

**MATERIALS RELATING TO  
INTERNATIONAL CHILD ABDUCTION**

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**CHAPTER 44**

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## Materials Relating to International Child Abduction<sup>®</sup>

### CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

*(Concluded October 25, 1980)*

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring 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, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

#### CHAPTER I – SCOPE OF THE CONVENTION

##### *Article 1*

The objects of the present Convention are –

- a)* to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b)* to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

##### *Article 2*

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

##### *Article 3*

The removal or the retention of a child is to be considered wrongful where –

- a)* it is in breach of rights of custody attributed to a person, an institution or any other 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 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 sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

##### *Article 4*

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

##### *Article 5*

For the purposes of this Convention –

- a)* "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b)* "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

#### CHAPTER II – CENTRAL AUTHORITIES

##### *Article 6*

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

##### *Article 7*

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary,

they shall take all appropriate measures –

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

### CHAPTER III – RETURN OF CHILDREN

#### *Article 8*

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of

the child is based;

- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

#### *Article 9*

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

#### *Article 10*

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

#### *Article 11*

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of 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. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

#### *Article 12*

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a

period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

#### *Article 13*

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

*a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

*b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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 account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

#### *Article 14*

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the

judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

#### *Article 15*

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

#### *Article 16*

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

#### *Article 17*

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

#### *Article 18*

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.

#### *Article 19*

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

#### *Article 20*

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

### CHAPTER IV – RIGHTS OF ACCESS

#### *Article 21*

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

### CHAPTER V – GENERAL PROVISIONS

#### *Article 22*

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

#### *Article 23*

No legalization or similar formality may be required in the context of this Convention.

#### *Article 24*

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a

translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

#### *Article 25*

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

#### *Article 26*

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

#### *Article 27*

When it is manifest that the requirements of this Conven-



tion are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

#### *Article 28*

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

#### *Article 29*

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

#### *Article 30*

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

#### *Article 31*

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

- a)* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b)* any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

#### *Article 32*

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

#### *Article 33*

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

#### *Article 34*

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

#### *Article 35*

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

#### *Article 36*

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

### CHAPTER VI – FINAL CLAUSES

#### *Article 37*

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### *Article 38*

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the

Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

#### *Article 39*

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### *Article 40*

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

#### *Article 41*

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

#### *Article 42*

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

#### *Article 43*

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

#### *Article 44*

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to

it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

*Article 45*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and

approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

The following information is taken from  
 Department of State Publication 10862  
 <<http://travel.state.gov/int'lchildabduction.html>>

It has been edited for brevity

## INTERNATIONAL PARENTAL CHILD ABDUCTION

*Revised July 2001*

*Department of State Publication 10862*

*Bureau of Consular Affairs*

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### Introduction

**Part I:** Prevention - How to Guard Against International Child Abduction

**Part II:** What the State Department Can and Cannot Do When a Child is Abducted Abroad

**Part III:** How to Search for a Child Abducted Abroad

**Part IV:** The Best Solution: Settling Out of Court

**Part V:** One Possible Solution: The Hague Convention

**Part VI:** Legal Solutions When the Hague Convention Does Not Apply

**Part VII:** Using the Criminal Justice System

**Part VIII:**

References

Uniform State and Federal Laws on Custody, Parental Child Abduction, and Missing Children

Reading List

**Appendix 1** - Questionnaire for Non-Hague Convention Parents

**Appendix 2** - Instructions for Completing the Hague Convention Application

**Appendix 3** - Children's Passport Issuance Alert Program

### INTRODUCTION

Parental child abduction is a tragedy. When a child is abducted across international borders, the difficulties are compounded for everyone involved. This pamphlet is designed to assist the adult most directly affected by international child abduction, the left-behind parent.

The Department of State considers international parental child abduction, as well as the welfare and protection of U.S. citizen children taken overseas, to be important, serious matters. We place the highest priority on the welfare of children who have been victimized by international abductions.

The Department of State's Office of Children's Issues (CA/OCS/CI) is designated to provide assistance to the left-behind parents of international parental child abduction. Since the late 1970's, we have been contacted in the cases of approximately 16,000 children who were either abducted from the United States or prevented from returning to the United States by one of their parents. This booklet discusses what the Department of State can and cannot do to help you. In addition, because we are only part of the network of resources available to you, we mention other avenues to pursue when your child has been abducted across international borders.

The Office of Children's Issues is prepared to assist you as you pursue recovery of your abducted child. Because it can be a bewildering experience, we have prepared both a questionnaire for the left-behind parents of children taken to countries not party to the Hague Abduction Convention (See Appendix 1.) and an application for left-behind parents of children taken to Hague Convention member countries (See Appendix 2.). To report an abduction case to CA/OCS/CI, call our office and follow-up with a copy of either the completed questionnaire or the completed application. Likewise, in order for us to provide the best service, we need to be informed of any developments in your case. Every child and every case is unique, and we will work with you to apply this information to your particular situation.

