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Possession is 9/10 of the Law: The Need for Strict Procedural Rules in Hague Abduction Convention Cases

ROBERT E. RAINS

Delay is often a significant factor in the outcome of custody litigation, working in favor of whichever party has actual physical possession of the child. Delay has both legal and practical ramifications. This is at least as true for Hague Abduction Convention cases as for domestic custody litigation. Statistics demonstrate that, all too often, parents who wrongfully remove or retain a child internationally are rewarded for their wrongful acts with ultimate custody of the child, which is in direct contravention of the fundamental purpose of the Hague Abduction Convention. This article will look at the evidence of the role of delay in Hague Abduction litigation and will propose rule changes for United States federal courts intended to address and minimize delay in the court system.

ABBOTT: CASE IN POINT

In the summer of 2012, Justice Samuel A. Alito, Jr. joined the Italy program of the Pennsylvania State University Dickinson School of Law, teaching a course on Current Issues in Constitutional Interpretation. The present author was teaching a course on International and Comparative Family Law in the same program. Unbeknownst to each other, the Justice and I had each assigned the recent United States Supreme Court decision in Abbott v. Abbott, in which the Court had held that a father’s ne exeat right constituted a right of custody under the Hague Child Abduction Convention, thus giving him the right to seek return of his wrongfully abducted child, as opposed to only a right to seek access.

I sat in on the Justice’s class on the day he taught the Abbott case, and, not unreasonably, he started the discussion by asking the students who had won the case. The students, equally understandably, were quite nervous; no one wanted to venture an answer and risk being wrong in front of a Supreme Court Justice, so they all sat on their hands. Finally, to break

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1 Under the Hague Abduction Convention, cases for return do not technically award custody to a parent, but only determine whether the child will be returned to her state of habitual residence for purposes of possible custody litigation. But, as a practical matter, a refusal of return will normally have the result of keeping the child with the abducting parent.


3 This article only addresses claims for return of a wrongfully abducted child, not the less frequent access claims under Article 21 of the Hague Abduction Convention.
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the ice, Justice Alito answered his own question, saying “Abbott, of course”. That got a laugh, and the Justice went on to explain how the father had won the case. Sometime later, I had the opportunity to pull the Justice aside and inform him that, in fact, Mr. Abbott ultimately lost his Hague Abduction Convention case because, due to the extreme length of the litigation, the wrongfully abducted child had aged out of Hague Convention coverage, so Mrs. Abbott was never required to return him. This is merely one of many examples of how litigation delay gives a decided advantage to the parent who wrongfully abducts or wrongfully retains a child.

CUSTODY DELAY IN GENERAL

The effects of delay in custody litigation are well understood by practitioners and academics. Simply put, the longer one parent actually has possession of a child, the harder it will be for the other parent to obtain custody, save, of course, some clearly demonstrable harm to the child while in the care of the parent in possession. In short, custody litigation affirms the old Scottish saying, “Possession is nine-tenths of the law”. That is, whichever parent walks into the courtroom with the child is likely to be the parent who walks out of the courtroom with the child. And, as demonstrated in Abbott, which will be discussed below, just because the non-custodian parent has won an important victory in even the highest court in the land, there is no guarantee that that parent will ever get the child returned.

A classic example of this phenomenon is the U. S. case of Palmore v. Sidoti, which went to the United States Supreme Court. A white, married couple living in Florida had a daughter, Melanie. When Melanie was three years old, the couple divorced and the mother, as is usually the case, was awarded custody. Nearly a year and a half later, in September 1981, the father petitioned for custody, asserting changed circumstances, to wit, that mother “was then cohabiting with a Negro” and that the mother had not properly cared for the child. The trial judge found that “there is no issue as to either party’s devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent”. Nevertheless, the court awarded custody of Melanie to her father because the mother was in an interracial marriage: “This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from social stigmatization that is sure to come”. In 1982 the Florida Second District Court of Appeal affirmed, without opinion, thereby denying the Florida Supreme Court jurisdiction to review the case.

In April 1984, in a brief and strongly worded opinion authored by Chief Justice Burger, the United States Supreme Court unanimously reversed, finding a violation of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution: “The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody. The judgment of the District Court of Appeal is reversed. It is so ordered”.

On its face, this decision would appear to have mandated that the mother regain custody of Melanie, but, as in Abbott three decades later, possession and delay worked against the wronged parent. While the case was in litigation, the father and his new wife had moved to Texas with Melanie. When the Supreme Court handed down its decision, the father filed for custody there and was made the “temporary managing conservator” of Melanie. The Texas court did not deem the Supreme Court decision to mandate that the mother should get custody, only that the Florida court’s rationale for awarding Melanie to her father had been improper. The Florida courts decided to yield jurisdiction to the Texas courts. Significantly, the Florida Court of Appeal reasoned:

The eight-year-old child appears to have had substantial upheavals in her life, and we find no compelling reason at this time to add a further upheaval. The record indicates that Melanie lived with both her parents until they separated when she was about two and one-half years old. She then lived with her mother for about two years until her father was awarded custody. After only two months with her father, Melanie was returned to her mother by court order. She stayed with her mother for about eight months, and then was awarded to her father’s custody, where she has remained for about two and one-half years except for a ten-day visit with her mother in August 1984. We cannot disagree that it appears to be in the best interests of Melanie that she continue in the status quo at least for the time being until the custody issue is finally resolved ...[W]e do not believe that the period from the March 1, 1982 order up to the present should be entirely viewed as a “time-out.” A child custody suit is not a game to be played for the benefit of either parent.5

Few would suggest that children do not need stability in their lives or that the clock can be turned back so that a lengthy period of removal can be simply ignored. At the same time, Palmore demonstrates that a wrongful removal of a child, coupled with lengthy delay while that child is in the custody of a parent who may have acted from improper motives, constitutes a potent combination which can work pernicious results. This effect is, if anything, magnified in Hague Abduction Convention litigation for several reasons which will be explained below.

