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Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention

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Judges' Guide to Criminal Parental Kidnapping Cases

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Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and Hague Child Abduction Convention

Foreword

Hundreds of child custody cases are fought across state and national borders every year. Some involve child abduction. Others are the consequence of parents moving with their children to different states or countries following the breakup of their relationships. Very often courts in different states — or countries — exercise custody jurisdiction and issue conflicting orders, raising questions about which order is enforceable.

Litigating custody and pursuing appeals in two different forums can leave parents emotionally and financially exhausted. Worse, children are subjected to long periods of uncertainty and the emotional trauma of being the objects of these prolonged conflicts.

The administration of justice is greatly enhanced when judges have a clear understanding of the complex state, federal and international laws applicable to litigation pending before them. Despite its obvious importance, ongoing judicial education in every aspect of the court's jurisdiction is often difficult, if not impossible. I am sure that most judges would agree that having all of the necessary information available prior to rendering a decision from the bench would be the ideal. However, when considering whether to exercise jurisdiction in an interstate child custody or abduction case all of the necessary information is rarely presented or even available within the state. During heightened litigation, often involving *pro se* litigants, it is often difficult to frame the right questions in order to obtain the information critical to a proper determination. The availability of a handy reference book, to assist the judge in sorting through applicable statutes and ever-changing case facts is an invaluable aid.

This unique volume is the first comprehensive study of jurisdiction in child custody and abduction cases specifically designed for use by the judiciary from the bench. Comprehensive yet succinct, the bench book is a valuable resource for judges faced with deciphering the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA), the federal Parental Kidnapping Prevention Act (PKPA), and the Hague Convention of the Civil Aspects of International Child Abduction (Convention), amidst burgeoning caseloads, limited resources and parties deep in the emotional throes of custody litigation.

However, in order for a bench book to be helpful it must be useable. A judge should be able to peruse it at his or her leisure for detailed understanding or, be able to flip it open, amidst arguments of counsel if need be, and locate information quickly and easily. This well-crafted bench book is designed to assist judges to do just that.

The UCCJA and the PKPA were enacted to prevent jurisdictional gridlock in child custody and abduction cases, and to facilitate interstate enforcement of custody and visitation decrees. The United States ratified the Hague Convention on the Civil Aspects of International Child Abduction (Convention), which requires the prompt return of children who have been wrongfully taken or kept abroad. Federal legislation, the International Child Abduction Remedies Act (ICARA), provides procedures for implementing the Convention in this country.

Judges have a critical role in making these laws work. Yet research conducted by the American Bar Association found that many judges have not applied these laws correctly or at all. Lack of knowledge was identified as a key

reason.[1] The Obstacles Report recommended continuing education for judges and lawyers on the UCCJA, PKPA, Hague Convention and ICARA.[2] Collaborative efforts between judges' organizations and the ABA were suggested to disseminate information about these laws to the legal community.[3] This *Journal* issue implements these recommendations. It is the product of a successful collaboration between the ABA Center on Children and the Law and the National Council of Juvenile and Family Court Judges.

Another effort is underway to improve the handling of interstate child custody and visitation cases. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is in the process of revising the UCCJA. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as the draft bill is called, makes the UCCJA consistent with the PKPA, establishes a uniform procedure for expedited interstate enforcement of custody and visitation orders, clarifies some UCCJA provisions to better reflect the drafter's original intent, and codifies good practice.

The National Council of Juvenile and Family Court Judges and the ABA have been involved, in an advisory capacity, with the NCCUSL committee that is drafting the UCCJEA. The UCCJEA is scheduled for its second reading in July 1997. It is difficult to determine how long it will take the 50 states to enact the UCCJEA once it is available for adoption, presumably in 1998. In the interim, the imperative remains for judges to accurately and efficiently apply the existing statutes as they were intended to be used. This bench book will assist judges to fulfill this mandate.

It is a book for all judges, whether on the family court, the juvenile bench, or a court of general jurisdiction, who preside over any civil case involving child custody. The UCCJA and PKPA apply to a broad range of "custody proceedings" and not solely when custody is at issue in proceedings for divorce or separation. The book should be consulted routinely whenever custody is at issue. This book does not cover how judges should decide the merits of a custody dispute once it is determined they have jurisdiction.

For those judges who are already knowledgeable about the intricacies of the UCCJA, PKPA and the Hague Convention, a review of the bench book will provide solid evidence that thousands of other judges will soon join the ranks of the well-informed. The rest of us, still struggling to make sense of the UCCJA *et al*, will welcome this bench book with open arms confident that much needed help has arrived.

The authors have made a valuable contribution to the library of judicial resources that improve the courts' ability to administer justice. It is a privilege to be associated with this publication.

Janice Brice Wellington
Board of Trustees
National Council of Juvenile
and Family Court Judges

Chapter 10.
International Child Custody and Abduction Cases

Summary

This chapter will familiarize judges in the U.S. with the state and federal law applicable to international child custody, visitation and abduction disputes. These laws are UCCJA § 23, the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), and the International Child Abduction Remedies Act (ICARA).

When a custody order from a foreign country is presented for recognition and enforcement, UCCJA § 23 controls. If notice and opportunity to be heard were given to all affected persons, state courts are to enforce foreign custody decrees.

When a petition is filed seeking the prompt return of a child to another country based on allegations that the child's removal or retention was wrongful, the Hague Convention and ICARA govern. If the child's removal or retention is wrongful within the meaning of the Convention, and no exceptions to return are proved, a court in the U.S. must order the child's return forthwith. A return order is not a decision on the merits of custody.

