l L. 155 (2008) (examining efforts to create a universal alternative dispute resolution model for international child abduction cases and exploring the value of online dispute resolution mechanisms for such cases).
Nuria González Martin, *International Parental Child Abduction and Mediation: An Overview*, 38 Fam. L.Q. 319 (2014) (arguing that mediation and other alternative dispute resolution methods are valuable tools for resolving international child abduction disputes, discussing efforts to ensure that parents can choose voluntary mediation with a skilled international family mediator, and assessing how best to use technology in these mediations).

Melissa A. Kucinski, *The Delicate Art of Mediating International Parental Child Abduction Cases*, Disp. Resol. Mag., Winter 2014, at 18 (examining complications that can arise in using mediation in international child abduction cases and discussing important skills and tactics for mediators in these cases).


Melissa A. Kucinski, *The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases*, 2010 J. Disp. Resol. 297 (2010) (providing advice for lawyers and mediators involved in mediation of international disputes about child custody, with a particular focus on the use of technology, such as videoconferencing and online automatic translations).

Paul Shulman, Note, *Brazil’s Legacy of International Parental Child Abduction: Mediation Under the Hague Abduction Convention as a Solution*, 16 Cardozo J. Conflict Resol. 237 (2014) (proposing the use of a new mediation system, similar to those of Germany and the United Kingdom, to address Brazil’s failure to comply with the Hague Convention’s requirements about expeditious return of children taken from their habitual residence).

Anne K. Subourne, Comment, *Motivations for Mediation: An Examination of the Philosophies Governing Divorce Mediation in the International Context*, 38 Tex. Int’l L.J. 381 (2003) (analyzing the rationales that different countries have for encouraging the use of mediation in divorce cases, including a long tradition of using mediation for dispute resolution, encouraging reconciliation
in order to reduce divorce rates, providing a means to ensure protection of children’s interests, empowering women, and making the legal process more efficient).

Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1 (2008) (examining the risks and benefits of mediation in international child abduction cases and discussing the ethical issues that can arise for mediators when there are conflicting rules governing the mediator’s conduct).

Chandra Zdenek, Comment, *The United States Versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance*, 16 SAN DIEGO INT’L L.J. 209 (2014) (recommending that a system of international mediation would help to ensure neutrality and fairness in international child abduction cases involving the United States and Japan).

**Separation and Reunification of Immigrant Families**

*Analysis of U.S. Policies*


Samantha R. Bentley, Comment, *Give Me Your Tired, Your Poor (Unless They Are from “One of Three Mexican Countries”): Unaccompanied Children and the Humanitarian Crisis at the U.S. Southern Border*, 54 U. RICH. L. REV. 569 (2020) (arguing that the focus of the United States approach to border issues should be on protecting children rather than deterring immigrants).

Carrie F. Cordero et al., *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430 (arguing that the Trump Administration’s policy of separating foreign children from the adults accompanying them on arrival at the U.S. border is not
authorized by domestic or international law and discussing how litigation and legislation should be used to stop the policy).

Morgan Doiron, Note, *Living the American Nightmare: The Adverse Psychological Effects of Separating Immigrant Children from Their Primary Caregivers at the Border*, 16 J. HEALTH & BIOMEDICAL L. 52 (2019) (examining the psychological harm to children separated from their families at the border, through comparisons to the psychological effects of being in foster care, being separated from family members due to their incarceration, and suffering ambiguous loss).

Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019) (contending that family separation is a pervasive part of the entire American immigration system and that this is a form of slow death or slow violence that happens slowly and gradually over time).

Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 GEO. IMMIGR. L.J. 807 (2011) (examining the tension created by the fact that the United States and European nations have been trending away from family reunification and toward restricting family immigration, while supra-national associations such as the European Union and United Nations have moved in the opposite direction and sought to limit national restrictions on family immigration).

Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107 (2016) (exploring the principle of family reunification within immigration law and contending that immigration law privileges families fitting the dominant nuclear family model and disadvantages other families, particularly those in which a woman is classified as unskilled or a child is the head of a migrating family unit).

people of Guatemala, and proposing statutory changes that would address the problems).

Juliet P. Stumpf, Justifying Family Separation: Constructing the Criminal Alien and the Alien Mother, 55 Wake Forest L. Rev. 1037 (2020) (exploring the symbiotic relationship between official discourse and legal change, describing how the discourse during the Trump Administration justified family separation as a natural consequence of the need to protect children while prosecuting parents for criminal behavior, and emphasizing the importance of recognizing how official discourse moves areas of law into or out of public view).


Child and Family Rights

Kerry Abrams, Family Reunification and the Security State, 32 Const. Comment. 247 (2017) (analyzing how the Trump Administration’s ban on immigration from several predominantly-Muslim countries had the effect of separating families, tracing the relationship between family rights and federal immigration power in past eras, and predicting that courts will recognize family reunification as a constitutional interest that must be balanced against national security interests).

