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I. INTRODUCTION

Increases in divorce rates and international travel in recent years have contributed to the growing problem of international child abduction.¹ The primary international abductors of children are either noncustodial or joint custodial parents who attempt to gain a full-time relationship with their child by removing the child from the country without the knowledge of the other parent.² Often referred to as “child-snatching,” this self-help method of obtaining full-time custody is dangerous for the child and frustrates the usual judicial process for determining custody.³

The parent whose child has been abducted endures financial and emotional hardships while searching for an abducted child, and may be forced to litigate in a foreign country for the return of the child or for the enforcement of an existing custody decree. More importantly, international child abduction causes psychological hardship to children, who are taken from their customary environment and subjected to a new parental situation, a new culture, and perhaps a new language.⁴

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2. See discussion of a “wrongful” taking and the definition of wrongfulness under the Convention, infra pp. 5-6. An abductor may possess custody rights, for example, in a joint custody arrangement, and thus be entitled to take the child out of the country of habitual residence. However, the taking is wrongful when the abduction deprives the other lawful custodian of his or her rights to custody.
4. See id. “Children who are deprived of normal parental relationships can develop ‘later antisocial behavior [problems], such as delinquency, prostitution, and drug addiction’ as well as ‘mistrust, low self-esteem, and chronic depression.’” Id. at 1 (quoting S. ABRAHMS, CHILDREN IN THE CROSSFIRE 76 (1983)).
The 1980 Hague Convention on the Civil Aspects of International Child Abduction\(^5\) (the Convention) is an international attempt to hasten the return of children wrongfully abducted and to deter such abductions in the future. The Convention was given force of law in the United Kingdom by the Child Abduction and Custody Act, 1985. In the United States, the Convention was implemented by the International Child Abduction Remedies Act (ICARA).\(^6\) The Convention’s stated goals are relatively simple: “to secure the prompt return of children wrongfully removed or retained in any Contracting State, and to ensure that the rights of custody and access under the laws of one Contracting State are effectively respected in the other Contracting States.”\(^7\) The Convention seeks to obtain these goals by reestablishing the status quo and returning the child to his or her country of habitual residence, where the merits of the custody dispute can be determined.

Under the Convention, an international analysis of the “merits of any custody issue” is specifically precluded.\(^8\) The courts in the country to which the child has been abducted, the “Requested State” under the Convention, are responsible only for deciding whether immediate return is warranted. The underlying custody issues are properly determined only in the State of habitual residence: “the Hague Convention is clearly designed to insure that the custody struggle must be carried out, in the first instance, under the laws of the country of habitual residence . . . .”\(^9\) By leaving the ultimate custody determination to the courts in the country of habitual residence, the Convention assures that an abducting parent cannot benefit from his or her unilateral actions by obtaining a favorable custody order in the Requested State.\(^10\) In recommending the Convention to the U.S. Senate for ratification, President Ronald Reagan described its goals as follows:

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7. Hague Convention, supra note 5, art. 1.
10. See Department of State Notices, 51 Fed. Reg. 10,494-10,516 (1986). The Convention “is not concerned with establishing the person to whom custody of the child will belong at some point in the future . . . . It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.” (citing Explanatory Report by Official Convention Reporter Professor Elisa Perez-Vera, Acts and Documents of the Fourteenth Session Book III (1980)). Id. at 10,494.
The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction... as resort to the Convention is to affect [sic] the child's swift return to his or her circumstances before the abduction... In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.¹¹

Despite the Convention's simple and admirable goals, it remains true that nations often have paternalistic views of family and childrearing. To order the return of a child to a foreign nation, especially when the abductor is a fellow citizen, undoubtedly proves difficult for judges in individual cases. For this reason, an analysis of the limitations and exceptions in the Convention that allow a court to refuse to order the prompt return of the child becomes important. This Note will analyze the cases and commentary in the United Kingdom and the United States to determine whether the Convention's objectives are being undermined through the use of such limitations and exceptions.

II. THE STRUCTURE OF THE CONVENTION

The Convention provides a simplified procedure for aggrieved parents to employ in facilitating the return of the child to legal custody. The Convention applies only between those countries that have ratified it, so-called "Contracting States." The usual formalities of filing lawsuits in foreign jurisdictions are minimized because the parent can use his or her own governmental structure to seek the child's return.¹² Each Contracting State must set up a "Central Authority" to serve as a liaison with the other Contracting States.¹³ A parent whose child has been wrongfully removed

¹³ The Central Authority for the United States is the Bureau of Consular Affairs of the Department of State. 22 C.F.R. § 94.2. For the United Kingdom, the Central Authority for England and Wales was the Child Abduction Unit within the Lord Chancellor's Department. The England and Wales Central Authority has now been relocated to the official Solicitor's Department. Carol S. Bruch, The
can file an application with either the Central Authority of the home country or the country where the child is located. Upon application, the Central Authority must take all appropriate measures to discover the whereabouts of the child, prevent harm to the child, protect the interests of the lawful custodian or applicant, and secure the voluntary return of the child. If necessary, the Central Authority can initiate judicial or administrative proceedings to secure the child's return.¹⁴