CHECKLIST

UCCJA cases

1. In an action brought under UCCJA § 23 to enforce a custody determination made by a court in another country, were all affected persons given reasonable notice and opportunity to be heard before the custody order was made? If so, the UCCJA directs the state court to enforce the foreign order.

2. Have UCCJA § 1, § 6, § 7, § 8, or § 14(a) been considered in deciding whether to exercise jurisdiction or to defer to a foreign court?

- Would the purposes of the UCCJA be served or undermined if the state court exercises jurisdiction over a child who is the subject of a foreign custody proceeding or order? UCCJA §1

- Are proceedings pending in a foreign court simultaneous with the state court proceedings? Is the foreign court better situated to decide custody, *e.g.*, because it is the child's home state? UCCJA § 6

- Has a foreign court previously decided custody? Does it have continuing modification jurisdiction to which the state court should defer? UCCJA § 14

- Is the foreign court a more convenient forum? UCCJA § 7

- Does the petitioner have "unclean hands," or has the petitioner engaged in reprehensible conduct that would warrant declining jurisdiction? UCCJA § 8

3. Has a court received notice that a child has been wrongfully taken to, or retained in, the United States under Article 3 of the Hague Convention? If so, the court shall not decide the custody case (l) until the court hearing the Convention case decides not to order the child's return or (2) unless a Hague petition is not filed within a reasonable time. Art. 16, Hague Convention.

Hague Convention cases for return of a child to a foreign country

1. Is the child covered by the Hague Convention?

- Is the child under the age of 16? Art. 4.

■ Was the child habitually resident in a Contracting State (listed in Appendix IIIB) immediately before any breach of custody or access rights? Art. 4
■ Did the removal or retention occur after the Convention entered into force in both Contracting States? Art. 35

2. Was the removal or retention wrongful within the meaning of the Convention? Arts. 3, 5.

■ Was there a breach of "custody rights," which includes the right to determine the child's place of residence? (Custody rights may arise by court order, operation of law, or agreement.)
■ Were the custody rights actually exercised, jointly or alone, or would they have been exercised but for the removal or retention?

3. Has the defendant proved one of the few narrow exceptions to return found in Articles 12, 13 and 20? If so, the court is not required to order the child returned.

■ Has a year or more elapsed between the time of the wrongful removal or retention and the commencement of the proceeding? If so, is the child now settled in its new environment? Art. 12
■ Did the petitioner acquiesce or consent to the removal or retention, or was the petitioner not actually exercising custody at the time of the alleged wrongful removal or retention? Art. 13(a)
■ Is there a grave risk that returning the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation? Art. 13(b)
■ Is a child mature enough for the court to consider his/her objections to being returned? Art.13
■ Would return violate fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms? Art. 20

The court has a treaty obligation to order the child returned if the removal or retention was wrongful and no exception applies.

4. If the petitioner prevails and asks for court costs, attorneys' fees and travel expenses, has the respondent shown that such an order would be clearly inappropriate? If not, the petitioner is entitled to the award under ICARA, 42 U.S.C. § 11607(b).

Applicable statutes

FEDERAL[1]

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

The International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 ("ICARA")

STATE

UCCJA § 23

Law, Policy and Practice, UCCJA § 23

The drafters of the UCCJA extended its application to international cases. The comment explains the rationale: "The basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives." UCCJA § 23 gives courts the statutory authority to resolve international jurisdiction disputes in much the same way they resolve interstate jurisdictional conflicts.

Enforcing foreign custody decrees in the U.S.

UCCJA § 23 makes the provisions of the Act relating to recognition and enforcement of custody decrees of other states applicable to "custody decrees and decrees involving legal institutions similar in nature to custody

institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons." The comment notes that the foreign tribunal must have had jurisdiction under its own law rather than under UCCJA § 3.

Jurisdiction to make a custody determination

In addition to the specific duty to recognize and enforce foreign custody decrees, § 23 also extends the general policies of the Act to the international area.

The comment to § 23 states that the substance of § 1 (*e.g.*, avoiding jurisdictional conflict, multiple litigation, and unilateral removals or retentions of children) and the principles underlying provisions like § 6 (simultaneous proceedings), § 7 (inconvenient forum), § 8 (unclean hands) and § 14(a) (restrictions on modification) are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

It takes self restraint for a court to defer jurisdiction to a foreign court, especially when the child is in the United States. But this is precisely what § 23 envisions.

The case of Superior Court v. Plas, 155 Cal. App. 3d 1008 (Cal. App. 1984), is a good example. In Plas, a mother filed for custody in California only four months after arriving from France with her child. The child was born and raised in France, and lived there until shortly before the California hearing. The appeals court held that California lacked jurisdiction to hear the mother's custody action. Even if the court had jurisdiction, the court abused its discretion in refusing to decline jurisdiction on inconvenient forum grounds. The court should have stayed proceedings pending a determination by the court in France. The court said, "The exercise of jurisdiction in the instant case flies into the face of the...purposes of the Act, both ignoring the fact that the family had much closer connection to France and circumventing totally the stated purposes of discouraging forum shopping and deterring the unilateral removal of children." *Id.* at 498.

Case law applying UCCJA § 23

Many courts conform to the letter and spirit of the UCCJA, even where the result is that a child in the United States is returned to another country pursuant to a foreign decree.[2] However, provincialism surfaces occasionally despite UCCJA § 23, keeping the case (and the child) in the United States even when a foreign country has a closer connection to the family.[3]

A state-by-state list of cases[4] involving the international application of the UCCJA is compiled in endnote 4.