If you have any further questions, please call us at 202-736-7000. You may also fax us at 202-312-9743, or write to us at:

U.S. Department of State  
 The Office of Children's Issues  
 2401 E Street, N.W., Room L127  
 Washington, D.C. 20522

You can receive additional information by dialing the State Department's Bureau of Consular Affairs' automated fax system at 202-647-3000 (from your fax) or visit us on the Internet at [http://travel.state.gov/children's\\_issues.html](http://travel.state.gov/children's_issues.html).

**PART I: PREVENTION****HOW TO GUARD AGAINST INTERNATIONAL CHILD ABDUCTION****How Vulnerable is Your Child?**

You and your child are most vulnerable when your relationship with the other parent is troubled or broken, the other parent has close ties to another country, and/or the other country has traditions or laws that may be prejudicial against a parent of your gender or to non-citizens in general. However, anyone can be vulnerable.

**Cross-cultural Marriages: Should You or Your Child Visit the Country of the Other Parent?**

Many cases of international parental child abduction are actually cases in which the child traveled to a foreign country with the approval of both parents, but was later prevented from returning to the United States. Sometimes the marriage is neither broken nor troubled, but the foreign parent, upon returning to his or her country of origin, decides not to return to the U.S. or to allow the child to do so. A person who has assimilated a second culture may find a return to his or her roots disturbing and may feel pulled to shift loyalties back to the original culture. Furthermore, a person's behavior may change when he or she returns to the culture where he or she grew up.

In some societies, children must have their father's permission and a woman must have her husband's permission to travel. If you are a woman, to prevent your own or your child's detention abroad, find out about the laws and traditions of the country you plan to visit or plan to allow your child to visit, and consider carefully the effect that a return to his traditional culture might have on your child's father; in other societies, children need the permission of both parents to travel and the refusal of one parent to give that permission may prevent the departure of a child from that country. For detailed advice in your specific case, you may wish to contact an attorney in your spouse's country of origin. Many U.S. Embassies/Consulates list attorneys on their web-sites, accessible via <http://travel.state.gov>.

**Precautions That Any Parent Should Take**

In international parental child abduction, an ounce of prevention is worth a pound of cure. Be alert to the possibility and be prepared:

Keep a list of the addresses and telephone numbers of the other parent's relatives, friends, and business associates both here and abroad;

Keep a record of important information about the other parent, including: physical description, passport, social security, bank account, and driver's license numbers, and vehicle description and plate number;

Keep a written description of your child, including hair

and eye color, height, weight, fingerprints, and any special physical characteristics; and

Take full-face color photographs and/or videos of your child every six months - a recent photo of the other parent may also be useful.

If your child should be abducted, this information could be vital in locating your child.

In addition, the National Center for Missing and Exploited Children (NCMEC), [www.missingkids.org](http://www.missingkids.org), at telephone 1-800-843-5678, suggests that you teach your child to use the telephone, memorize your home phone number, practice making collect calls, and instruct him or her to call home immediately if anything unusual happens. Discuss possible plans of action with your child in the case of abduction. Most important, however, if you feel your child is vulnerable to abduction, seek legal advice. Do not merely tell a friend or relative about your fears.

**The Importance of a Custody Decree**

Under the laws of the United States and many foreign countries, **if there is no decree of custody prior to an abduction, both parents may be considered to have equal legal custody of their child.** (IMPORTANT: Even though both parents may have custody of a child, it still may be a crime for one parent to remove the child from the United States against the other parent's wishes.) If you are contemplating divorce or separation, or are divorced or separated, or even if you were never legally married to the other parent, ask your attorney, as soon as possible, if you should obtain a decree of sole custody or a decree that prohibits the travel of your child without your permission or that of the court. If you have or would prefer to have a joint custody decree, you may want to make certain that it prohibits your child from traveling abroad without your permission or that of the court.

**How to Draft or Modify a Custody Decree**

A well-written custody decree is an important line of defense against international parental child abduction. NCMEC, in its publication *Family Abduction: How to Prevent an Abduction and What to Do If Your Child is Abducted*, makes several recommendations to help prevent the abduction of your child if your spouse is a legal permanent resident alien or a U.S. citizen with ties to a foreign country. For instance, it may be advisable to include court-ordered supervised visitation and a statement prohibiting your child from traveling without your permission or that of the court. If the country to which your child might be taken is a member of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), your custody decree should state that the terms of the Hague Convention apply if there is an abduction or wrongful retention. The American Bar Association (ABA) also suggests having the court require the non-citizen parent or the parent with ties to a foreign country to post a bond. This may be

useful both as a deterrent to abduction and, if forfeited because of an abduction, as a source of revenue for you in your efforts to locate and recover your child. For further prevention information, you should contact the NCMEC.