If a judicial proceeding is initiated, the court must act expeditiously. Article 11 gives the applicant or the Central Authority of the Requested State the right to demand a statement from the court detailing the reasons for delay if a decision has not been made within six weeks from the commencement of proceedings.¹⁵ Swift resolution of these proceedings is essential to the Convention's goal of returning abducted children to the factual status quo as soon as possible.¹⁶

There need not be a custody decree in effect in order to trigger the return provisions under the Convention. A child can be ordered returned to the person with whom the child was an habitual resident, even if the abduction was not in violation of an existing custody order.¹⁷ Children are often abducted long before custody actions are initiated, and this provision allowing parents to bring pre-decree petitions assures that children will not be prejudiced by the legal inaction of their physical custodians, who may not have anticipated the abduction.¹⁸ In addition, because application of

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¹⁴. Elliott, supra note 12, at 2. See also Bruch, supra note 13, concluding that the Central Authorities are the unsung heroes who facilitate the Convention's success. They can be helpful to parents even before a problem occurs by suggesting preventative measures. They provide education to the bench, the bar, and the public about the Convention. They guide a parent through the entire return request, often providing help with translation and obtaining legal counsel, and much more. Id.

¹⁵. Department of State Notices, supra note 10, at 10,508.

¹⁶. Navarro v. Bullock, 15 Fam. L. Rep. (BNA) 1576 (1989), highlights the potential for quick and effective relief under the Convention. The court ruled on the wrongfulness of the mother's retention of her children only eight days after the father filed his petition.

¹⁷. In this way, the Convention is different from other U.S. laws that deal with child abduction. Both the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. 116 (1979), and the Parental Kidnapping Prevention Act (PKPA), Pub. L. No. 96-611, 94 Stat. 3566 (1980), provide for enforcement of existing custody decrees. Application of the UCCJA and the PKPA restores the legal status quo, while application of the Hague Convention restores the factual status quo. Department of State Notices, supra note 10, at 10,505.

¹⁸. Department of State Notices, supra note 10, at 10,505.
the Convention is not contingent upon an existing custody order, there is no need for interminable litigation concerning the enforcement of foreign custody decrees, and the child can be returned more swiftly.19

Moreover, an abductor cannot insulate the child from the return provisions by obtaining a custody order in the country of new residence. Article 17 provides that the Requested State cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer. However, article 17 does permit a court to consider the reasons underlying an existing custody decree when it applies the Convention.20

The primary duty of the courts in the Requested State is to determine whether there has been a wrongful removal or retention. The child’s immediate return is mandated when a wrongful removal or retention is found, unless one of the Convention’s exceptions applies. Under ICARA, the petitioner (the parent from whom the child has been taken) has the burden of proving by a preponderance of the evidence that the removal was wrongful.21 Under article 3, the removal or retention of a child 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 immediately 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.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of agreement having legal effect under the law of that state.22

The term “custody rights” as used in subparagraph (a) of article 3 is defined in article 5(a) as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of

20. Hague Convention, supra note 5, art. 17.
22. Hague Convention, supra note 5, art. 3.
The term takes on a more specific meaning by reference to the law of the country in which the child was a habitual resident immediately before the removal or retention. For example, in the United States, prior to a decree of custody allocating rights between parents, both parents are presumed to have a right of custody. If one parent unilaterally interferes with the right of the other parent, the removal or retention is wrongful. The final subparagraph of article 3 indicates that custody rights may arise by operation of law, by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the laws of that Contracting State. The aforementioned pre-decree right to custody for each parent in the United States is an example of a custody right arising by operation of law.

"Habitual Residence" is not defined by the Convention. The determination of habitual residence is necessarily fact specific and, thus, the term must remain fluid. If a country, such as the United States, has more than one territorial unit, habitual residence refers to the particular unit where the child was a resident. In the United States, this refers to the state where the child lived.

Subparagraph (b) of article 3 adds the requirement that the parent’s custody rights must be “actually exercised.” It is not difficult for an applicant who seeks return of a child to demonstrate that his or her custody rights were actually exercised. Preliminary evidence suggesting that the parent took physical care of the child is sufficient. The question of whether custody rights were “actually exercised” is most frequently an issue under article 13, which provides an exception for return of the child if the abductor can prove the nonexercise of custody rights. Therefore, under the scheme of the Convention, it is presumed that a person who has custody rights is actually exercising them.

Article 21 deals with the obstruction of rights of visitation, termed “access rights” by the Convention. Although ensuring rights of access is one of the Convention’s primary goals, the remedies for breach of access

23. Hague Convention, supra note 5, art. 5.
24. Shirman, supra note 1, at 206.
25. Hague Convention, supra note 5, art. 3.
27. Hague Convention, supra note 5, art. 3.
29. Id.
INTERNATIONAL CHILD ABDUCTION

rights do not include the return remedy.\textsuperscript{30} Moreover, the term "wrongful retention" does not include the refusal by the custodial parent to permit visitation by the other parent. Thus, a parent who is denied his or her rights of access to the child by the custodial parent cannot request that the child be ordered returned in order to commence visitation.\textsuperscript{31} The aggrieved parent seeking access rights can apply to the Central Authority of any Contracting State only for administrative assistance in acquiring access rights.\textsuperscript{32}