**RELEVANT HAGUE ABDUCTION CONVENTION PROVISIONS**

The Hague Abduction Convention, as set forth in its Preamble, reflects the desire of Contracting States, “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence”6 (emphasis added). In her Explanatory Report on the Convention, Elisa Pérez-Vera elaborated that “the true victim of ‘childnapping’ is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives”.7 As noted by the United States

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6 Preamble, Hague Abduction Convention.
Department of State, “This right of return is the core of the Convention”. Accordingly, Articles 1 and 11 favor prompt return of wrongfully removed and retained children and expeditious handling of their cases.

Article 1 relevantly provides: “The objects of the present Convention are—a) to ensure the prompt return of children wrongfully removed or retained in any Contracting State...” (emphasis added).

Article 11 relevantly provides:

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority has not reached a decision within six weeks from the commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay (emphasis added).

Yet, as a practical matter, other provisions of the Convention foster and reward delay.

Article 4 provides the age 16 cut-off: “The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody and access rights. The Convention shall cease to apply when the child attains the age of 16 years” (emphasis added). This provision doomed Mr. Abbott’s efforts to obtain return of his wrongfully abducted son. In Abbott, the mother removed the parties’ son from Chile, his State of habitual residence, in August 2005. The father filed his Hague Abduction Convention claim in a federal district court in Texas in May 2006. The father lost in both the district court and federal circuit court of appeals on the basis that his ne exeat right under Chilean law was not a right of custody, and hence he was not entitled to return of the child. In May 2010, four years after the father had commenced the litigation, the United States Supreme Court reversed the lower courts and ruled that the father’s ne exeat right was indeed a right of custody, making the abduction wrongful, and remanded the case. In its decision the Court noted that: “An abduction can have devastating consequences for a child ... Abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child’s ability to mature”. But the wheels of justice too often grind slowly. More than a year later, in June 2011, while the case was back before the district court on remand, the son turned 16-years-of-age. This deprived the court of jurisdiction, and, in February 2012, the court dismissed the case. Mr. Abbott was left with no remedy under the Hague Abduction Convention.

Article 12 relevantly provides: “The judicial or administrative authority, even where the proceedings have been commenced after the expiration of ... one year ... shall ... order the return of the child, unless it is demonstrated that the child is now settled in its new environment” (emphasis added). In March 2014, in Lozano v. Montoya Alvarez, the United States Supreme Court unanimously ruled that equitable tolling of the one-year period in Article 12 is not available when the abducting parent has concealed the whereabouts of the child from the left-behind parent. Justice Alito, joined by Justices Breyer and Sotomayor,
filed a concurring opinion arguing that courts always have equitable discretion to return a child even if the child is settled in the new country, but that position did not command a majority on the Court. Hence the wrongfully abducting parent can profit from delay coupled with concealment.

Article 13 relevantly provides: “The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take its views into account” (emphasis added). The wrongfully abducting parent who can delay the proceedings until the child has reached this (unspecified) age will likely be rewarded for her efforts.

In short, whereas Articles 1 and 11 envision that the general rule will be prompt return of a wrongfully abducted child, with a goal of decisions on return within six weeks, Articles 4, 12, and 13 provide potent incentives for delay to defeat those purposes. The available statistics strongly suggest that delay (among other factors) has greatly undermined the proper functioning of the Convention.

THE CARDIFF STUDY: A STATISTICAL ANALYSIS

The Centre of International Family Law Studies at Cardiff University Law School, under the directorship of Professor Nigel Lowe, in collaboration with the Permanent Bureau of the Hague Conference on Private International Law, has conducted three statistical surveys of the operations of the Convention, analyzing applications made in 1999, 2003, and 2008. The latest statistics, although admittedly incomplete and somewhat dated, show how severely the goals of the Convention have been thwarted.

The 2008 Cardiff Study is incomplete. It was based on questionnaires sent to the then 81 Contracting States. Of those, only sixty States actually completed the questionnaire. Thus the Study lacks data from the Central Authorities of fully a quarter of all Contracting States. Moreover, the Study does not capture those cases where the left-behind parent opted not to file an application with a Central Authority, but rather filed for return directly in a court of a Contracting State pursuant to Article 29 of the Convention. It also, obviously, does not include those situations where the left-behind parent failed to take any formal action at all, whether because of ignorance, language barriers, poverty, apathy, threats, family pressure, mental infirmity, effective concealment by the abductor, or other reasons. One can reasonably argue that the Study may under-report returns by not including cases filed directly in court (although we cannot know the actual statistics in those cases) or may over-report returns by not including cases where the left-behind parent simply has accepted what he perceives to be a fait accompli. And, of course, the data is based on filings made a half-decade ago. Subject to those caveats, the Study paints a depressing picture.

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12 Indeed, Article 18 specifies that: “The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time”.