Widespread adoption

Section 23 has been adopted with little variation in all but four states: Missouri, New Mexico, Ohio and South Dakota. Indiana has undermined its § 23 considerably by giving its courts broad latitude to modify foreign custody orders.[5]

Nonreciprocal

Where § 23 is in effect, state courts are required to recognize and enforce a foreign country's custody order even if the foreign court has no reciprocal duty to enforce a U.S. custody order. The Hague Convention, discussed below, fills the gap by giving parents in the U.S. a legal means to secure the return of their children from countries that are parties to the treaty.

PKPA does not apply to foreign custody determinations

The PKPA does not expressly apply to foreign custody orders. Nevertheless, the policies it has in common with the UCCJA

(*e.g.*, limiting custody litigation usually to the child's "home state," and deterring unilateral removal and retention of children) are served by state court compliance with § 23.

Hague proceedings take precedence over custody proceedings

Under Article 16 of the Hague Convention, a court that receives notice that a child has been wrongfully removed or retained in this country shall not decide the custody case (l) until the court hearing the Convention case determines not to order the child's return; or (2) unless a Hague petition is not filed within a reasonable time.

The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act

Basic principles judges need to know

The Hague Convention took effect in the United States in 1988 upon enactment of ICARA, the federal implementing statute. The text of the Convention appears in Appendix IIIA and the list of party countries with effective dates is in Appendix IIIB. ICARA is reprinted in Appendix IV.

Unique remedy

The Convention creates a unique remedy which allows parents in contracting states (*i.e.*, countries that have ratified or acceded to the Convention) to obtain the prompt return of children who have been removed from their country of habitual residence and wrongfully taken to, or kept in, another contracting state when "rights of custody" have been breached. Custody rights are defined under the law of the child's country of habitual residence. They may arise by court order, agreement, or operation of law, and may be exercised jointly or alone. A parent does not need a custody order to invoke the Convention. This makes the remedy available in pre-decree abduction and retention cases.

The Convention establishes a more limited remedy to help parents exercise "access" (visitation) rights when their children are in contracting states. The remedy in Article 21 for interference with access rights does not include the right to have the child ordered returned, which is available only when custody rights have been breached.

Duty to order a child returned

The Hague Convention creates a treaty obligation to order a child returned forthwith if the removal or retention of the child is found to be wrongful within the meaning of Article 3. The duty to return is absolute unless the respondent establishes one of the limited exceptions provided for in Articles 12, 13 or 20. Even then, the court retains discretion to order the child returned.

Not a "best interests" hearing

The Hague Convention does not provide a forum for litigating the merits of a custody dispute. Its purpose is to promptly restore the status quo that existed before the child was wrongfully removed or retained. The Convention and ICARA state that decisions to return a child are not on the merits of custody.

The Convention leaves the responsibility for deciding custody and visitation issues to courts in the child's country of habitual residence if the child is ordered returned.

Under this framework, children who are ordered returned to the U.S. under the Convention may then have custody adjudicated by the state court which has jurisdiction under the UCCJA.

Expeditious proceedings

The court should never allow a Convention

case to develop into a custody trial. This is key to reaching decisions quickly as the Convention urges. Article 11 compels courts to "act expeditiously in proceedings for return of children."[6] If a decision is not reached within six weeks, the U.S. Central Authority[7] is authorized to ask the court for an explanation for the delay.

Relaxed evidence rules

The Convention relaxes certain evidentiary rules as a way of speeding up return proceedings. Under Article 30, any application submitted to the Central Authority or petition submitted to a court, along with any documents or information appended thereto, are admissible in court. Under Article 23, no legalization or similar formalities may be required. (However, authentication of private documents may be required.) These provisions are reiterated in ICARA, 42 U.S.C. § 11605. Prompt disposition of a Convention case is also facilitated by the requirement that return petitions filed in a court in this country must be in English.

Applicable legal precedent

ICARA creates concurrent jurisdiction in state and federal courts over Hague Convention cases. 42 U.S.C. § 11603(a). The petitioner elects the forum by filing the petition for return either in state or federal court.

Legal research for useful case precedent should cover state and federal case law. Foreign case law is also relevant given the uniformity of the Convention in all contracting states.[8]

♦ **Practice Tip**

For information about Hague Convention cases worldwide, check William Hilton at http://www.hiltonhouse.com.

"Provisional remedies"

The court is authorized by ICARA, 42 § 11604, to take or cause to be taken measures to protect the well-being of the child and to prevent the child from being abducted or concealed before the final disposition of the case. A court can order the child removed from the physical custody of the alleged abductor and taken into protective custody in accordance with state law.

THE CASE FOR RETURN

Article 12's right to return

Under Article 12, a court must order a child returned forthwith if the child has been wrongfully removed or retained in terms of Article 3 and less than one year has elapsed from the date of the wrongful removal or retention to the date of the commencement of proceedings. The petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed or retained under the Convention. 42 U.S.C. § 11603(e)(1)(A).

Wrongful removal or retention

Under Article 3, a removal or retention is wrongful where:

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

What are "custody rights?"

"Custody rights" are defined in Article 5(a)

to mean "rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence." Custody rights are defined by the law of the child's habitual residence. They may arise by operation of law, court order, or agreement of the parties. Article 3.

Because custody rights may arise by operation of law in the country of habitual residence and need not be conferred by court order, a person whose child is abducted prior to the entry of a custody order may invoke the Convention for the child's return. This is not a Convention for the recognition and enforcement of judgments; it is a Convention to restore the child to the situation that existed before the abduction or retention.

What is the child's country of "habitual residence" and why does it matter?

It is essential to determine the child's country of "habitual residence." The Convention only applies if the child was "habitually resident" in a Contracting State immediately before the alleged breach of custody or access rights. Article 4. Second, the law of the child's country of habitual residence governs whether the removal or retention is "wrongful," *i.e.*, whether there was a breach of "custody rights."