Indeed, in the United Kingdom, article 21 has been described as toothless: "There are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the judge."\textsuperscript{33} The Court of Appeal in the case of Re G noted that article 21 did not confer jurisdiction to the British courts to determine matters relating to access, or to recognize or enforce foreign access orders. Instead, article 21 merely provided for executive cooperation among Central Authorities in the enforcement of such recognition as national law allows.\textsuperscript{34} Accordingly, the Court of Appeal held that the duty of the Lord Chancellor’s Department, Central Authority for England and Wales, was to make appropriate arrangements for the applicant by providing solicitors to act on his or her behalf in applying for legal aid and instituting proceedings under different national laws.\textsuperscript{35}

\textsuperscript{30} Id. at 10,513.
\textsuperscript{31} See Viragh v. Foldes, 612 N.E.2d 241, 247 n.10 (Mass. 1993). Under article 18, a judge has discretion to order that children be returned for the purpose of visitation. However, the Convention clearly distinguishes between mandatory return due to wrongful removal or retention and discretionary return under article 18. Id.
\textsuperscript{32} See Hague Convention, supra note 5, art. 21. Article 21 instructs nations "to take steps to remove, as far as possible, all obstacles to the exercise of [access] rights."
\textsuperscript{33} Re G (A Minor), 1 Fam. 669, 675 (Eng. C.A. 1993), available in LEXIS, Enggen Library, CASES File.
\textsuperscript{34} Lord Chancellor’s Department, Practice Note: Child Abduction Unit, 1 Fam. 804 (1993)
\textsuperscript{35} Id.
III. WAYS IN WHICH THE CONVENTION’S GOALS MAY BE UNDERMINED

A. The Lack of Contracting States

The most significant limitation to the Convention’s effectiveness today is the large number of nonsignatories to whom the Convention’s provisions do not apply.\(^{36}\) Thus, there are still many “Haven-States” where abductors can take children and where the custodial parent will be forced to litigate a custody determination in a foreign country, assuming the child can be located.\(^{37}\) A parent will have no recourse under the Convention not only when the child is abducted to a nonsignatory State, but also when the child is an habitual resident of a nonsignatory State. For example, in *Mohsen v. Mohsen*, the U.S. District Court for Wyoming refused to consider the father’s petition for return of his child to her habitual residence in Bahrain because Bahrain is a nonsignatory to the Convention.\(^{38}\) The court’s refusal was based on the notion of reciprocity: “As a nonsignatory to the Convention, Bahrain has no obligation to reciprocate by affording similar rights to the respondent, in the event she found herself in a Bahrainian court trying to secure the return of [the child] from that country.”\(^{39}\)

Despite the concern for reciprocity in U.S. courts, courts in the United Kingdom have consistently applied the principles of the Convention to order the return of children to nonsignatory States:

The Court of Appeal has now ruled that the principles of the Convention should be applied in non-Convention cases too. The result is that, in the absence of any contra-indications which . . . would fall within the exceptions to the obligation to return, and in the absence of other grounds for concern, such as the risk of persecution or discrimination, or, doubtless, the application of non-

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36. As of May 1, 1994, twenty-two countries were parties to the Convention. Bruch, *supra* note 13, at 36 n.2.
37. See *Copertino, supra* note 3, at 731-35.
38. *Mohsen v. Mohsen*, 715 F. Supp. 1063, 1065 (D. Wyo. 1989). *See also* Mezo v. Elmergawi, 855 F. Supp. 59 (E.D.N.Y. 1994). A mother sued Secretary of State Warren Christopher, as head of the Department of State, in an attempt to compel him to litigate under the Convention for the return of her children. Despite the fact that her children were abducted first to Egypt and then to Libya, and that she possessed valid custody orders in both the United States and Egypt, the State Department acting as Central Authority was unable to help because neither Egypt nor Libya was a signatory to the Convention. *Id.*
welfare principles by the foreign court, an abducted or wrongfully
retained child will normally be returned home, whether or not his
home is in a Contracting State.\footnote{40}

In \textit{Re S}, the Court of Appeal, Civil Division, ordered the return of two
children to their father in Pakistan, a nonsignatory State.\footnote{41} The order was
made despite the mother’s assertions that Pakistan does not apply a similar
system of law to govern the welfare of children, and that she would not get
a fair trial in any custody determination in Pakistan.\footnote{42} On the issue of a
fair trial, the mother argued that fairness would be impossible due to the
influence of the father’s family, a family of material substance. The court
accepted the trial judge’s determination that the mother’s assertion was
unsupported by the evidence.\footnote{43} The \textit{Re S} court then considered evidence
of the applicable law in Pakistan and found that the matter would be
governed by principles of Muslim law. According to Muslim law as applied
in Pakistan, the mother retains physical custody until the girl reaches
puberty and the boy reaches the age of seven. The mother loses entitlement
to bring up her children: (1) if she concludes a subsequent marriage, or
forms a liaison with another man other than a close relative to the children;
(2) if she is deemed to be unsuitable, for instance if she has a way of life
that the court considers un-Islamic; or (3) if there is a suggestion that the
children would not be raised as Muslims.\footnote{44}