**Reminder:** *Obtain several certified copies of your custody decree from the court that issued it. Give a copy to your child's school and advise school personnel to whom your child may be released.*

### U.S. Passports

The Department of State's Passport Lookout Program can help you determine if your child has been issued a U.S. passport. You may also ask that your child's name be entered into the State Department's Children's Passport Issuance Alert Program. This will enable the Department to notify you or your attorney if an application for a U.S. passport for the child is received anywhere in the United States or at any U.S. embassy or consulate abroad. If you have a court order that either grants you sole custody, joint legal custody, or prohibits your child from traveling without your permission or the permission of the court, the Department may also refuse to issue a U.S. passport for your child. **The Department may not, however, revoke a passport that has already been issued to the child.** There is also no way to track the use of a passport once it has been issued, since there are no exit controls of people leaving the U.S.

To inquire about a U.S. passport or to have your child's name entered into the passport alert program, complete the request form in Appendix 3 and mail or fax it to:

Office of Children's Issues  
Children's Passport Issuance Alert Program (CPIAP)  
2401 E Street, N.W., Room L127  
Washington, D.C. 20522  
Tel. (202) 736-7000  
Fax (202) 312-9743

### Change in Passport Regulations

A new law, which took effect in July 2001, requires the signature of both parents prior to issuance of a U.S. passport to children under the age of 14.

#### Requirements:

Both parents, or the child's legal guardians, must execute the child's passport application and provide documentary evidence demonstrating that they are the parents or guardians; or the person executing the application must provide documentary evidence that such person has sole custody of the child; has the consent of the other parent to the issuance of the passport; or is acting in place of the parents and has the consent of both parents, of a parent with sole custody over the child, or of the child's legal guardian, to the issuance of the passport.

#### Exceptions:

The law does provide two exceptions to this requirement: (1) for exigent circumstances, such as those involving the health or welfare of the child, or (2) when the Secretary of State determines that issuance of a passport is warranted by special family circumstances. For additional information, see the Bureau of Consular Affairs home page on the Internet at <http://travel.state.gov>.

### Foreign Passports - the Problem of Dual Nationality

Many United States citizen children who fall victim to international parental abduction possess, or may have a claim to dual nationality. While the Department of State will make every effort to avoid issuing a United States passport if the custodial parent has provided a custody decree, the Department cannot prevent embassies and consulates of other countries in the United States from issuing their passports to children who are also their nationals. You can, however, ask a foreign embassy or consulate not to issue a passport to your child. Send the embassy or consulate a written request, along with certified complete copies of any court orders you have which address custody or the overseas travel of your child. In your letter, inform them that you are sending a copy of this request to the United States Department of State. If your child is *only* a United States citizen, you can request that no visa for that country be issued in his or her United States passport. No international law requires compliance with such requests, but some countries may comply voluntarily.

The United States government does not have exit controls at the border. There is no way to stop someone with valid travel documents at the United States border. The U.S. government does not check the names or the documents of travelers leaving the United States. Many foreign countries do not require a passport for entry. A birth certificate is sufficient to enter some foreign countries. If your child has a valid passport from any country, he or she may be able to travel outside the United States without your consent.

## PART II

### WHAT THE STATE DEPARTMENT CAN AND CANNOT DO WHEN A CHILD IS ABDUCTED ABROAD

When a United States citizen child is abducted abroad, the State Department's Office of Children's Issues (CA/OCS/CI) works with United States embassies and consulates abroad to assist the child and left-behind parent in a number of ways. *Despite the fact that children are taken across international borders, child custody disputes remain fundamentally civil legal matters between the parents involved, over which the Department of State has no jurisdiction.* If a child custody dispute cannot be settled amicably between the parties, it often must be resolved by judicial proceedings in the country where the child is located.

[Text omitted in the interest of brevity]

### PART III

## HOW TO SEARCH FOR A CHILD ABDUCTED ABROAD

### Where to Report Your Missing Child

1. If your child is missing or has been abducted, file a missing person report with your local police department and request that your child's name and description be entered into the "missing person" section of the National Crime Information Center (NCIC) computer. This is provided for under the National Child Search Act of 1990. The abductor does not have to be charged with a crime when you file a missing person report. It is not always a good idea to file criminal charges against the abducting parent at the same time you file a missing person report, although local law enforcement authorities may urge you to do so (*see cautionary note on page 17*). In addition, through INTERPOL, the international police organization, your local police can request that a search for your child be conducted by the police in the country where you believe your child may have been taken. If your local law enforcement is unaware of the legal requirements for immediate entry into NCIC please contact the Office of Children's Issues at (202) 736-7000.