The Convention does not define "habitual residence." There is no fixed period of time that a child must live in a country for it to be considered the child's "habitual residence." In this respect, "habitual residence" differs from "home state" in the UCCJA and PKPA, which means the state where the child lived for at least six months immediately before commencement of the proceeding.

Many cases have interpreted the term "habitual residence."[9] The Third Circuit Court of Appeals' description of "habitual residence" in Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995) builds upon the excellent analyses in Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) and In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989). The court in Feder said:

> ...a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

"Actually exercised"

In the scheme of the Convention it is presumed that the person who has custody actually exercised it, or would have but for the alleged wrongful removal or retention. Article 13 places on the alleged abductor the burden of proving the nonexercise of custody rights by the applicant as an exception to the return obligation. See defenses, below.

The Sixth Circuit Court of Appeals produced a simple working definition of "actually exercised" in its review of the Friedrich case.[10] The court said:

> If a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.

DEFENSES TO RETURN

Once a petitioner establishes that the removal

or retention was wrongful, the child must be returned forthwith unless the respondent establishes one of the exceptions to return. It is important to point out, however, that a defense once proved does not absolutely preclude a court from ordering the child returned. The court has discretion to order the child's return anyway.

■ Article 12

The court is not obligated to order the return of a child when return proceedings pursuant to the Convention are commenced a year or more after the alleged removal or retention and it is demonstrated that the child is "settled in its new environment." ICARA defines "commencement of the proceedings" to mean with respect to a child located in the United States, the filing of a petition for return or access. 42 U.S.C. 11603(f)(3). The court must determine whether the child is "settled in its new environment" based upon the particular facts of the case.[11] The Convention does not define this phrase.

The respondent must establish this defense by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B).

Article 13(a): nonexercise of custody rights/acquiescence or consent

The court may deny an application for return of a child if the person having the care of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention. Whether the applicant consented to or acquiesced in the removal or retention requires a detailed analysis of the facts.[12]

Questions about consent tend to arise when temporary removals turn into de facto permanent changes in custody. For instance, one parent may consent to the other parent taking the child on a temporary visit to that parent's home country. If the parent decides not to return , the left-behind parent will claim she or he did not consent to the permanent change of residence. Evidence of return airline tickets, school registrations, employment, etc. will help the court ferret out the true intentions of the parents.

A question can arise about whether a left-behind parent acquiesces in a wrongful retention by allowing the abductor-parent to keep the child while trying to work out a settlement of the underlying conflict. The better view is that negotiations for the child's return between the left-behind parent and the alleged abductor-parent should not be viewed as acquiescence on the part of the left-behind parent to the removal or retention. This would discourage amicable resolutions which ought to be encouraged.

The respondent must establish an Art. 13(a) defense by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B).

Article 13(b): grave risk of harm / intolerable situation

A court may refuse to order the return of a child where the respondent proves, by clear and convincing evidence (42 U.S.C. § 11603(2)(A)), that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

♦ Practice tip

A HAGUE CASE IS NOT A CUSTODY CASE!

The most predictable point at which a court can get sidetracked into substantive custody issues is when the person objecting to return argues an Article 13(b) defense. It is a common defense strategy to try to convince the court that return would not be in the child's best interests. Expert testimony and other evidence may be

offered. The respondent should not be permitted to try the underlying custody case under the guise of proving a defense. The merits of custody are not to be considered until it is determined that the child is not to be returned. Article 16.

There is ample case authority for the proposition that courts should interpret "grave risk" restrictively. [13]

A concise, thoughtful analysis of what constitutes "grave risk" is found in Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996). According to Friedrich, evidence that a child will suffer adjustment problems if returned to the country of habitual residence is not enough to establish a "grave risk" of psychological harm that would defeat the Convention's return remedy. The court's rationale is persuasive: the abducting parent should not be permitted to profit from the very situation he or she created by wrongfully removing or retaining the child in the first place.[14]

Specifically, the court held:

> We believe that a grave risk of harm for purposes of the convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - *e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.
> *Id.* at 2604.

■ Views of the mature child

The court may deny return if a child objects to being returned and has attained an age and decree of maturity at which it is appropriate to take account of his or her views.[15] This defense must be proved by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B). Like the others, this defense is discretionary.

The discretionary aspect of Article 13 is especially important because of the potential for brainwashing of the child by the alleged abductor or older sibling. A child's objection to being returned should be given little weight if the court believes that the child's preference is the product of such undue influence.

■ Article 20

Article 20 states: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

As all other exceptions, Article 20 is to be restrictively applied. According to the State Department Legal Analysis, it may be invoked "on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." 51 Fed.Reg.10510. It is not be used as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed. *Id.*

Custody order no defense to return

Under Article 17, a court cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer. The court may, however, take into account the reasons underlying an existing custody decree when it applies the Convention.

THE RETURN ORDER

Once the court determines that the child's removal or retention was wrongful and that no exceptions apply, Article 12 provides that the

court "shall order the return of the child forthwith."

An order for the return of a child envisions returning the child to the parent seeking his or her return in the country of habitual residence. If the petitioner has moved from the country of habitual residence, normally the child will be returned to the petitioner anyway, rather than the country of habitual residence.