The court found that although Pakistani Muslim law is significantly
different from the law of England, the principles of Pakistani law would be
appropriate for these children, in light of the fact that both parents intended
to raise the children as Muslims.\footnote{45} The court suggested that summary
return can be justified even when the law of the habitual residence is
different from English law, so long as it is accepted by the English courts
as appropriate for the children.\footnote{46}

\begin{footnotes}
\item[42] Id.; see also Re F, 140 New L.J. 1193 (1990) (holding that Convention principles applied
to resolution of the case, even though Israel was not a signatory at the time).
\item[43] Re S (A Minor), 2 Fam. at 36.
\item[44] Id. at 36-37 (quoting affidavit of Professor Pearl, expert in Pakistani law).
\item[45] Id.
\item[46] Id.
\end{footnotes}
Although the United Kingdom's application of the Convention's principles to nonsignatory States serves the key goal of immediately returning wrongfully abducted children, no reciprocity is required from the State of habitual residence. It is arguable, therefore, that nonsignatory States will have no incentive to ratify the Convention, since their own children are promptly returned by Contracting States. The United Kingdom's policy of applying the Convention to nonsignatories compounds the problems caused by a lack of Member States.

Why are there relatively few signatories to the Convention? First, since there were only twenty-nine Member States to the Conference that wrote the Convention, it is doubtful that countries that did not participate in the Convention's drafting would be eager to ratify. The legal systems of those countries that are currently Contracting States are relatively homogeneous, demonstrating that countries with divergent legal systems and social norms are much less likely to become signatories. Those countries are also less likely to have knowledge about the benefits of the Convention. Ultimately, the worldwide effectiveness of the Convention will depend upon securing more Contracting States, thereby decreasing the number of "Haven-States" for abductors.

In addition to the problem of "Haven-States," there are several limitations and exceptions inherent in the Convention's language that could potentially hinder its goal of promptly returning abducted children. The remainder of this discussion will focus first upon the Convention's limitations, and second upon its exceptions, looking at case law applications in these potentially damaging areas.

B. Limitations of Convention Applicability

A parent seeking return of an abducted child must overcome three major limitations to the Convention's applicability. First, under article 35, the

47. Copertino, supra note 3, at 720.
48. See id. at 732.
49. There have been many suggestions for increasing the number of Contracting States, such as using international human rights organizations to disseminate information about the Convention, creating a United Nations expert committee to discover why countries are hesitant to become Contracting States, and disseminating United Nations aid or subsidies to countries for the implementation of anti-abduction programs. Id. at 10. In addition, it has been suggested that the United States should admonish nonsignatories by refusing to apply the UCCJA to these countries and by using economic incentives to encourage ratification. Shirman, supra note 1, at 217.
Convention applies only to removals or retentions that occurred after the date when the Convention came into effect between the two countries. Second, under article 4, the Convention does not apply once a child reaches age sixteen. Third, under article 12, the court is not obligated to order the return of a child when return proceedings are commenced one year or more after the removal or retention, and it is proven that the child is settled in his or her new environment.

Despite the strict nature of the exceptions in article 35 and article 4, it is important to note that pursuant to article 36, a country can limit the restrictions that might block a child’s return.\textsuperscript{50} This can be accomplished if two or more countries agree to extend the Convention to children beyond sixteen years or to apply the Convention retroactively to removals and retentions occurring before the Convention’s entry into effect between the two nations. Moreover, article 36 is supplemented in the Convention by article 18, which notes that the Convention does not limit the power of judicial authorities to order the return of a child pursuant to other existing local laws or procedures, which may not include the age limitation in article 4.\textsuperscript{51}

\textit{1. Article 35}

Under a strict interpretation of article 35, the Convention will not apply to a child who is wrongfully removed or retained in a Contracting State if that removal or retention occurred before the Convention came into effect between the two States. This provision has ongoing relevance, as new countries continue to sign on as Contracting States. Although it is possible to interpret article 35 liberally, covering removals or retentions that began before the Convention took effect, but which continue after its entry into force,\textsuperscript{52} this interpretation has been rejected by the United Kingdom’s courts. In the appeals of \textit{Re S} and \textit{Re H}, Canadian and U.S. mothers of children wrongfully taken to England by their fathers argued that although the removals had occurred before the Convention’s effective date, the removals were followed by retentions, and the children were still being...

\textsuperscript{50.} Hague Convention, \textit{supra} note 5, art. 36.
\textsuperscript{51.} Hague Convention, \textit{supra} note 5, art. 18; Department of State Notices, \textit{supra} note 10, at 10,504.
\textsuperscript{52.} Department of State Notices, \textit{supra} note 10, at 10,504.
wrongfully retained after the Convention came into effect.\textsuperscript{53} The court disagreed, holding that under the Convention, retention, like removal, is an event occurring on a specific occasion. Removal occurs when a child is unlawfully taken away from his or her state of habitual residence. Retention occurs where a child lawfully removed for a limited period is not returned on the expiration of that period. Removal and retention are therefore mutually exclusive concepts. According to the court, the children in these cases were wrongfully removed, not retained, and that removal took place before the Convention came into force.\textsuperscript{54}

2. Article 4

Parents seeking the return of children over age sixteen have no remedy at all under the Convention. Even if a child is under sixteen at the time of the wrongful removal or retention, the Convention ceases to apply when the child reaches sixteen.\textsuperscript{55} Brenda J. Shirman suggests an additional provision in the Convention providing for the automatic return of mentally or physically dependent children over the age of sixteen.\textsuperscript{56} Although the arbitrary age limit of sixteen may seem unfair to parents of older children who remain mentally or physically dependent, a provision providing for the return of such children may prove to be burdensome for deciding courts. A determination of mental or physical dependence would have to be made by the court in the Requested State, possibly requiring evidence, such as the testimony of psychologists or social workers, which is properly presented only at the ultimate custody hearing in the State of habitual residence.