14 Lowe, ibid., p. 42.
The most significant finding in the Cardiff Study is that the overall return rate for reported 2008 cases has dropped below 50%. In more than half of all cases studied, the abducting parent was not compell’d to return the child. Interestingly, the study revealed that 69% of abductors were mothers, so there is necessarily a gendered component to the outcomes. In some of those cases there was a finding that the Convention did not apply because either the child was not a habitual resident of the requesting State (15%) or the applicant had no rights of custody (8%). While the return rate for cases decided by courts was higher than the overall return rate, the judicial return rate has dropped, from 74% in the study of 1999 applications, to 66% for 2003 applications, to 61% for 2008 applications. In cases of judicial refusal to order return, 11% were based on the applicant having waited a year to file and the child being now settled (Article 12), 21% were based on grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation (Article 13(b)), 10% on the mature child’s objections, and 18% on more than one reason.

Delay is a major factor in many cases. For a variety of reasons, there may be delay between the date a Central Authority receives an application and the date it is sent to court. The seven applications received by Uruguay were sent to court in an average of two days. By contrast, five Contracting States took more than 200 days on average to send applications to court. The United States reported an average delay of 207 days; South Africa had the worst record at 270 days. The United States also ranked poorly as to the number of 2008 applications still pending as of 30 June 2010. Of the 154 applications reported pending worldwide, 34 were in the United States. This constituted 12% of the applications received in the United States in 2008.

Article 11 sets a goal of reaching a decision in a Hague Abduction Convention case within six weeks from the date of “commencement of the proceedings”. There is currently a dispute as to what constitutes “commencement of the proceedings”. In an amicus brief to the Supreme Court in the Lozano case, the International Academy of Matrimonial Lawyers (IAML) noted that while a majority of jurisdictions have interpreted “commencement of the proceedings” as filing an action in court, a minority have held that filing a petition with the Central Authority is the commencement. Without directly addressing the issue, the Supreme Court appears to have adopted the majority view in Lozano.

There was an enormous disparity in processing times among reporting Central Authorities. Denmark resolved applications in an average of 44 days; Iceland in 73, Finland

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15 Ibid., p. 54.
16 Ibid., p. 43.
17 Ibid., p. 61.
18 Ibid., p. 54.
19 See note 13 above, at para. 103.
20 See note 16 above, p. 70.
21 Ibid., pp. 70-71. The sheer size of the United States plus its division into 50 states can be major factors in delay in finding the abducting parent.
22 Ibid., pp. 73-74.
23 Ibid.
24 In this regard it is noteworthy that the International Child Abduction Remedies Act (ICARA) does not define “commencement of proceedings”, but does define an “applicant” as any person who files an application with a Central Authority for return of a child or right of access. 42 U.S.C. §11602(1).
in 75, and Sweden in 83.25 In stark contrast average resolution time was 227 days for the United States, 252 for Mexico, and 278 for France.26

Surely, the longer the case is delayed, the more likely it will be that the child will be subject to grave risk of psychological harm if returned, or that the child will be now settled in the new State, or that the child will object to being returned and will have attained an age and degree of maturity that it is appropriate for to take his views into account, or that the child will simply age out. In such situations delay works to increase the likelihood that an exception or defense to return will be able to be successfully argued by the wrongfully abducting parent.

THE ROLE OF COUNSEL: ETHICAL CONSIDERATIONS

The high rate of success in international abductions gives rise to thorny ethical issues for the family law practitioner with a client who may be considering such an abduction. There can be an almost infinite number of permutations and combinations.

Consider the situation where the mother and father are married but separated, the child was born during the marriage and the husband is listed on the birth certificate as the father, the child lives with the mother but stays with the father on alternating weekends by virtue of a court order entered in the pending divorce litigation by agreement between the parties. The father is good with the child, but a lousy provider who never holds a job for very long. The mother goes to her divorce lawyer and says she wants to take the child with her back to her native country, which we will call Freedonia, which is a Contracting State to the Convention. She says she can live free of charge with her financially comfortable parents and there will be many relatives available to help with child care. When she proposed this move to the father, he “hit the ceiling” and said he would never let her take his son away from him. He also got his attorney to seek and receive a writ of ne exeat from the divorce court, which has been duly served on her. He did not, however, seek to take control of the child’s passport nor did he enter the child’s name on the State Department’s Children’s Passport Issuance Alert Program (CPIAP). She asks the lawyer what she should do.

Presumably most counsel would agree that the attorney cannot advise the mother to violate a court ordered writ of ne exeat. ABA Model Rule of Professional Conduct 1.2, Scope of Representation and Allocation of Authority between Client and Lawyer, is not altogether dispositive, however. Rule 1.2(d) mandates that: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law”. Violating the current custody order and writ of ne exeat may not be fraudulent and it may not be criminal under the law of the state. But it would almost certainly constitute a federal crime under the relatively rarely invoked International Parental Kidnapping Crime Act.27

25 See note 16 above, p. 75.
26 Ibid.
27 18 U.S.C. §1204(a). (“Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned for not more than 3 years, or both.”). See United
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Other Model Rules provide even less guidance. Rule 3.4, Fairness to Opposing Party and Counsel, has two subsections that may be relevant. Under subsection (a), “A lawyer shall not obstruct another party’s access to evidence or unlawfully ... conceal other material having potential evidentiary value”. If the child is deemed to be evidence or to have evidentiary value, this subsection is implicated. Subsection (c) mandates that: “A lawyer shall not knowingly disobey an obligation under the rules of the tribunal ...”. Interestingly it does not, in so many words, prohibit a lawyer from counseling a client to disobey an obligation to a tribunal. Rule 3.5, Impartiality and Decorum of the Tribunal, provides that: “A lawyer shall not: (d) engage in conduct intended to disrupt a tribunal”. Especially if a hearing is pending, advising a client to abscond with the child before that hearing could well be construed as demonstrating an intention to disrupt the proceedings.