2. Contact the National Center for Missing and Exploited Children (NCMEC) at 1-800-THE LOST/1-800-843-5678. With the searching parent's permission, the child's photograph and description may be circulated to the media in the country to which you believe the child may have been taken.

3. Request information about a possible United States passport and have your child's name entered into the United States Children's Passport Issuance Alert Program. A United States passport for a child under 16 years expires after 5 years. If you do not know where your child is, but information about the child is in the name check system, it may be possible to locate him or her through the passport application process. All United States passport agencies and United States embassies and consulates are on-line with the name check system (See the information in Part I on U.S. Passports.)

### After Your Child Is Located

A consular officer overseas, working with this information, will try to confirm the location of your child. If the consular officer is unable to find the child based on the information provided, he or she may also request information from local officials on your child's entry or residence in the country. Please note, however, that most countries do not maintain such records in a retrievable form, and some countries will not release such information.

We may also ask you for photographs of both your child and the abducting parent because these are often helpful

to foreign authorities trying to find a missing child.

The Department of State, when requested to do so, may conduct visits to determine the welfare and whereabouts of American citizens abroad. The Office of Children's Issues communicates such requests to the United States embassy or consulate responsible for the area to which you believe your child has been abducted. A welfare and whereabouts visit cannot be conducted if the abducting parent refuses access. Your signed letter requesting such a visit and containing the following information can be faxed to us at 202-312-9743:

Child's full name (and any aliases);

Child's date and place of birth;

Full name (and any aliases) of the abductor; and

Information which may assist the embassy or consulate in locating the abductor, such as the names, addresses, and telephone numbers of friends, relatives, place of employment, or business connections there.

### Further Steps to Take in Your Search

It is possible that none of the institutions mentioned (the police, the NCMEC, or the Department of State) will succeed in locating your child right away and you will need to carry on the search on your own. As you search, you should, however, keep these institutions informed of your actions and progress.

One of the best ways to find your child overseas is through establishing friendly contact with relatives and friends of the other parent, either here or abroad. You may have more influence with such persons than you suspect, and their interest in your child's welfare may lead them to cooperate with you.

The United States Department of Health and Human Services, Office of Child Support Enforcement maintains the Federal Parent Locator Service (FPLS). The primary purpose of this service is to locate parents who are delinquent in child support payments, but the service will also search for parental abductors when requested to do so by an authorized person. Generally speaking, an authorized person is a state court judge, police officer, prosecutor, or other state official seeking to enforce a child custody order. Please ask your local law enforcement to request a search.

To learn how to access the services of the FPLS, contact your local or state Child Support Enforcement office. These offices are listed under government listings in your telephone directory.

You can contact the principal of the school to obtain information on requests that may have been made by the abductor to your child's school for the transfer of your child's records.

You can find out from the National Center for Missing and Exploited Children how to prepare a poster on your child.

A poster may assist foreign authorities in attempting to locate your child.

You can ask your district attorney to contact the United States Postal Inspection Service to see if a "mail cover" can be put on any address that you know of in the United States to which the abductor might write.

It may be possible for local law enforcement authorities to obtain, by subpoena or search warrant, credit card records that may show where the abductor is making purchases. Check with state and local authorities if anything can be done. In the same manner, you can try to obtain copies of telephone bills of the abductor's friends or relatives who may have received collect calls from the abductor. Law enforcement may also be able to track usage of a cell phone or emails the abductor may be sending.

#### PART IV

##### THE BEST SOLUTION: SETTLING OUT OF COURT

###### Promoting Communication Between Parents and Children

Legal procedures can be long and expensive. You may have greater success negotiating with the abducting parent. In some cases, friends or relatives of the abductor may be able to help you reach a compromise with the abductor. A decrease in tension might bring about the return of your child, but, even if it does not, it can increase your chances of being able to visit the child and participate in some way in the child's upbringing. In some cases compromise and some kind of reconciliation are the only realistic option.

[Text omitted in the interest of brevity]

#### PART V

##### ONE POSSIBLE SOLUTION: THE HAGUE CONVENTION

One of the most difficult and frustrating elements for a parent of a child abducted abroad is that United States laws and court orders are not automatically recognized abroad and therefore are not directly enforceable abroad. Each country has jurisdiction within its own territory and over people present within its borders. No country can tell another country how to decide cases or enforce laws. Just as foreign court orders are not automatically enforceable in the United States, United States court orders are not automatically enforceable abroad.