3. Article 12

The third limitation that petitioners must overcome under the Convention is the one-year deadline for requesting a child’s return. Under


\textsuperscript{54} \textit{Id.}; \textit{see also Re H (A Minor)}, 140 NEW L.J. 1192 (1990) (holding that wrongful retention is not a continuing state of affairs but refers to the single act or event of wrongfully retaining the child outside the jurisdiction).


\textsuperscript{56} Shirman, \textit{supra} note 1, at 217.
article 12, if it is demonstrated that the child is settled in his or her new environment, a court is not obligated to return the child if the return proceedings are commenced a year or more after the wrongful removal or retention. The one-year statute of limitations was added to the Convention because delegates felt that a failure to bring a swift application may indicate acquiescence in, or mixed emotions about, the abduction. Also, the delegates feared that ordering a return at such a late date might cause additional confusion and psychological damage to the child.

The one-year statute of limitations has been criticized, however, because an abductor could delay the commencement of the proceedings by concealing the whereabouts of the child for more than a year. Clearly, an abductor should not benefit from the use of article 12 when the abductor's concealment of the child caused the delay. Courts must be mindful of the reasons for delay when considering whether to order a child's return, and the statute of limitations should begin to run only when the petitioner has sufficient knowledge of the location of the child and the abductor. Moreover, there should be a strong burden on the abductor to prove that the child is settled in his or her new environment. In the United States, under ICARA, the alleged abductor has the burden of proving by a preponderance of evidence that the child should not be returned because the child is settled in the new environment.

In David S. v. Zamira S., a U.S. court was faced with a mother's argument under article 12 that her children had become settled in their new environment. After finding that petitioner had met his burden of showing by a preponderance of evidence that the children were wrongfully removed from Ontario by their mother, the court considered whether the mother had met her burden of showing by a preponderance of evidence that the children should not be returned because they were settled in their new environment. The court found that the mother had not met her burden and ordered the return of the children.

57. Hague Convention, supra note 5, art. 12.
58. Copertino, supra note 3, at 729.
59. See, e.g., id. at 730; Department of State Notices, supra note 10, at 10,509; Shirman, supra note 1, at 214-15.
60. Copertino, supra note 3, at 731.
63. Id. at 433.
Although the mother wanted to remain in the new environment, Brooklyn, New York, in order to be close to the “population of available Orthodox Jewish men’ and search for a new husband,” the court found no significant ties indicating that the children, ages three years and one and one-half years, were settled in the new environment. On the contrary, the court found that the children continued to have substantial and meaningful connections to Ontario, the place of habitual residence and the home of their father.

The court’s decision on the article 12 question was clearly correct, as an abducting parent cannot be permitted to prove that the children are settled in their new environment by demonstrating the parent’s own ties to the community. However, it seems that ICARA’s preponderance of evidence standard could be too easily met in cases where the children are older and have ties to a particular school or youth activity. A burden on the respondent requiring clear and convincing evidence that the children are settled in their new environment may better serve the Convention’s goals than ICARA’s preponderance of evidence standard. ICARA requires respondents to prove exceptions to a child’s return under articles 13(b) or 20 by clear and convincing evidence. If the goals of deterring abduction and acquiring the immediate return of abducted children are to be met, a clear and convincing standard of proof should be required for an abducting parent to block a child’s return under article 12 as well.

C. Exceptions to the Return Requirement

In addition to the three limitations that a petitioning parent must overcome in order to secure the return of a child under the Convention, four important exceptions to the Convention’s return requirement may be invoked by the respondent. Three of those exceptions are contained in article 13; the remaining exception is in article 20.

64. Id.
65. Id.
66. Hague Convention, supra note 5, art. 20.
1. Article 20

Article 20 contains the Convention's public policy exception. It states, "[t]he 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." Article 20 is ambiguous and could be problematic should courts choose to use the exception often. Those opposed to article 20 feared that it could be interpreted broadly, possibly undermining the entire Convention. However, the exception "was intended to be restrictively interpreted and applied, and is not to be used, for example, 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." There is no evidence in the United Kingdom or the United States that article 20 has been used by courts at all, much less as a frequent vehicle for refusing the return of children. If countries with divergent political systems and divergent notions of childrearing should eventually join as signatories to the Convention, article 20 could be more frequently invoked. At this time, however, the public policy exception in article 20 poses no viable threat to the objectives of the Convention.