The court may order the child returned to the country of habitual residence, but allow the abducting parent to accompany the child home. Although the court cannot order the abductor-parent to return to the habitual residence with the child (the Convention mandates only the child's return), nothing in the Convention prohibits the court from allowing it. This may be an appropriate solution where the court is persuaded that the child would be at risk of harm if returned to the applicant-parent. There is some precedent for having the applicant-parent provide transportation and housing for the respondent-parent who wishes to return with the child.[16]

Attorneys' fees

Under Article 26, upon ordering the return of a child or issuing an order concerning rights of access, the court may direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant to secure the child's return, including costs incurred or payments made for locating the child, costs of legal fees, and those of returning the child.

ICARA's fee-shifting provision is stronger than Article 26 when a court orders a child returned.[17] Under ICARA, 42 U.S.C. § 11607:

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

The rationale for mandatory fee awards "unless clearly inappropriate" is to compensate the parent from whom the child was wrongfully removed or retained, and to deter others from engaging in the proscribed conduct.

ACCESS CASES

Article 5(b) defines "access rights" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence." A parent whose access rights are infringed is not entitled under Article 21 of the Convention to the child's return, but may petition a court "to organize or protect these rights and secure respect for the conditions to which their exercise may be subject." A court in the U.S. would need jurisdiction under the UCCJA before it could make or modify an order of visitation.

There may be situations where noncustodial parents would be deemed to have "custody rights," the breach of which would give rise to an action for return. For instance, if a custody order gives the noncustodial parent a right to be consulted before a child is taken out of the country, that parent could be said to have a right to determine the child's residence. Since the return remedy is available for a breach of custody but not access rights, noncustodial parents will seek to frame their rights in terms of custody rather than access, which may be justified by the facts.

Section 23 of the UCCJA may provide a better remedy than the Convention when there has been a violation of court-ordered visitation rights. A state court in the United States could

order the custodial parent to comply with the prescribed visitation period in a foreign order by sending the child to the parent who is abroad. This remedy is potentially broader and more meaningful than the Convention, since the Convention does not include the right to order a child sent overseas to visit with the noncustodial parent.

♦ Practice tip

As good as the Hague Convention remedy is for recovering abducted children from foreign countries, it is no substitute for preventing abductions in the first place. When counsel demonstrate a likelihood of international child abduction, judges should include safeguards in the custody order.

These include restrictions on leaving the U.S. without written consent of the other parent or court permission; restrictions on applying for or receiving original or duplicate passports for a child; mandatory surrender of all passports (U.S. and foreign) before visitation rights may be exercised; requirement of a bond to guarantee the child's return from abroad; securing a "mirror image" order from a court in the foreign national parent's country as a prerequisite to exercise of custody or visitation rights. See Chapter 7 for a discussion of risk factors for child abduction and preventive measures that the court can incorporate into the custody order.

Judicial safeguards are of added importance when an abduction to a non-Hague country is foreseeable, particularly where it is shown that the custody law of the foreign country does not give both parents a fair hearing or consider the child's best interests.

Endnotes

1. The full text of the Hague Convention and ICARA appear in Appendices III and IV, respectively.

2. Courts, for the most part, have given deference to foreign court orders as the UCCJA intends. *See, e.g.*, Vause v. Vause, 409 N.W.2d 412 (Wis. Ct. App. 1987) (Wisconsin court recognized and enforced a West German order where mother had actual notice of the West German proceedings); In re Marriage of Malak, 182 Cal. App. 3d 1018 (Ct. App. 1986) (California was obligated to recognize and enforce a Lebanese custody order in favor of father pursuant to UCCJA § 23, where mother had reasonable notice and opportunity to be heard, the factual circumstances under which the Lebanese decrees were made satisfied the jurisdictional requirements of the UCCJA, and no evidence was presented that father would automatically get custody in Lebanon); Woodhouse v. District Court, 587 P.2d 1199 (Colo. 1978) (Where father filed for change of custody after abducting child from England, lower court's assumption of "significant connection" jurisdiction was improper in light of the international application of the UCCJA, the English court's retention of continuing jurisdiction, and the absence of a true emergency situation; the Colorado Supreme Court granted a writ of habeas corpus enforcing the English custody order, which gave mother custody); Miller v. Superior Court, 587 P.2d 723 (Cal. 1978) (Australian father obtained enforcement under California's UCCJA of an Australian decree granting him custody of his two children after mother abducted them to California. Court rejected mother's objections that she was not given reasonable notice and opportunity to be heard in the Australian proceedings, and that the Australian custody order should be denied enforcement because its purpose was to punish her for removing the children from Australia. The court noted that the mother still had the full right to be heard on the custody issue in Australia, because the custody award in favor of father was temporary.)

3. *See, e.g.*, Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (Michigan's exercise of significant connection jurisdiction, which resulted in an award of custody to the mother with limited visitation rights to the father living in Ireland, upheld despite the fact that Ireland was the home state of the three children who had been abducted from that country by their mother. Michigan was not required to recognize and enforce the Irish custody order obtained by father after the abduction because the mother had not been given notice and an opportunity to be heard. There was no abuse of discretion in failing to find Michigan an inconvenient forum.). The Farrell case sends the wrong message. By rewarding the abductor-mother with a friendly forum, the court actually encourages unilateral removals of children and forum-shopping.

4. Cases applying UCCJA § 23, by state:

Arizona
Tiscornia v. Tiscornia, 742 P.2d 1362 (Ariz. Ct. App. 1987)(France; deferred jurisdiction).