At the Hague Conference on Private International Law in 1976, 23 nations agreed to draft a treaty to deter international child abduction. Between 1976 and 1980, the United States was a major force in preparing and negotiating the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or the Convention). The Convention was incorporated into U.S. law and came into force for the United States on July 1, 1988. As of July 2001, the Convention is in force

between the United States and 50 other countries. The Convention applies to wrongful removals or retentions that occurred on or after the date the treaty came into force between those two countries. The dates vary for each country and more countries are considering signing on to the Convention all the time. Check the most recent list prepared by the Office of Children's Issues to learn whether the Convention was in force in a particular county at the time of the wrongful removal or retention. You can find the list on our web site.

##### What Is Covered by the Convention

The Hague Convention is a civil legal mechanism available to parents seeking the return of, or access to, their child. As a civil law mechanism, the parents, not the governments, are parties to the legal action.

The countries that are party to the Convention have agreed that a child who is habitually resident in one party country, and who has been removed to or retained in another party country in violation of the left-behind parent's custodial rights, shall be promptly returned to the country of habitual residence. The Convention can also help parents exercise visitation rights abroad.

There is a treaty obligation to return an abducted child below the age of 16 if application is made **within one year** from the date of the wrongful removal or retention, unless one of the exceptions to return apply. If the application for return is made after one year, the court may use its discretion to decide that the child has become resettled in his or her new country and refuse return of the child. In any case, a court may refuse to order a child returned if there is:

A grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in his or her country of habitual residence;

If the child objects to being returned and has reached an age and degree of maturity at which the court can take account of the child's views (the treaty does not establish at what age children reach this level of maturity: that age and the degree of weight given to children's views varies from country to country); or

If the return would violate the fundamental principles of human rights and freedoms of the country where the child is being held.

*Note: Interpretation of these exceptions varies from country to country.*

##### How to Use the Hague Convention

The Convention provides a legal mechanism for you to seek return of your child or exercise your visitation rights. **You do not need to have a custody decree to use the Convention.** However, to apply for the return of your child, you must have had and been actually exercising a



"right of custody" at the time of the abduction, and you must not have given permission for the child to be removed or, in the case of a retention, to be retained beyond a specified, agreed-upon period of time. The Convention defines "rights of custody" as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." This right need not be sole custody. If there was no court order in effect at the date of the abduction, these "rights of custody" may be established by the law in the state in which your child was living before his or her removal. In some cases it may be advisable to get a determination (as per Article 15 of the Convention) in your local court that 1) you have a right of custody to your child, and 2) the removal or retention was wrongful. Use of the Convention is not restricted to U.S. citizens.

An application should be submitted as soon as possible after an abduction or wrongful retention has taken place. As stated above, there is a time factor of one year involved. Do not wait until you get a custody order. That order would be irrelevant anyway. Copies of the application form can be found in Appendix 2.

Each country that is party to the Convention has designated a Central Authority to carry out specialized duties under the Convention. The Central Authority for the United States is the Department of State's Office of Children's Issues (CA/OCS/CI). You may submit your application directly to the Central Authority or foreign court of the country where the child is believed to be held, but, in order to ensure that you receive all available assistance it is best to submit your application to the U.S. Central Authority.

### **The Role of the United States Central Authority**

The responsibilities of the Central Authority for the Hague Abduction Convention are set forth in Articles 7-12 and 21 of the Convention<sup>1</sup>. The United States Central Authority is prohibited from acting as an agent or attorney in legal proceedings arising under the Convention<sup>2</sup>. The United States Central Authority was not intended to be and has never been a party to such proceedings.

<sup>1</sup> Although article 7(f) of the Convention and 22 C.F.R. 94.6(d) and (h) refer to legal proceedings under the Convention, they do not assign the U.S. Central Authority a direct role in such proceedings.

<sup>2</sup> 22 C.F.R. 94.4

The United States Central Authority's role in proceedings in the United States under the Convention is that of an active facilitator. We seek to promote cooperation among the relevant parties and institutions and act as a source of information about proper procedures under the Convention and the contents and status of applications for assistance. The Central Authority in the country where your child is located, however, has the primary

responsibility for processing your application.

The Office of Children's Issues will review your application to ensure that it is complete and that your request complies with the requirements of the Convention. If it does, we will forward it to the foreign Central Authority and work with that authority until your case is resolved. If the abducting parent does not voluntarily agree to the return of your child, you may be required to retain an attorney abroad to present your case under the Hague Convention to the foreign court. If you need to retain an attorney abroad, see Using the Civil Justice System - How to Proceed .

The Office of Children's Issues works with the applicant and the other Central Authority to facilitate communication between the parties involved and work toward resolving the case as quickly as possible. While specific operations and procedures under the Convention differ in each country party to the treaty, we stand ready to help applicants understand the process and monitor all cases in which assistance is sought.