2. Article 13

In contrast to article 20, the exceptions contained in article 13 have been frequently litigated. Under article 13(a), a court may deny an application for the return of a child if the petitioner was not actually exercising custody rights at the time of removal or retention, or if the petitioner had acquiesced in the removal or retention. Article 13(b) allows a court, in its discretion, to refuse the return of a child if there is "a grave risk of harm that return . . . would expose the child to physical or psychological harm or otherwise

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67. Hague Convention, supra note 5, art. 20.
68. Department of State Notices, supra note 10, at 10,510.
69. Id. Under ICARA, a respondent opposing the return of a child under article 20 has the burden of establishing by clear and convincing evidence that the article 20 exception applies. 42 U.S.C. § 11603(e)(2)(A) (1988).
place the child in an intolerable situation."71 A third, unlettered paragraph of Article 13 allows a court to refuse a child’s return if the child objects to being returned and the child has attained an age and degree of maturity at which a court can appropriately consider the child’s views.72

These exceptions were drawn narrowly by the Convention’s drafters and were intended to be interpreted narrowly by the courts.73 The ultimate success of the Convention depends upon allowing the use of these exceptions only in rare cases where a strict burden of proof has been met: Nevertheless, the article 13 exceptions have been described as “so broad that they are apt to turn what are to be summary proceedings into adversary hearings on the merits, contrary to the purposes of the Convention.”74 Therefore, the true effect of the article 13 exceptions, as demonstrated by their case law applications, deserves further analysis.

a. Article 13(a)

Two basic arguments can be raised by respondents under article 13(a). First, respondents can argue that petitioner does not actually possess rights of custody. Second, respondents can argue that petitioner acquiesced in the child’s removal or retention. In David S. v. Zamira S., the mother (respondent) argued that the father (petitioner) did not possess custody rights over their son, and thus was not entitled to the child’s return under the Convention.75 Whether a parent was exercising lawful custody rights at the time of removal must be determined under the law of the child’s habitual residence.76 This means that a reviewing court faced with an Article 13(a) argument must study the law of the country of habitual residence to determine whether the petitioning parent actually possessed custody rights.

71. Hague Convention, supra note 5, art. 13(b). A respondent opposing the return of a child under 13(b) in the United States must establish the exception by clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A).

72. Hague Convention, supra note 5, art. 13. This exception must be established by a preponderance of the evidence under ICARA. 42 U.S.C. § 11603(e)(2)(B).

73. Department of State Notices, supra note 10, at 10,509.


76. Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993). Because the Friedrich court found Germany to be the child’s habitual residence, the case was remanded for determination of whether, under German law, the child’s father was exercising custody rights at the time of removal.
David S. v. Zamira S. involved two children, a son and a daughter, whose habitual residence was Ontario, Canada. There had been no valid separation agreement or custody decree concerning the daughter and, thus, under Ontario law, the petitioner and respondent had equal rights to custody of their daughter. With respect to their son, however, the father's statutory right to custody had been suspended by virtue of a separation agreement that only granted the father access rights to the son. The court noted that the mother's arguments under 13(a) were meritorious with regards to the son because the father had only access rights and not rights of custody. Nevertheless, the court ordered both of the children returned to their father.

The separation agreement limited the mother's ability to relocate the children outside of the Metropolitan Toronto area. However, the mother relocated the children to the United States and, in response to this contumacious conduct, the Supreme Court of Ontario subsequently gave temporary custody of both children to the father. Therefore, even though the father did not possess traditional rights of custody over the son at the time of removal, the court interpreted the father's ability to force the mother to remain in Toronto with the children as a type of custody right. Although this interpretation seemingly pushes the limit of what constitutes a right of custody, it is consistent with the article 5(a) definition of custody rights as "the right to determine the child's place of residence." The United Kingdom Court of Appeal exhibited a narrower view of custody rights in its interpretation of the applicable law in Australia, the country of habitual residence in Re J. The father in this case petitioned for return of his child to Australia pursuant to the Convention after the mother left for the United Kingdom with the child. The parents were unmarried, however, and Australian law gave the custody and guardianship

78. Children's Law Reform Act, R.S.O., ch. 68, § 20(1) (1990) (Can.). This section provides that "the father and mother of a child are equally entitled to custody of the child."
79. David S., 574 N.Y.S.2d at 432.
80. Id.
81. Id.
82. Id.
83. Hague Convention, supra note 5, art. 5(a).
85. Id.
of a child of unmarried parents solely to the mother, unless a court ordered otherwise. The father obtained a court order granting him custody of the child, but only after the mother’s removal of the child. The court indicated that retention could only be wrongful and in breach of the father’s custody rights if the father possessed custody rights immediately before the retention. Since the removal occurred before the father obtained a custody order granting him rights to the child, the removal was not in breach of these rights.86

These two cases, *David S. v. Zamira S.* and *Re J*, demonstrate the disparate results that might be reached based on a Requesting State’s judicial reading of the custody laws in the State of habitual residence. Although neither of these cases was improperly decided, they highlight the possibility that a court’s bias against a petitioner, or the petitioner’s country of habitual residence, could be exercised through an uninformed reading of the custody law in the State of habitual residence.