Assuming that the attorney quite properly tells the mother that her proposed course of action would be illegal under federal law and possibly state law, and would violate the father’s rights under the Hague Abduction Convention, which could lead to the forced return of the child to the United States and imposition of expenses and costs against her pursuant to Article 26, would this necessarily be the end of the conversation and advice? What if the mother asks her counsel what the odds are that she will be compelled to return the child and to pay the father’s bills? Nothing in the Model Rules prevents a lawyer from having an honest discussion of the practical consequences of a proposed course of conduct. Presumably counsel could thoroughly review the Cardiff Study with the mother, informing her that in a majority of known cases the absconding parent is not compelled to return the child. Indeed, would it be malpractice for counsel not to inform her client of the odds?

Many situations will be even less clear. There might be a custody order, but no writ of ne exeat. There might be no custody order, but only an informal arrangement between the parents. The parents may never have been married. The man exercising custodial rights might not be the legal father of the child. The child may have no legal father. Or, another man may be the legal father. The co-parent might be a non-adopting step-parent. The mother may raise allegations of abuse of herself or of the child which might arguably support a defense to return. There may be a factual dispute (as there often is), as to what is the child’s “state of habitual residence”.\(^{28}\) There may be a factual dispute between the parents as to whether the father has actually been exercising his custody rights, especially if he is residing with one or both of his parents. There may be a factual dispute as to whether the father has consented to the removal of the child (what if he sent an angry text during an argument saying something like, “Get out of my life and take that awful brat with you”?). There may be a dispute as to whether the child has reached an age and degree of maturity at which it is appropriate to take his views into account. Even if he has not quite reached that age, he might reasonably be expected to reach such an age during the lengthy pendency of any future Hague proceedings.

In light of the recent Lozano decision, can counsel advise a client to abduct the child and conceal the child’s whereabouts? Can counsel say that it is a violation of law to abduct the

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\(^{28}\) Unfortunately, neither the Hague Abduction Convention nor ICARA defines the “state of habitual residence”, nor has the United States Supreme Court attempted to define that term. See Gitter v. Gitter, 396 F.3d 124 (2nd Cir. 2003).

States v. Amer, 110 F.3d 873 (2nd Cir. 1997).
child, but if the client does so she would be wise to conceal the child's whereabouts? Is it now malpractice not to advise a client of the potential strategic benefits of concealing the child?

Yet another ethical quandary is presented if a client tells her counsel, or gives her counsel reason to believe, that she is about to abduct the child internationally. Generally, of course, Model Rule 1.6, Confidentiality of Information, protects client confidences. It is far from clear whether any of the exceptions to confidentiality in Rule 1.6 apply to this situation. Subsection (b) provides that a lawyer may "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ..." in any of seven listed situations. Of those seven situations, the only one that might arguably apply is subsection (6): "to comply with other law or a court order". Even if that subsection applies, under the language of 1.6(b), disclosure would be only permissible, not mandatory.

EFFORTS TO PRIORITIZE HAGUE CASES IN UNITED STATES FEDERAL COURTS

The current abysmal failure of the United States to act expeditiously in many Hague Abduction Convention cases is in violation not only of the general mandate of prompt decision-making and return set forth in the Convention, but also of federal law. The implementing statute, the International Child Abduction Remedies Act (ICARA), contains the same mandate. In the Findings section, Congress unequivocally states: "The international abduction or wrongful retention of children is harmful to their well-being ... Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies."

In a 2013 case addressing a procedural issue (mootness) under ICARA, Chafin v. Chafin, the United States Supreme Court explicitly recognized the necessity for prompt adjudication of Hague Abduction Convention claims:

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in this unfortunate situation.

The Court went on to describe current efforts in this regard rather glowingly:


29 This is not a mere hypothetical situation. A number of years ago, in a clinic supervised by the author, a client informed her law student advocate of her intention to leave the country with the children before a scheduled custody hearing. The court had not issued a writ of ne exeat to prevent her from removing the children from the jurisdiction.
30 The author does not mean to suggest that no federal courts prioritize Hague cases. Many do, but it is far from a universal practice.
32 Chafin v. Chafin, 133 S.Ct. 1017, 1027 (2013). The precise issue in Chafin was whether the trial court's order returning the child to her State of habitual residence rendered the father's appeal moot. The Court unanimously ruled that there was still a live dispute between the parties.
Unfortunately, an examination of the courts and cases cited by Judge Garbolino demonstrates that expedition, while favorably discussed and sometimes applied, is hardly the universal practice even with those courts which theoretically “expedite appeals”.

Judge Garbolino cites *In re Application of Adan* for the proposition that: “This emphasis on prompt disposition applies to appellate proceedings as well”. But the facts in *Adan* belie the rhetoric. The unmarried parties in *Adan* had a baby girl in June 2000 in New Jersey. Thereafter the parties returned to Argentina with the child in September 2000. The mother alleged significant ongoing abuse by the father against both her and the child. Shortly before a February 2004 court date in Argentina on the mother’s abuse complaint, the mother removed herself and the child to the United States. The child was then three years of age.