### **Immigration and the Hague Convention**

The Hague Convention on the Civil Aspects of International Child Abduction focuses on issues of residency, not citizenship. It is important to note that the Convention does not confer any immigration benefit. Anyone seeking to enter the United States who is not a United States citizen must fulfill the appropriate entry requirements, even if that person was ordered by a court to return to the United States. This applies to children and parents involved in any child abduction case including a Hague Convention case.

When a taking parent in a Hague Abduction Convention case is ineligible to enter the United States under United States immigration laws, the parent **may** be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole in order to participate in custody or other related proceedings in a United States court.

### **Good News for Applicants Under the Hague Convention**

The Hague Convention on International Child Abduction has improved the likelihood and speed of return of abducted or wrongfully retained children from countries that are party to the Convention. The Convention's success is encouraging more countries to become party to the Convention. As of July 2001, fifty-five countries have joined since the United States became the 10th country in July 1988. In addition, the reputation of the Hague Convention is such that, when an abducting or retaining parent learns that a Hague application has been or will be filed, he or she may return the child voluntarily and no further civil action will be taken. The majority of Hague cases still, however, require the left behind parent to retain an attorney in the country where the child is located and petition the court for return.

**A note of caution:** Criminal charges may have an unintended negative effect on the operation of the Hague Convention. With the Hague Convention, the emphasis is on the swift return of a child to his or her place of habitual residence where the custody dispute can then be resolved, if necessary, in the courts of that jurisdiction. Courts in some countries, including the United States, have denied return of children solely because the taking parent would be arrested if they accompanied the child home. Many of these courts, United States and foreign, have held that the arrest of the parent would expose the child to psychological harm under Article 13(b) of the Convention. This varies by country and the type of criminal charge. Please contact CI to discuss this matter further.

### **Children Abducted to the United States**

The Hague Convention applies to children abducted to and from countries party to the Convention. If a child is abducted to the United States from one of our Hague treaty partners the parent left behind in the country may apply for return under the Convention. Even if the child was born in the United States, if the child is now found to be "habitually resident" in another country the child may be ordered to return to that country under the Convention. The U.S., provided the case meets the requirements of the Hague and the child's country of habitual residence is a signatory to the Hague Convention.

As of September 5, 1995, by agreement between the National Center for Missing and Exploited Children (NCMEC), the Department of State, and the Department of Justice, applications seeking return of or access to children in the United States are processed on behalf of the Office of Children's Issues by the NCMEC (See References.)

## **PART VI**

### **LEGAL SOLUTIONS WHEN THE HAGUE CONVENTION DOES NOT APPLY**

If your child has been abducted to a country that is *not* a party to the Hague Convention, or if the Convention does not apply in your case, you can seek other legal remedies against the abductor, in the United States and abroad, from both the civil and criminal justice systems. The family court system from which you get a custody decree is part of the civil justice system. At the same time you are using that system, you can also use the criminal justice system consisting of the police, prosecutors, and the FBI.

#### **Using the Civil Justice System: How To Proceed**

In addition to obtaining a custody decree in the United States, you may have to use the civil justice system in the country to which your child has been abducted. The Office of Children's Issues (CA/OCS/CI) can provide

general information on the customs and legal practices for many countries around the world. We can also give you general information on legal service of process abroad or obtaining evidence, and on how to have documents authenticated for use in a foreign country. You may write or telephone CA/OCS/CI for information sheets, such as *Retaining a Foreign Attorney, and Authentication (or Legalization) of Documents in the United States for Use Abroad*.

*To obtain authoritative advice on the laws of a foreign country or to take legal action in that country, you should retain an attorney there. United States consular and diplomatic officers are prohibited by law from performing legal services. (22 C.F.R. 92.81) We can, however, provide you with a list of attorneys in a foreign country. United States embassies and consulates abroad prepare these lists. The United States Department of State can neither guarantee attorney services nor pay attorney fees.*

**Cautionary note:** *Attorney fees can vary widely from country to country. The fee agreement that you make with your local attorney should be put into writing as soon as possible to avoid a potentially serious misunderstanding later.*

Although officers at United States embassies and consulates cannot take legal action on behalf of United States citizens, consular officers may be able to assist in communication problems with a foreign attorney. Consular officers can sometimes inquire about the status of proceedings in the foreign court, and they may be able to coordinate with your attorney to ensure that your rights as provided for by the laws of that foreign country are respected.

Your foreign attorney may ask for a certified copy of your custody decree and/or state and federal warrants regarding the abducting parent which have been authenticated for use abroad. It is also advisable to send copies of your state's laws on custody and parental kidnapping or custodial interference, the Federal Parental Kidnapping Prevention Act, and copies of reported cases of your state's enforcement of foreign custody decrees under Section 23 of the Uniform Child Custody Jurisdiction Act. Your U.S. attorney can help you gather this information.