A parent can also argue under article 13(a) that the petitioning parent acquiesced to the removal or retention. This argument is difficult to make, however, since an application for return indicates that the petitioner does not want the child living in a foreign country.87 Perhaps the strongest argument for acquiescence is when the petitioner has allowed the one-year statute of limitations to run. However, the abducting parent’s unilateral actions must not have precipitated the delay, and the child’s return will still be ordered unless the respondent can show that the child is settled in her environment.88

b. Article 13(b)

The article 13(b) “grave risk of harm” exception, like the other article 13 exceptions, was intended to be construed narrowly and applied only in rare circumstances.89 Nevertheless, article 13(b) is the most frequently litigated exception, because it comes the closest to allowing the Requested

86. For another case narrowly interpreting parental rights in a country of habitual residence, see *Viragh v. Foldes*, 612 N.E.2d 241 (1993) (holding that the father’s rights under Hungarian Law amounted to rights of access and not rights of custody).
87. *See* *Becker v. Becker*, 15 Fam. L. Rep. 1605 (BNA) (1989) (finding that although the mother may have acquiesced in the removal of her children, she did not consent to their retention).
89. *See* Department of State Notices, *supra* note 10, at 11,509.
State's court to examine the merits of the case. Because litigation of the underlying custody dispute, including the “best interests” of the child, is prohibited by the Convention at the hearing seeking return of the child, litigants often surreptitiously attempt to bring in evidence of this nature by using article 13(b). Yet, “[t]he Convention’s drafters . . . did not intend for this exception to be used by defendants as a vehicle to allow the litigation or relitigation of the abducted child’s ‘best interests.’”

Article 13(b) is also dangerous because the terms “grave risk of harm” and “intolerable situation” are susceptible to various interpretations, and because abductors can use the exception as machinery for delay.

Caroline LeGette advocates a strict construction of the term “intolerable situation”:

Return of the child to a home where financial resources and educational opportunities are more limited than that offered by the abducting parent would not place the child in an ‘intolerable situation’ within the meaning of article 13(b). Instead, only those situations in which the child would be threatened with sexual or physical abuse should be considered intolerable.

Although article 13(b) does not permit refusing an order of return merely because financial or educational opportunities in the habitual residence are more limited, LeGette’s definition disregards article 13(b)’s inclusion of “psychological harm,” focusing instead on physical harms.

Parents seeking to block a child’s return frequently argue that psychological harm will ensue because of the return and, almost universally, such claims of psychological harm are properly rejected by the courts. However, LeGette’s definition reads the term “psychological harm” out of...
13(b), rendering helpless a parent whose child will legitimately be subject to severe emotional abuse upon return. An "intolerable situation" should include a situation where a child might endure severe psychological harm.

Nevertheless, claims of psychological harm must be viewed skeptically by the courts, as they have been in recent years in the United States and the United Kingdom. For example, in the United Kingdom case of Re C, the mother (respondent) argued that the removal of the child would cause grave psychological harm, because the child would be separated from her.94 The Court of Appeal held that the article 13(b) exception does not apply when the risk would occur only if the mother refused to accompany the child back to the country of habitual residence.95 Although the mother in Re C had legitimate reasons for not wanting to return to the habitual residence, the court declined to hold that the mother's refusal to return would cause a grave risk of harm to the child. Lord Justice Butler-Sloss would not extend the 13(b) exception to such situations, noting that to do so would "drive a coach and four through the Convention."96

Re C is an excellent decision and a proper example. The court did not allow a parent to profit from the abduction by refusing to return with the child and then claiming that the child would suffer psychological harm from the separation.

Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return.97

Another noteworthy aspect of the Re C decision is that the father in Australia was required to make certain "undertakings" regarding the financial position of the mother, should the mother and child return to Australia.98 Similarly, in Re L, the father seeking return of his child to the

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94. Re C (A Minor), 139 New L.J. 226 (1988); see also Re L (A Minor), 2 Fam. 401 (1993), available in LEXIS, Enggen Library, CASES File (holding that a mother could not claim grave psychological harm due to separation because she feared that her visa would be denied and she would not be permitted to return).
95. Re C (A Minor), supra note 94, at 226.
96. Id.
97. Id.
98. Id.
United States made undertakings, offering to allow the mother to stay in the matrimonial home and to pay the air fares for the return of mother and child.\(^9\) The offers of accommodation made by the fathers in those two cases certainly made the court's refusal to apply article 13(b) easier. It is unclear whether these decisions would have been made in the same way if the court had been certain that the mother would endure hardship if forced to return with the child. If the spirit of the Convention is to be maintained, and abductors deterred, parents must be consistently barred from arguing that psychological harm will result from their own refusal to return to the country of habitual residence. The abducting parent and the child must return to the habitual residence, where the issue of hardship can be raised in the custody dispute on the merits of the case.

c. The Child's Opinion

The third and final exception contained in the last unlettered paragraph of article 13 allows a court to deny a return petition if a child of sufficient age and maturity objects to the return. This exception gives significant discretion to the court to determine what age and level of maturity is required to make a decision of this sort.\(^10\) This provision is potentially problematic because an abducting parent could exert undue influence over the child. However, consideration of the child's preference is not mandatory, and courts can attach little weight to the child's opinion if brainwashing by the abducting parent is suspected. As with the other exceptions, the last article 13 exception has caused no real damage to the Convention's goals as applied by courts in the United States and the United Kingdom.