Kerry Abrams & R. Kent Placenti, Immigration’s Family Values, 100 Va. L. Rev. 629 (2014) (examining the inconsistencies that can arise in how state family law and federal immigration law define parentage, arguing that immigration law has failed to properly incorporate family law principles, and proposing that immigration law should be reformed to adequately integrate interests in family reunification).

Trump Administration’s family separation policies, arguing that the enforcement mechanisms for international law may be too weak to be effective in addressing those policies, and urging that legislators and voters need to act in opposition to human rights violations).

Beth Caldwell, *Deported by Marriage: Americans Forced to Choose Between Love and Country*, 82 Brooklyn L. Rev. 1 (2016) (considering the increasing number of Americans who face a choice between leaving the country or remaining here alone after deportation of a spouse, examining why courts have concluded that a spouse’s deportation does not infringe upon a citizen’s right to marriage, and arguing that courts should protect the rights of couples to remain together in the United States).


Jenny-Brooke Condon & Lori A. Nessel, *Border Enforcement as State-Created Danger*, 96 St. John’s L. Rev. 829 (2022) (arguing that the government has a constitutional obligation to refrain from acting in ways that create such a risk of danger that they shock the conscience, applying this doctrine to family separation and other policies affecting immigrant families, and asserting that there is a strong basis for holding the government accountable for harm perpetrated in the name of border enforcement).

Keila E. Molina & Lynne Marie Kohm, “Are We There Yet?” *Immigration Reform for Children Left Behind*, 23 Berkeley La Raza L.J. 77 (2013) (examining the tension between family law and immigration law and arguing that the best interests of the child standard should apply in decisions about immigration and deportation that may result in separation of immigrant families).

family separation could lead to establishment of due process rights to maintain the integrity of immigrant families).


Sarah Rogerson, *Cruelty Was the Point: Theories of Recovery for Family Separation and Detention Abuses*, 21 Nev. L.J. 583 (2021) (discussing litigation concerning separation of immigrant families and the extent to which liability can be imposed for harm suffered by detained immigrants, particularly children).


Felicity Sackville Northcott & Wendy Jeffries, *Forgotten Families: International Family Connections for Children in the American Public Child-Welfare System*, 47 Fam. L.Q. 273 (2013) (examining what happens to children who remain in the United States when their parents are deported or detained and arguing that steps must be taken to ensure that parental rights are not terminated without justification and all safe and legitimate options are considered in permanency planning for the child).

Olivia Saldaña Schulman, “*Now They’ve Robbed Me:” The Use of Termination of Parental Rights in Government-Fractured Immigrant Families*, 43 N.Y.U. Rev. L. & Soc. Change 361 (2019) (explaining how states can terminate the parental rights of immigrant parents in civil detention, unfairly forcing these parents to choose whether to contest their immigration cases and risk losing their children or accept deportation and preserve their family’s unity).

U.S. immigration law violates the right to family preservation by failing to account for the best interests of children in decisions about deportation of a parent).

Jonathan Todres & Daniela Villamizar Fink, The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective, 95 Wash. L. Rev. 377 (2020) (contending that the Trump administration’s family separation policies violate children’s rights and calling for action by lawyers and law professors to oppose these policies).

Jesus Torres-Rojas, No Parent Left Behind: Seeking Equality for Parents of U.S. Citizens, 36 Geo. Immigr. L.J. 823 (2022) (discussing how people who were unlawfully in the United States at some point may later be barred from seeking immigration benefits through a family member, explaining that this bar can be waived for spouses and offspring of U.S. citizens but not their parents, and arguing that the inability for parents to obtain a waiver violates equal protection rights).

Alysa Williams, Note, The Forgotten Relatives in the Fight Against Family Separation: A Constitutional Analysis of the Statutory Definition of Unaccompanied Minors in Immigration Detention, 26 Wm. & Mary J. Race, Gender & Soc. Just. 191 (2019) (asserting that children who arrive at the U.S. border with non-parental adult family members have a constitutional right to family unity and should not be classified as unaccompanied minors).


Marcia Zug, Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It, 43 U.C. Davis L. Rev. 193 (2009) (contending that the hardship exception, which allows a deportation to be cancelled where it would cause hardship to a family member who is a U.S. citizen or permanent resident, should be expanded to cover situations where a grandparent who cares for children is facing deportation).
Empirical Studies

Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99 (2011) (describing the systemic failures of the immigration enforcement and child welfare systems in situations involving children in state custody while their parents are in detention or deportation proceedings, based on a detailed case study of one such situation and empirical results from surveys and interviews with attorneys, caseworkers, and judges in one Arizona county).