After tracing the mother and child to New Jersey, the father (who has always denied the abuse claims) filed a Hague application in federal district court in New Jersey in October 2004. The district court did not hold a hearing until June 2005, after which the judge ordered the immediate return of the child to Argentina. The mother promptly filed an appeal to the Third Circuit Court of Appeals which, on 16 June 2005, granted an emergency stay of the order of return. The case was argued before the Third Circuit on 29 September 2005, and five and a half months later that court reversed the decision of the district court with the decision cited by Judge Garbolino and remanded the case for further proceedings before the district court. The district court heard further evidence in May 2006 and April 2007, and, in June 2007, the district court again ordered the child’s return to Argentina. The mother again appealed to the Third Circuit, which held oral argument on the matter fifteen months later in September 2008, and again reversed the district court and ordered the case dismissed. By this time, the child, who was three years old when she was abducted to the United States, was eight years old. The circuit court provided no explanation for the fifteen month delay between the second appeal and the oral argument on that appeal.

Several other cases cited by Judge Garbolino reveal similar delays. In *Holder v. Holder*, the children were retained in the United States by the mother in May 2000, the father filed his Hague petition in November 2000, the district court dismissed that petition in deference to state court custody proceedings in April 2001, the Ninth Circuit reversed that dismissal and remanded the case in September 2002, the district court again dismissed the petition on remand on the basis that the father had not proven that the children’s state of habitual residence was Germany, and the Ninth Circuit upheld that decision in December 2004, over four years after the father’s original filing.34

In *Gaudin v. Remis* the left-behind mother filed her Hague petition in June or July, 2000, which the district court promptly denied in December 2000, but the case did not reach its inglorious end until a final decision of the Ninth Circuit in October 2009, close to a decade later and after multiple appeals.35 Most Hague cases will not likely involve one appeal, much less multiple appeals, but surely a delay of this magnitude is unconscionable under any circumstances.

34 *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002); 392 F.3d 1009 (9th Cir. 2004).
35 *Gaudin v. Remis*, 282 F.3d 1178 (9th Cir. 2002); 379 F.3d 31 (9th Cir. 2004); 415 F.3d 1023 (9th Cir. 2005); 334 Fed. Apps. 153 (9th Cir. 2005).
Finally, the procedural history of the Lozano case itself is instructive. The parties, who were not married, lived together in London where their daughter was born in October 2005. From October 2005 until November 2008, when the mother absconded with the child, then three years old, they continued to cohabit. The mother described a pattern of physical and emotional abuse by the father, and, not surprisingly, the father denied those allegations. The mother eventually left the United Kingdom with the child and moved to New York. The father made multiple efforts to find the child. It is unclear exactly when he discovered the mother’s address; at oral argument before the district court, his counsel suggested that the father “knew that the child was probably in New York” as of 22 February 2010, which, significantly, was more than one year after her abduction. Sometime later, the father found the mother’s actual address, and, after he obtained legal counsel in the United States, he filed his Hague petition in November 2010. The district court promptly entered an order “prohibiting (the father), or anyone acting on behalf of (the father) except for his counsel, from contacting (the mother) or the child”. The case was fully litigated in the district court, which entered an order denying the father’s petition in August 2011. The judge found that the child was now settled in her new environment and that the mother’s concealment of the child did not equitably toll the one year time period after which the “now settled” defense becomes available. In making his ruling, the judge explicitly recognized how the process had worked to the father’s disadvantage:

The court acknowledges that this outcome is in many ways unfair to Petitioner, who has been denied access to his child for over two years now. And the Court recognizes that because neither Petitioner nor Respondent appears to have the finances or immigration status to be able to travel easily between the United Kingdom and New York for a custody hearing, this outcome does disadvantage Petitioner (and his opportunities to have a meaningful relationship with his child). But the Convention provides for the settled defense, the merits of which the Court has determined have been established here. And, in the end, given that she is now settled in New York, the Court believes the child is simply too fragile to justify forcing her to return to the United Kingdom at this time.37

The Second Circuit upheld the district court fifteen months later, in October 2012,38 and the United States Supreme Court affirmed that decision seventeen months after that, in March 2014.39 The child was three years old when she was abducted by her mother and almost eight-and-a-half years old at the time of the Supreme Court’s decision. It appears that the father has been unable to have any access to his daughter in the intervening five years; surely any relationship between the father and the daughter has been successfully destroyed by the mother’s actions and the potent combination of concealment and delay.

It is abundantly clear both from the available statistics and case law that current efforts to resolve Hague Abduction Convention cases promptly in federal court often fall far short of the mark. Despite efforts by individual judges to expedite Hague cases and isolated statements in isolated cases noting the need for expedition, untoward delay is too often

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37 Ibid., p. 235, n. 21.
38 Lozano v. MontoyaAlvarez, 697 F.3d 41 (2nd Cir. 2012).
39 See note 13 above.
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the reality, usually to the detriment of the left-behind parent. Indeed, in *Chafin*, after optimistically noting that many courts act expeditiously (and we have seen that deeds often do not match words in this regard), the Supreme Court acknowledged that: “Cases in American courts often take over two years from filing to resolution...”.40 Clearly the United States must address this problem in a coordinated fashion, not a mere piecemeal approach of various courts trying to impose efficiency on an ad hoc basis. The European Union has already taken a (modest) step in this direction.