California
Miller v. Superior Court, 587 P.2d 723 (Cal. 1978)(Australian custody order enforced)
Ben-Yehoshua v. Ben-Yehoshua, 154 Cal. Rptr. 80 (Cal. Ct. App. 1979) (California lacked jurisdiction when it awarded mother custody; Israel had jurisdiction; Israel father's appearance in California proceeding did not confer subject matter jurisdiction, which was otherwise lacking under UCCJA).
In re Marriage of Malak, 182 Cal. App. 3d 1018 (Ct. App. 1986) (Lebanese custody order enforced under UCCJA § 23).
Superior Court v. Plas, 155 Cal. App. 3d 1008 (Ct.App.) (France, not California, had custody jurisdiction; California's exercise of jurisdiction circumvented the stated purpose of discouraging forum shopping and deterring the unilateral removal of children).
In re Stephanie M., 867 P.2d 706(Cal. 1994)(California properly exercised jurisdiction under the UCCJA, and there was no abuse of discretion in the California court's failure to decline jurisdiction on inconvenient forum grounds in favor of Mexico, where dependent child's grandmother lived), *cert. denied*, 115 S. Ct. 277 (1994).

Colorado
Woodhouse v. District Court, 587 P.2d 1199 (Colo. 1978) (Colorado enforced U.K. custody order).

Connecticut
Goldstein v. Fischer, 510 A.2d 184 (Conn. 1986) (Germany, not Connecticut, had custody jurisdiction, where child was only in state for four months).
Hurtado v. Hurtado, 541 A.2d 873 (Conn. App. Ct. 1988) (Connecticut retained modification jurisdiction despite custodial father's removal of children to Columbia, South America).

Florida
Al-Fassi v. Al-Fassi, 433 So. 2d 664 (Fla. Dist. Ct. App. 1983) (Florida not required to recognize and enforce Bahamian custody order, and even if recognition was required, Florida could modify because all parties had left Bahamas), *rev.den.* 446 So. 2d 99 (Fla. 1984);
Suarez Ortega v. Pujals de Suarez, 465 So. 2d 607 (Fla. App. 1985) (Florida clearly lacked jurisdiction under UCCJA § 23 where Mexico was child's home).
Sterzinger v. Efron, 550 So. 2d 475 (Fla. Dist. Ct. App. 1988) (Florida was prohibited from exercising jurisdiction to domesticate a West German judgment, where a proceeding concerning custody was pending in Puerto Rico in substantial conformity with the UCCJA).
Dixson v. Cantrell, 564 So. 2d 1138 (Fla. App. 1 Dist. 1990) (Florida recognized Dutch decree).
Brown v. Tan, 395 So. 2d 1249 (Fla. Dist. Ct. App. 1981)(Child ordered returned to father in Singapore, rejecting mother's arguments that Florida had jurisdiction. The court noted its abhorrence of wrongful detention of children).

Georgia
Mitchell v. Mitchell, 311 S.E.2d 456 (Ga. 1984) (Georgia court upheld imposition of safeguards to prohibit removal of children from the U.S., where evidence showed that if Lebanese mother removed children to the United Arab Emirates, the courts there would provide no relief and father could not enforce his joint custody rights).

Illinois
In re Marriage of Alush, 527 N.E.2d 66 (Ill. App. Ct.) (Illinois court bound to recognize and enforce Israeli decree once it was filed in accordance with UCCJA).
In re Marriage of Agathos, 550 N.E.2d 1161 (Ill.App. Ct. 1990) (Greek order must be registered and party given opportunity to object).
In re Marriage of Silvestri-Gagliardoni, 542 N.E.2d 106 (Ill. App. Ct. 1989) (Illinois enforced Italian decree; Illinois lacked jurisdiction) .

Indiana
Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991)
(Indiana court had "home state" jurisdiction, France did not. Trial court abused its discretion by declining jurisdiction on inconvenient forum grounds in favor of France, where mother commenced proceeding two months after abducting children from Indiana).

Kansas
In re Marriage of Nasica, 758 P.2d 240 (Kan. Ct. App. 1988) (Kansas' exercise of jurisdiction permissible where father failed to prove that prior pending proceeding in France was in substantial conformity with UCCJA).

Louisiana
Gay v. Morrison, 511 So. 2d 1173 (La. Ct. App.)
(Louisiana enforceds Brazilian visitation rights confirmed in New York order because Brazil was a "state" within the meaning of the UCCJA and had most significant connections with the children), *writ denied*, 515 So. 2d 1008 (La. 1987).

Maryland
Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996) (Maryland granted comity to Pakistani custody order awarding custody to father. In making the order, the best interests of the child (based on the culture, customs and mores of Pakistan and the religion of the parties) was considered under Pakistani law, and that law is not so contrary to Maryland public policy as to undermine confidence in the outcome of the trial. The fact that the Pakistani custody order was based on "Hazanit" -- complex Islamic rules of maternal and paternal preference, depending on the age and sex of the child -- does not mean that Pakistani law is so repugnant to Maryland law that comity should be denied, since the Hazanit is not the only factor used to determine the best interest of the child.).

Massachusetts
Bak v. Bak, 511 N.E.2d 625 (Mass. App. Ct.1987) (Probate judge did not abuse discretion in refusing to defer to West German courts where Massachusetts has jurisdiction based on "home state" and significant connection jurisdiction).
Custody of a Minor (No. 3), 468 N.E.2d 251 (Mass. 1984) (Massachusetts obliged to enforce Australian custody order which was made in substantial conformity with the UCCJA, was not punitive, was made with notice to mother, and took into consideration child's best interests).

Michigan
Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (Michigan not obligated to recognize and enforce Irish order made without notice to mother or opportunity to be heard; Michigan exercised significant connection jurisdiction).
Klont v. Klont, 342 N.W.2d 549 (Mich. Ct. App. 1983) (Michigan recognized and enforced West German order).

Mississippi
Laskosky v. Laskosky, 504 So. 2d 726 (Miss. 1987) (Mississippi enforced valid temporary Canadian custody order pursuant to UCCJA § 23).