#### **What Are Your Chances of Enforcing Your United States Custody Order Abroad?**

Just as a foreign court order has no direct effect in the United States, a custody decree issued by a court in the United States has no binding legal force abroad, although it may have persuasive force in some countries. Courts decide child custody cases on the basis of their own domestic relations law and the decision whether to recognize a foreign order is at the court's discretion. This may give a "home court" advantage to a person who has

abducted a child to the country of his or her origin. You could also be disadvantaged if the country has a cultural bias in favor of a mother or a father. A United States custody decree may, however, be considered by foreign courts and authorities as evidence and, in some cases, it may be recognized and enforced by them on the basis of comity (the voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another). Your chances of having your United States court order enforced depend, to a large degree, upon the tradition of comity that the legal system of the country in question has with the United States legal system. While CA/OCS/CI can give you some information on these traditions, you should consult with your attorney in that country on how to proceed.

## PART VII

### USING THE CRIMINAL JUSTICE SYSTEM

There are many factors to consider in determining whether or not to file criminal charges against the abductor. The child's safe return is the primary objective in any missing child case, and criminal charges may actually complicate child recovery efforts. While the threat of outstanding criminal charges may intimidate some abductors into returning the child, others may react by increasing their efforts to remain undetected.

#### The Pros of Using the Criminal Justice System

In the event that a left-behind parent is both unaware of the whereabouts of the child and does not have access to the child, using the criminal justice system may be helpful as a tracking tool. There are a multitude of federal and state agencies that work in conjunction with local law enforcement to help locate a missing child and abductor in foreign countries. The FBI is the primary source of law enforcement assistance and can provide investigative support and coordinate the issuance of federal warrants. The United States Customs Service and the Immigration and Naturalization Service utilize the Interagency Border Inspection System (IBIS) to simultaneously access and query several federal databases for warrants, and entry or exit restrictions. INTERPOL coordinates activities with foreign law enforcement to trace and locate fugitives and abductors.

#### What Are the Risks?

Formal resort to the criminal justice system (filing of charges, issuance of an arrest warrant, transmission of an extradition request to a foreign government under an applicable treaty, and criminal prosecution) should be considered carefully. This is especially true if the other country concerned is a party to the Hague Convention. You should be aware that, while you may have a degree of control over the ongoing civil procedures, you may not be able to affect the course of criminal actions once charges are filed. Check with the police and prosecutor to determine if your wishes would be considered in a criminal

action. Furthermore, law enforcement authorities in the United States and some countries abroad may be valuable sources of information and assistance. However, they may be unfamiliar with international parental child abduction. If this is the case, please call the Office of Children's Issues (CA/OCS/CI) as soon as possible.

Your decision on whether or not to try to utilize the criminal justice system depends upon the circumstances of your case. You should also realize that **neither extradition nor prosecution of the abductor guarantees the return of your child** and may in some cases complicate, delay, or ultimately jeopardize return of your child.

Presumably, your primary interest is to obtain the return of your child. That is not the primary responsibility of the prosecutors. When the criminal justice system becomes involved in a case, there are several interests at stake, some of which may be in conflict:

The interests of the child;

The interests of each parent/guardian and other immediate family members;

The interests of the civil justice system in a stable and workable custody arrangement; and

The interests of the criminal justice system in apprehending, prosecuting, and punishing those who have violated the criminal laws of their jurisdiction in connection with a parental child abduction.

Another factor to consider is the possible reaction of the abductor to the filing of criminal charges and the threat of prosecution and punishment. Although some individuals may be intimidated enough to return the child (with or without an agreement by a prosecutor to the condition that the charges be dropped), others might go deeper into hiding, particularly if they are in a country where they have family or community support. If an abductor is ultimately brought to trial, how far are you willing to go in pursuing criminal prosecution? Unless you are prepared to testify in court against the abductor, you should not pursue criminal prosecution. A final factor to consider is the effect on the child of seeing the abducting parent prosecuted and perhaps incarcerated, with you playing an active role in that process.

#### Steps to Take in Case You Decide to Use the Criminal Justice System

Once you have decided to pursue criminal remedies, you or your attorney may contact your local prosecutor or law enforcement authorities to request, if provided for by your state law, that the abducting parent be criminally prosecuted and an arrest warrant be issued. In some states, parental child abduction or custodial interference is a misdemeanor; however, under many state laws it may be a crime depending on the circumstances of the removal. If you are able to obtain a state warrant, the local

prosecutor can contact the F.B.I. or the United States Attorney to request the issuance of a federal *Unlawful Flight to Avoid Prosecution* (UFAP) warrant for the arrest of the abductor. The federal Parental Kidnapping Prevention Act of 1980 provides for the issuance of this warrant.