THE EUROPEAN REFORM EFFORT

After several years of study, the European Union adopted a measure in 2003 to address perceived problems with overuse of the Article 13(1)(b) exception to return (grave risk of harm) and delays within the system.41 Formally labelled Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No. 1347/2000, this initiative is commonly referred to as the Brussels II bis Regulation.42 The critical provision addressing overuse of the grave risk defense is Article 11(4) of Brussels II bis, which provides that a court dealing with an intra-European child abduction should not refuse return on the basis of grave risk if it is established that adequate arrangements have been made in the requesting State to assure the protection of the child upon return.43

This rule, it should be noted, is consistent with case law adopted by some circuit courts of appeal in the United States, but not others. In the United States the rule appears to have originated in dictum in the seminal Sixth Circuit case of *Friedrich v. Friedrich*, where the court stated that “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”.44 Although the Third Circuit appears to have followed *Friedrich*,45 the Seventh Circuit has declined to do so, reasoning that this language does not appear in the Convention and that it may be an unrealistic premise that the law can protect children from an abusive parent.46 Subsequently, the Eleventh Circuit rejected this proposition on the grounds that: “To require a respondent to adduce evidence regarding the condition of the legal and social service systems in a country she has fled creates difficult problems of proof, and appears not to have been contemplated by the Convention”.47

The Brussels II bis Regulation also attempts to make the six week goal for decision-making set forth in the Convention obligatory for intra-European child abduction cases. Article 11(3) of the Regulation states that courts must issue a decision within six weeks

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40 See note 32 above, p. 1028.
42 Ibid., p. 2.
43 Ibid., p. 42.
45 *In re Application of Adam*, 427 F.3d 381, 395 (3rd Cir. 2005).
46 *Van de Sande v. Van de Sande*, 431 F.3d 567, 571 (7th Cir. 2005).
47 *Baran v. Bentley*, 526 F.3d 1340, 1344 (11th Cir. 2008).

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of being seised of the matter. But, the time limit may still be exceeded if exceptional circumstances make it impossible for the court to conclude the case within six weeks. 48

Dr. Katarina Trimmings published an extensive study of the effects of the Brussels II bis Regulation in 2013. 49 It is too early to tell how effective the Brussels II bis Regulation will be in lowering the number of judicial refusals to return abducted children within the European Union because the number of cases in the Trimmings study is rather small. But, of those Hague Abduction Convention cases that went to court, the percentage that resulted in a refusal of return dropped from 24% in 2003 to 21% in 2005/6. 50 More significantly, in cases of judicial refusal, the percentage based on Hague Article 13(1)(b) (grave risk) dropped from 30% in 2003 to 19% in 2005/6. 51

The Regulation’s effort to enforce the six-week goal for disposition of Hague cases has met with less success. Only 20% of all judicial decisions were made within the six-week deadline. No judicial refusals of return met the deadline. The overall EU average time was 173 days (more than four times the six-week goal). Most worrying, the overall time for resolution actually lengthened after implementation of Brussels II bis! 52 Moreover, the 2010 decision of the Grand Chamber of the European Court of Human Rights in the Neulinger case, which appears to require parties to the European Convention on Human Rights to make a full-blown assessment of the best interests of the child before returning an abducted child, can only exacerbate delay. 53

A WAY FORWARD

If one believes that child snatching is an evil to be deterred, that international child snatching creates even more harm than domestic child snatching, and that the Hague Abduction Convention has valid goals, then it is imperative that the United States (and other parties to the Convention, as well) take coordinated steps to strengthen enforcement of the Convention. 54 For the Convention to work correctly it must have a real deterrent effect. When cases of abduction are dragged out for many months and even years and when a majority of abductions do not result in return of the child, the deterrence value of the Convention is severely compromised.

The Uniform Law Commission has taken the lead at the state level by proposing the Uniform Child Abduction Prevention Act (UCAPA). The UCAPA authorizes a court of competent jurisdiction, on petition of a party, a prosecutor, or a designated public authority, or on the court’s own motion, to order a variety of abduction prevention

49 See note 43 above.
50 See note 43 above, p. 85, figure 5.14.
51 See note 43 above, p. 89, Figure 5.16.
52 See note 43 above, pp. 162-163.
54 This is not meant to imply that the Convention itself could not be improved. At the very least, it is abundantly clear that the Hague Conference needs to reassess time limits under the Hague Abduction Convention and put teeth into those limits. It would also be useful for the Conference to address the often litigated issue of “state of habitual residence” and provide a working definition of that key concept.
measures. As of this writing (July 2014), thirteen states plus the District of Columbia have enacted UCAPA.55

It is abundantly clear that more is to be done. At the federal level, Congress should consider amending the International Child Abduction Remedies Act, and the Judicial Conference’s Advisory Committees on Federal Rules of Civil and Appellate Procedures should consider adoption of Hague-specific federal rules of civil and appellate procedure.56

With regard to ICARA, it would be helpful if Congress would specify that Hague cases must be given priority by the federal courts, as is recommended by the Hague Conference Guide to Good Practice.57 This is not explicit in the “Judicial Remedies” provision of the statute.58 Such an amendment could have real, positive consequences because Rule 40 of the Federal Rules of Civil Procedure provides that: “The court must give priority to actions entitled to priority by federal statute”.59