New Jersey
MC v. MC, 521 A.2d 381 (N.J. Super. Ct. Ch. Div. 1986) (two cases involving Irish custody orders were consolidated with mixed results: New Jersey enforced one but not the other).
Schmidt v. Schmidt, 548 A.2d 195 (N.J.Super.Ct. App. Div. 1988) (UCCJA required enforcement of valid foreign decrees, but New Jersey not bound to enforce West German *ex parte* custody orders; denial of father's motion to transfer case to Germany on inconvenient forum grounds not an abuse of discretion, as it wawithin the court's discretion to apply the Act's general jurisdictional provisions to international cases.).

New York
Braunstein v. Braunstein, 497 N.Y.S.2d 58 (App Div. 2 Dept. 1985) (New York court enforced, and refuses father's request to modify, Swedish custody order).
Klien v. Klien, 533 N.Y.S.2d 211 (Sup. Ct. 1988) (New York refused to decline jurisdiction on inconvenient forum grounds in favor of Israel, where father abducted children from their "home state" of New York and Israel was not a "state" under the inconvenient forum provision of the UCCJA).
Lotte V. v. Leo V., 491 N.Y.S.2d 581 58, 128 Misc. 2d 896 (Fam. Ct. 1985) (Switzerland was not a "state" within meaning of UCCJA prohibition on simultaneous proceedings, leaving New York free to exercise jurisdiction notwithstanding pending custody proceeding in Switzerland).
Evans v. Evans, 447 N.Y.S.2d 200 (Sup .Ct. 1982) (New York lacks modification jurisdiction and defers to Israel which issued a custody decree based on jurisdictional principles similar to those of the UCCJA).
L.H. v. Youth Welfare Office of Wiesbaden, Germany, 568 N.Y.S.2d 852, 150 Misc. 2d 490(Fam. Ct.)(New York deferred to Germany's jurisdiction).

Pennsylvania
Commonwealth ex rel. Taylor v. Taylor, 480 A.2d 1188(Pa. Super. Ct. 1984) (Pennsylvania lost modification jurisdiction and Bermuda could validly modify the Pennsylvania order consistent with the UCCJA).
Hovav v. Hovav, 458 A.2d 972 (Pa. Super. Ct. 1983) (Pennsylvania lacked jurisdiction to modify Israeli decree).
Zaubi v. Zaubi, 423 A.2d 333 (Pa. Super Ct. 1980) (Pennsylvania must enforce and cannot modify, except as provided by statute, Danish decree, where father had notice an opportunity to be heard in the Danish proceeding. The father "evaded the jurisdiction of the Danish court, flouted its decree, and relitigated in a 'friendlier' forum the very issues which the Danish court had decided against him," precisely what the UCCJA was intended to prevent.).
Taylor v. Taylor, 420 A.2d 570 (Pa. Super. Ct. 1980) (Pennsylvania enforced, and could not modify, Canadian custody order), *cert. denied*, 454 U.S. 1151 (1982).

Tennessee
Falco Adkins v. Falco Antapara, 850 S.W. 2d 148 (Tenn. Ct. App. 1992) (where Panama and Tennessee entered conflicting custody orders, dismissal of Tennessee proceeding was affirmed where Panama was "home state" of children, Tennessee lacked jurisdiction, and even if it had jurisdiction, it was an inconvenient forum. There was no evidence that Panama would not afford due process or that it would not follow the principles of the UCCJA. Tennessee cannot exercise jurisdiction, but it would enforce the order of a country acting in accordance with the principles of the UCCJA.).

Texas
Garza v. Harrey, 726 S.W.2d 198 (Tex. App. 1987) (Texas bound by UCCJA to recognize and enforce Mexican decree, but short term temporary emergency relief allowed until steps were taken in Mexico to protect the child).

Vermont
In re Cifarelli, 611 A.2d 394 (Vt. 1992) (Vermont deferred to Bermuda. Although Vermont had emergency jurisdiction when it entered the initial guardianship, Vermont lacked continuing jurisdiction and was an inconvenient forum. Bermuda, where child

lived for over a year, is the only forum with evidence of the child's best interests.).

Virginia
Middleton v. Middleton, 314 S.E.2d 362 (Va. 1984) (In Middleton, Virginia abused its discretion in refusing to find England a more appropriate forum. Modification jurisdiction shifted from Virginia to England, which had been the childrens' "home state" for seven years. In Lyons, Virginia not required to recognize and enforce a U.K. order obtained by the mother who had abducted child from Virginia, the child's "home state.").

Washington
In re Marriage of Ieronimakis, 831 P.2d 172 (Wash. Ct. App. 1992) (Washington applied the general principles of the UCCJA to conclude that Greece, not Washington, was the childrens' home state and the proper place to decide custody. Washington also should not exercise jurisdiction based on inconvenient forum and unclean hands, because the mother wrongfully removed the children from Greece. The Washington court received written assurances from Greece that it provided equal rights for women and that custody determinations are based on the best interests of the child.).

Wisconsin
Vause v. Vause, 409 N.W.2d 412 (Wis. App. 1987)(Wisconsin recognized and enforced German order.)

5. "Except as provided in § 25 of this chapter "at the beginning of the second sentence of § 23 Section 25 (IC 31-1-11.6-25 provides: "(a) Notwithstanding § 3, § 7, and § 8 of this chapter, a court of this state has jurisdiction to make a child custody and support determination by modification decree if: (1) the child is a citizen of the United States; (2) a determination concerning the custody of the child has been made by a court in another nation; (3) the child is physically present in this a state; and (4) there is a reasonable probability that the child will be moved outside of the United States if a determination concerning the custody of the child made by a court in another nation is given effect in the United States..."