Emily Ryo & Reed Humphrey, *Children in Custody: A Study of Detained Migrant Children in the United States*, 68 UCLA L. REV. 136 (2021) (presenting results of the first systematic empirical investigation of children in the custody of the Office of Refugee Resettlement, finding that an increasing number of the children are extremely vulnerable, and questioning the system’s capacity to provide adequate care and protection for them).

Historical Perspectives

Sara Gray, *The Effect of Rhetoric: The Narrow Nexus Between Great Britain’s 1938 Kindertransport Rescue Operation and the United States 2018 Zero Tolerance Immigration Policy*, 20 RUTGERS J.L. & RELIGION 203 (2019) (comparing the Trump Administration’s zero tolerance and family separation policies to the British government’s Kindertransport operation in 1938, which brought thousands of Jewish children out of Germany, Poland, and Austria, and finding that the rhetoric used to justify the actions is strikingly similar even though the motivations underlying the practices is different).

Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643 (2014) (comparing the contemporary policy of separating immigrant families to historical child welfare practices such as when children were removed from poor immigrant families by “child-saving” agencies in the 1880s and when Native American children were removed from their families and sent to boarding schools).

Christina A. Quiñónez, Comment, *Exposing the American History of Applying Racial Anxieties to Regulate and Devalue*
Latinx Immigrant Reproductive Rights, 54 U. S.F. L. REV. 557 (2020) (contending that policies requiring separation of immigrant families at the border are a continuation of racial anxieties used to disempower Latinx women and violate their right to bear children).

Anita Sinha, A Lineage of Family Separation, 87 BROOKLYN L. REV. 445 (2022) (tracing the history of family separation policies in America, including the separation of enslaved families and indigenous families and the “orphan train” movement aimed at immigrant families, and comparing the narratives justifying those practices to the ones used to justify separation of families at the U.S. border with Mexico).

Proposed Reforms

Jessica Feinberg, The Plus One Policy: An Autonomous Model of Family Reunification, 11 NEV. L.J. 629 (2011) (describing how some American citizens have important relationships with non-citizens that do not qualify under the family reunification provisions for admission to the United States, arguing that the definition of family relationships should be expanded beyond the traditional family relationships, and suggesting a “plus one policy” that would allow each adult citizen to sponsor the admission of one important person despite the absence of a family relationship recognized by the immigration laws).

Renee Ambrosek Graves, Note, “Deleting” Family Units: The Need to Codify the Flores Settlement Agreement, 51 U. MEMPHIS L. REV. 507 (2021) (discussing the settlement of the Reno v. Flores litigation, providing standards for treatment of unaccompanied children arriving at the border, and why regulations should be enacted to replace the settlement agreement).

Medha D. Makhlouf, Theorizing the Immigrant Child: The Case of Married Minors, 82 BROOKLYN L. REV. 1603 (2017) (analyzing how the immigration laws do not adequately account for individuals in the immigration system who are married but also minors, examining how this reflects outdated assumptions about marriage and family, and proposing reforms to address the disadvantages that married minors face in the immigration system).

**Special Immigrant Juvenile Status**

Javeria Ahmed, Note, *No Parents Allowed: The Problem with Special Immigrant Juvenile Status*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 131 (2017) (proposing that the law on special immigrant juvenile status should be interpreted to deny any immigration benefits to parents who have been abusive, neglectful, or abandoning, but should not bar other parents from obtaining immigration relief).

Michelle Anne Paznokas, Note, *More Than One Achilles’ Heel: Exploring the Weaknesses of SIJS’s Protection of Abused, Neglected, and Abandoned Immigrant Youth*, 9 DREXEL L. REV. 421 (2017) (arguing that state judges frequently misunderstand their role in cases involving special immigrant juvenile status cases, the judges’ decisions in such cases should be based on a best interests of the child standard derived from family law, and a standard order should be created for state judges to use in special immigrant juvenile cases).


Irene Scharf, *Robbing Special Immigrant Juveniles of Their Rights as US Citizens: The Legislative Error in the 2008 TVPRA Amendments*, 30 BERKELEY LA RAZA L.J. 40 (2020) (criticizing how immigration law does not give special immigrant juveniles who obtain American citizenship through naturalization the same rights as other citizens to petition for their parents to be able to immigrate to the United States).
Richard F. Storrow, *Unaccompanied Minors at the U.S.-Mexico Border: The Shifting Sands of Special Immigrant Juvenile Status*, 33 Geo. Immigr. L.J. 1 (2018) (discussing how special immigrant juvenile status is supposed to permit undocumented minors abandoned or neglected by their parents to obtain lawful resident status, but resistance from state courts and federal agencies is undermining its effectiveness).