At this writing there are no Hague specific rules of federal civil or appellate procedure, which is consistent with the generalized approach taken in those rules. But, there is no compelling reason to fail to address this matter specifically in the federal rules. Many family lawyers will be familiar with state court rules prioritizing and streamlining custody litigation. For example, in Pennsylvania, there are special rules of civil procedure for custody matters requiring, among other things, that the parties have initial in-person contact with the court within 45 days of the filing of the action, that no answer is required to be filed, that trial be scheduled within 90 days of entrance of a scheduling order, and that the judge’s decision shall ordinarily be entered within 15 days of the conclusion of the trial.60 Discovery is disallowed unless authorized by special order of court.61 Procedures for alternative dispute resolution before a hearing officer are also in place.62

At the appellate level, many states, including Pennsylvania, have rules to “fast track” appeals in child custody cases (as well as other cases involving children). Such rules include shortened briefing schedules, severe restrictions on petitions for extension of time, no deferred briefing schedule, strict limits on the time for the first level appellate court (the Pennsylvania Superior Court) to act on a petition for reargument, and so on.63 The front cover of all briefs must include a statement advising the appellate court that the appeal is a children’s fast track appeal.64 Internal operating procedures of both the Pennsylvania Superior and Supreme Courts likewise call for expedited handling of children’s fast-track appeals.65

56 ICARA provides that an applicant may file a Hague petition in either state or federal court. 42 U.S.C. §11603(a). This article focuses on streamlining federal ICARA cases since the petitioner always has the option of filing federally, and, as will be seen, many state court systems already prioritize children’s cases.
58 42 U.S.C. 11603.
59 F.R.Civ.P. 40.
60 See generally PA Rules of Civil Procedure (PA.R.C.P.) 1915.4 and 1915.5.
61 PA.R.C.P. 1915.5(c).
62 PA.R.C.P. 1915.4-2.
63 Pa Rules of Appellate Procedure (PA.R.A.P.) 102, 1113, 1116, 2171, 2185,
64 PA.R.A.P. 2172(b).
In her concurring opinion in *Chafin*, Justice Ginsburg, joined by Justices Scalia and Breyer, suggested various alternatives for expediting the federal appeals process in Hague cases. Noting that the Hague Conference *Guide to Good Practice* states that: “Expeditious procedures are essential at all stages of the Convention Process”, Justice Ginsburg proposed that the United States follow the example of England and Wales, and require leave to file an appeal in a Hague case, which would only be granted if the appeal had a real prospect of success or there is some other compelling reason why the appeal should be heard. If such leave were granted, the appeal would then be fast-tracked with a target of six weeks for disposition. Justice Ginsburg recognized that eliminating the current automatic right to an appeal would require Congressional action.\(^6\)

In response to Justice Ginsburg, Professors Silberman and Spector agreed that the United States should have expedited appeals in Hague case, but disagreed with the idea of adopting the English approach requiring leave of court to file an appeal. Instead they suggested that “legislation or rules of court should provide for the routine grant of a temporary stay by the court issuing a return order to allow a respondent to obtain an expedited hearing from the appellate court or appellate judge, who would then be entrusted to determine whether to stay the return order or to permit its immediate execution. Should the stay be issued, an expedited appeal would follow”.\(^6\)

Absent Congressional amendments to ICARA, serious consideration should be given by the Advisory Committees to fast-tracking rules for Hague cases at all federal levels. The following innovations should be considered in the federal rules of civil procedure:

- no requirement for responsive pleadings;\(^6\)
- no discovery unless authorized by the court upon good cause shown;\(^6\)
- if so ordered, discovery to be expedited;\(^7\)
- trial to be held within 20 days of original service on the defendant except for good cause shown;\(^7\)
- no referral to a magistrate judge unless the parties agree that the magistrate judge sit as the final decision-maker at the district court level;
- the district court to issue its decision within 5 days of trial or post-trial submissions.
- At the federal circuit court of appeals level, the following changes should be considered:
  - appeal must be filed within 7 days;\(^7\)

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\(^6\) See note 34 above, pp. 1028-1030.
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\(^6\) Compare F.R.Civ.P. 12(a)(A)(i)(defendant must serve answer within 21 days of service of summons and complaint) and F.R.Civ.P. 55(a) (entry of default judgment for failure to plead or otherwise defend).
\(^6\) Compare F.R.Civ.P. 30 (depositions by oral testimony), 31 (depositions by written questions), 33 (interrogatories to parties), 43 (requests for production), and 36 (requests for admission).
\(^7\) See Norinder v. Fuentes, 657 F.3d 526, 533 (7th Cir. 2011).
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\(^7\) Compare F.R.Civ.P. 40 (scheduling cases for trial) which gives no time constraints other than, “The court must give priority to actions entitled to priority by a federal statute”.
\(^7\) Compare Federal Rule of Appellate Procedure (FRAP) 4(a), (notice of appeal due within 30 days unless United States is a party).
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- appellant to order transcript or certify no transcript will be ordered simultaneously with filing notice of appeal;\(^{73}\)
- appellant must file and serve brief with 10 days after record is filed;\(^{74}\)
- appellee must file and serve brief within 10 days of service of appellant’s brief;\(^{75}\)
- no reply brief except by special order of court, in which case it shall be filed and served within 5 business days of the order;\(^{76}\)
- no oral argument except by special order of court on its own motion or for good cause shown;\(^{77}\)
- panels to give priority in circulation of and voting on proposed decisions;\(^{78}\)
- no en banc hearings or rehearings except in cases of a clear division of authority among panels within a circuit.\(^{79}\)