6. Zajaczkowski v. Zajaczkowska, 932 F. Supp. 128 (D. Md. 1996) (return petition treated as an application for a writ of habeas corpus, based in part on the court's analysis that ordinary federal rules of civil procedure would be at odds with the Convention and ICARA's premium on expedited decision-making); Walton v. Walton, 925 F. Supp. 453 (S.D. Miss. 1996) (court ruled on return petition thirty days after it was filed); Navarro v. Bullock, 15 Fam. L. Rep. (BNA) 1576 (Cal. Super. Ct. Sept. 1, 1989) (court ruled on return petition eight days after it was filed).

7. The State Department is designated as the U.S. Central Authority (CA). The 'CA' can be reached in Washington, D.C. at (202)636-7000. Its duties are set forth in Article 7 of the Convention.

8. *See* Air France v. Saks, 470 U.S. 392 (1985) (When a treaty is involved the use of foreign decisions is proper authority in the U.S. Courts.).

9. *See, e.g.*, Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) (habitual residence determined by focusing on the child, looking back in time, not forward to the future intentions of only one of the parents. Once established, "habitual residence" may be altered only by a change in geography, which must occur before the questionable removal and the passage of time, not by changes in parental affection and responsibility); In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989) ("There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed, his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."); Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995). Also *see* Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (there is no real distinction between habitual and ordinary residence); In re Ponath, 829 F. Supp. 363, 367-68 (D. Utah 1993) (concept of habitual residence must encompass some element of voluntariness and purposeful design which can be characterized as settled purpose; coerced stay in a country does not make that country the habitual residence); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993) (the intent is for the concept of habitual residence to remain fluid and fact based, without becoming rigid); Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) (habitual residence determined more by a state of being than a particular time period; settled purpose may be attainable even in a singleday).

10. Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).

11. For cases interpreting "settled in its new environment," *see, e.g.*, David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S.2d 429(Fam. Ct. 1991) (children were not so settled that they could not be uprooted and returned to Canada); In re Coffield, 644 N.E.2d 662 (Ohio Ct. App. 1994) (child had not developed the connections to the community that would normally be expected of a 5-year old after 3 years in the new community).

12. *See, e.g.*, In re Ponath, 829 F. Supp. 363 (D.C. Utah 1993) (father found to have acquiesced); Currier v. Currier, 845 F. Supp. 916 (D.C. N.H. 1994) (mother found not to have acquiesced); Wanninger v. Wanninger, 850 F. Supp. 78)(D.Mass. 1994) (father consented to initial removal but found not to have acquiesced in mother's retention of children); Levesque v. Levesque, 816 F. Supp. 662 (D.Kan. 1993) (insufficient evidence to establish mother's acquiescence in father's removal of children from Germany); David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S. 429 (Fam. Ct. 1991) (father's delay in commencing proceeding did not amount to acquiescence); In re A, 1 AER 929 (Ct. of App. 1992)(the English Court of Appeal found the father had acquiesced in mother's unilateral removal of the children based on a letter he wrote to her following the removal, his three-month delay in filing a return application, and his failure to tell mother he wanted the children back).

13. *See, e.g.*, Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996); Thomson v. Thomson, 119 D.L.R.4th 253 (Can. 1994)(Supreme Court of Canada held that the exception applies only to harm "that also amounts to an intolerable situation."); Tahan v. Duquette, 613 A.2d 486 (N.J. Super. Ct. 1992) ("grave risk" hearing should be focused on the country to which the child would be returned and whether there is such internal strife or unrest there as to pose a risk of harm. Although the court may not delve into the merits of the custody dispute, the court may evaluate the surrounding to which the child would be returned and the basic personal qualities of those located there); In re Coffield, 644 N.E.2d 662 (Ohio Ct. App. 1994) (scope of inquiry under the Article 13(b) grave risk exception is extremely narrow and should focus on the environment in which the child would reside if returned; evidence of psychological tests of child and father, past lifestyle of mother, and evidence of the possible harm the child would suffer if separated from his father all deemed irrelevant to the Art. 13 (b) inquiry); Nunez-Escudero v. Tice- Menley, 58 F.3d 374 (8th Cir. 1995) (mother's claims of alleged physical, sexual and emotional abuse were too general to warrant exception to return); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (there must be specific evidence of potential harm; separation of the child from its parent not sufficient).

14. *See also* Navarro v. Bullock, 15 FLR 1576 (BNA)(Cal. Super. Ct. 1989) ("To retain the children in the United States guarantees that the mother will continue to frustrate the custodial and visitation rights of the father . . . . To allow this to happen would be to allow mother to profit from her own wrong . . . . ").

15. *See, e.g.*, Sheikh v. Cahill, 546 N.Y.S.2d 517, 145 Misc. 2d 171 (Sup. Ct. 1989) (nine-year old child ordered returned to mother in England despite his expressed desire to remain with father in New York, which probably was influenced by father's favorable treatment during summer visit. The child was neither old enough nor mature enough to take his views into account.).

16. *See, e.g.*, Korwin v. Korwin (District Court of Horgen (Switzerland) Feb. 13, 1992) (Father submitted a sworn statement declaring his willingness to provide housing and to bear the costs if mother were to return to the United States while custody proceedings were pending. She was ordered to return the child to Michigan after she wrongfully withheld the child in Switzerland.) The case is on file at the ABA Center on Children and the Law.

17. *See, e.g.*, Grimer v. Grimer, 1993 LEXIS 19616 (D.C. Kan 1993) (mother awarded costs and fees in conjunction with return order); Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993) (father denied attorneys fees in association with his unsuccessful petition for children's return).