D. Determining Habitual Residence

The final area where the Convention's objectives might be undermined is the determination of habitual residence. Ultimately, the success of a petition for return is contingent upon the court agreeing that petitioner's

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home country is the habitual residence. This determination is often extremely difficult because children in international marriages in which divorces have occurred are moved around the world quite frequently. Courts faced with a genuine question concerning a child’s habitual residence must make a fact-specific inquiry in each case.

In the United States, the leading case concerning habitual residence is Friedrich v. Friedrich. In Friedrich, the Sixth Circuit noted that a child’s habitual residence cannot be easily altered. “A child’s habitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility.” Furthermore, the change in geography must occur before the questionable removal, and must not be a result of the removal. A court determining the habitual residence of a particular child must focus on the child, and not the parents, and must examine past experience, not future intentions.

The Friedrich court found that the mother’s removal of the child from Germany to the United States precipitated the change in geography, noting that “[i]f we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich’s knowledge or consent Mrs. Friedrich ‘altered’ Thomas’s habitual residence, we would render the Convention meaningless.” The respondent mother, a member of the U.S. armed services stationed in Germany, argued that it was always her intention for Thomas to reside in the United States. However, the court refused to consider the mother’s future intentions, stating that they were irrelevant to the inquiry.

However, in both the United States and the United Kingdom, other cases have considered the intentions of the parent when determining habitual residence. In the United Kingdom case of Re J, the Court of Appeal held that the habitual residence of an infant who is in the sole custody of his mother is necessarily the same as hers. Therefore, since the mother in this case left Australia with the settled intention never to return, the child

102. Id. at 1402.
103. Id.; see also Slagenweit v. Slagenweit, 841 F. Supp. 264 (N.D. Iowa 1993).
104. Friedrich, 983 F.2d at 1401.
105. Id. at 1402.
106. Id.
ceased to be a habitual resident of Australia. Although the Re J court's consideration of the mother's intention seems to contradict the ruling in Friedrich, the two cases are distinguishable. The mother in Re J had sole custody, the father possessing no custody rights, while in Friedrich the father had valid custody rights. Therefore, the intentions of the sole custodian of a very young child may be relevant to the habitual residence inquiry, but one parent's intentions should not be considered when both parents enjoy custody rights.

Ponath v. Ponath raises an additional consideration for courts who are determining habitual residence. The Ponath court stated that “[a]lthough it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant.” The court also noted that “[t]he concept of habitual residence must . . . entail some element of voluntariness and purposeful design.”

In Ponath, the court found the child's habitual residence to be the United States, despite the fact that the family's move to Germany might have been viewed as a change of habitual residence. The court considered the move to Germany to be an extended visit, rather than a change of residence, because the mother wanted to return to the United States with the child yet was willfully obstructed from doing so by the father's verbal, emotional, and physical abuse. “In the court's view, coerced residence is not habitual residence.” The Ponath court's consideration of the mother's intentions can be distinguished from the refusal to consider the mother's intentions in Friedrich, because the mother in Ponath was coerced into residing with the child in Germany.

The Friedrich case has been described as an example of the “American judicial commitment to uniformity and international comity” in the interpretation of the Convention. Friedrich requires both a change in

108. The Friedrich court remanded for determination of whether the father was exercising custody rights under German Law. Friedrich, 983 F.2d at 1402.
110. Id. at 367.
111. Id.
112. Id. at 368; see also Prevot v. Prevot, 855 F. Supp. 915 (N.D. Tenn. 1994) (refusing to apply the Ponath coerced residence argument to the factual situation at issue.)
geography and a passage of time in order to alter habitual residence. This strict requirement represents an important adherence to the policy goals of the Convention. The Friedrich case and the recent case law in both the United States and the United Kingdom demonstrate that courts in these two nations have refused to use the determination of habitual residence as a means of denying the return of children under the Convention.

IV. CONCLUSION

A detailed review of the cases and commentary in the United States and the United Kingdom reveals that courts in both countries are adhering to the spirit of the Convention by refusing to liberally construe its limitations and exceptions, and by determining the country of habitual residence in a uniform manner. Although ordering the return of a child to a foreign country must undoubtedly be difficult for courts, strict adherence to the Convention’s goals and methods will insure that children abducted from the United States and the United Kingdom will be returned home. Moreover, judicial authorities in both countries are consistently demonstrating to parents that an international abduction will no longer aid them in obtaining a favorable custody decree. In decisions to date, the courts in the United States and the United Kingdom have fostered and served the Convention’s most important goal—deterring international child abduction.


114. Others have also recognized the importance of this requirement. As one of the highest judicial holdings on these provisions, the precedential effects are far reaching, and although this action frustrates the efforts of an American citizen, “it ultimately ensures that prompt return of the American children abducted to foreign countries pursuant to the broadest sense of reciprocity under the Convention.”

Id. at 756 (quoting Dana R. Rivers, The Hague International Child Abduction Convention and The International Child Abduction Remedies Act, 2 TRANSNAT’L LAW 589, 590 (1989)).