- At the United States Supreme Court level, consideration should be given to the following rules changes:
  - 20 days to file petition for writ of certiorari;\(^{80}\)
  - 20 days to file brief in opposition, if any.\(^{81}\)
  - no reply brief by petitioner.\(^{82}\)
  - certiorari to be granted or denied within 30 days of filing of brief in opposition.\(^{83}\)
  - if cert granted, petitioner must file merits brief within 20 days.\(^{84}\)
  - respondent to file merits brief within 20 days thereafter.\(^{85}\)
  - no reply brief by petitioner.\(^{86}\)
  - oral argument to be scheduled within two weeks of respondent’s merits brief.\(^{87}\)
  - order of disposition to be entered within two weeks of oral argument.\(^{88}\)

Unquestionably any such rules changes will meet with resistance, as they will place an added burden on both the already burdened federal judiciary and on counsel who litigate these cases, many of whom may be volunteers appearing pro bono. Indeed, shortly after the *Chafin* decision, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sent Justice Ginsburg a letter addressing her proposals for

\(^{73}\) Compare FRAP 10(b), (normal rule is 14 days after filing notice of appeal).
\(^{74}\) Compare FRAP 31(a), (40 days after record filed).
\(^{75}\) Compare FRAP 31(a), (30 days after appellant’s brief served).
\(^{76}\) Compare FRAP 31(a), (reply brief may be served within 14 days after service of appellee’s brief, but at least 7 days before argument).
\(^{77}\) Compare FRAP 34(a)(2), (“Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary....”).
\(^{78}\) Based on PA Superior Court Internal Operating Rule §65.42
\(^{79}\) Compare FRAP 35(a), (“A majority of the circuit judges...may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored....”).
\(^{80}\) Compare Supreme Court Rule 13(1), (90 days).
\(^{81}\) Compare Supreme Court Rule 15(3), (30 days after case placed on docket).
\(^{82}\) Compare Supreme Court Rule 15(6), (“Any petitioner may file a reply brief addressed to new points raised in the brief in opposition....”).
\(^{83}\) There is currently no time limit in the Supreme Court’s Rules for action on a cert petition.
\(^{84}\) Compare Supreme Court Rule 25(1), (45 days).
\(^{85}\) Compare Supreme Court Rule 25(2), (30 days).
\(^{86}\) Compare Supreme Court Rule 25(3), (30 days to file reply brief).
\(^{87}\) Compare Supreme Court Rule 27(1), (“A case will not ordinarily be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.”).
\(^{88}\) There is currently no time limit for disposition in the Supreme Court’s Rules. Note that this proposal does not mandate a time limit for the Court to issue its opinion(s).
rules requiring the expeditious handling of Hague cases at the appellate level, stating their opposition to any such rules:

The Judicial Conference has a long-established policy of opposing statutes or court rules that mandate docket priority and timelines for categories of cases. While exceptions exist, our collective thinking was that further education, usefully highlighted by the Chafin opinions, presented the best and least intrusive initial response to the issue.90

No set of procedural rules for Hague cases will be perfect, and delays will still occur, either by design of one or both of the parties, or otherwise. Indeed, as the Cardiff Study has reported for applications in 2008, it took an average of 207 days, presumably from a filing with our Central Authority, the United States Department of State, before an application was sent to court, but only 106 days on average for the court to conclude an application.91 Thus, delay at the judicial level is only one part of the problem.

Any of these proposals may be subject to valid criticism. One experienced Hague Abduction Convention litigator has suggested to this author that such rules could give an unfair advantage to the left-behind parent who could muster all of his evidence before filing his initial petition. But it should be remembered that the abducting parent has already placed the left-behind parent at a serious disadvantage by taking the child away from the left-behind parent to a new country where it may be difficult or, indeed, impossible for the left-behind to find and afford knowledgeable local counsel and where the left-behind parent may be unable to travel to see his child or litigate the case.

The Hague Abduction Convention and United States law recognize that international child abduction is harmful to children. It disrupts their lives, their relationship with their left-behind parent and often their education, and places them in a new environment which may be totally alien to them, where they may be confronted with a language they neither speak nor understand. If the final resolution of the Hague Abduction Convention case is their return to their country of habitual residence, then the sooner that result is effectuated, the less the harm to the child. In her official commentary to the Convention, Elisa Pérez-Vera noted: "...the time factor is of decisive importance. In fact, the psychological problems which a child may suffer as a result of its removal could reappear if a decision on its return were to be taken only after some delay."92 If the Hague Abduction Convention litigation is allowed to drag on, as the Abbott case demonstrates, the more likely it is that one of the exceptions to return will prevail and the wrongful abduction will succeed.

The available data regarding the less than 50% rate of return in international abduction cases should give pause to anyone concerned about the evil of international child abduction. Ms. Pérez-Vera underlined the fact that the exceptions to return "must be applied only as far as they go and no further".93 She cautioned presciently that: "This implies above all that they are to be interpreted in a restrictive manner if the Convention is not to become a dead letter."

91 See note 9 above at ¶36.
92 Ibid., ¶34.
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letter". Combatting untoward delay in Hague Abduction Convention cases will be one step toward lowering the unsustainable rate of successful international child abductions, thus helping to deter this particularly odious form of child abuse.

Ibid. 270 JCL 9:1