Furthermore, the International Parental Kidnapping Crime Act (IPKCA) of 1993 (H.R. 3378) makes it a federal offense to remove a child from the United States or retain a child (who has been in the United States) outside the United States with intent to obstruct the exercise of parental rights (custody or visitation). An unlawful retention begun after 1993 could violate the statute, even though the actual removal of the child may have occurred before the date of enactment. The F.B.I. is responsible for investigating the abduction.

#### **Prosecution of Agents or Accomplices of the Abductor**

Find out if your state, through consultation with a lawyer, has laws that allow legal action to be taken against agents or accomplices to an abduction. Consider whether such actions would be useful in learning your child's whereabouts or compelling the return of your child.

#### **Implications of an Arrest Warrant for a United States Citizen**

If the abducting parent is a United States citizen and the subject of a federal arrest warrant, the F.B.I. or United States Attorney's office can ask the Department of State's Passport Office to revoke the person's United States passport. This may or may not be a burden to an abducting parent who is entitled to hold a foreign passport as well as a United States passport. However, an abducting parent who is only a United States citizen becomes an undocumented alien in a foreign country if his or her United States passport is revoked. Some countries may deport undocumented aliens or at least make it difficult for them to remain in the country.

For a United States passport to be revoked, the F.B.I. or United States Attorney must send a request for such action and a copy of the federal warrant to the Department of State's Office of Passport Policy and Advisory Services (telephone 202-663-2662). The regulatory basis for revocation of passports is found in the Code of Federal Regulations (22 C.F.R. 51.70, et seq.)

In certain circumstances, you may decide that revoking the abducting parent's passport will not achieve the desired result. For example, if you know the location of the other parent, there may be a possibility of negotiation and a settlement or, at least, the possibility of communication with your child. If the abducting parent is threatened with passport revocation, he or she might choose to flee with your child again.

#### **Implications of a Warrant for a Non-United States Citizen**

Even if the abductor is not a United States citizen, the existence of a federal warrant is important. Such a warrant may encourage the abducting parent to return the child voluntarily, especially if he or she has business or other reasons to travel to the United States. The warrant also serves to inform the foreign government that the abduction of the child is a violation of United States law and that the abductor is a federal fugitive. An arrest warrant is also necessary if you wish to have authorities seek extradition of the abductor. Note that the United States does not have an extradition treaty with every country, and even if a treaty exists extradition may not always be possible.

#### **The Possibility of Extradition**

The United States Department of Justice, not the United States Department of State, is responsible for pursuing extradition of wanted persons. Through INTERPOL and other international links, national law enforcement authorities in many countries regularly cooperate in the location and apprehension of international fugitives. Extradition, the surrender of a fugitive or prisoner by one jurisdiction for criminal prosecution or service of a sentence in another jurisdiction, is rarely a viable approach in international child abduction cases. Extradition is utilized only for criminal justice purposes in cases that prosecutors believe can be successfully prosecuted due to the sufficiency of the evidence. Prosecutors may decide not to proceed with a request for extradition for a number of different reasons. Moreover, it must be remembered that extradition **does not** apply to the abducted or wrongfully retained child, but only to the abductor. There is no guarantee that the child will be returned by foreign authorities in connection with extradition of the alleged wrongdoer. Threatened with impending extradition, abducting parents may hide the child or children with a friend or relative in the foreign country.

Another reason that extradition may not be useful is that the offenses of parental child abduction or custodial interference are covered by only a few of the extradition treaties now in force between the United States and more than 100 foreign countries. Most of these treaties contain a list of covered offenses and were negotiated before international parental child abduction became a widely recognized phenomenon. With respect to these older treaties, there was no intent on the part of the negotiators to cover such conduct, and it cannot therefore be validly argued that parental child abduction is a covered extraditable offense, even if the language used in the list of offenses covered by a given treaty appears somewhat broad (e.g., "abduction" or "kidnapping" or "abduction/kidnapping of minors").

In negotiating more modern extradition treaties, the United States has tried to substitute a "dual criminality" approach for a rigid list of extraditable offenses, or at least

has tried to combine the two. Under an extradition treaty with a dual criminality provision, an offense is covered if it is a felony in both countries. Accordingly, if the *underlying conduct* involved in parental child abduction or custodial interference is a felony in both the United States and the foreign jurisdiction involved, then that conduct is an extraditable offense under an extradition treaty based on dual criminality.

Despite the fact that parental child abduction may be covered by certain extradition treaties, you should be aware of potential difficulties in utilizing them. Apart from the possible counterproductive effects already discussed, specifically, most all civil law countries (in contrast with common law countries like the United States, United Kingdom, Canada, and Australia) refuse to extradite their own nationals. Nearly all the nations of Latin America and Europe are civil law countries. Whatever the terms of any applicable extradition treaty, experience has also shown that foreign governments are generally reluctant (and often simply unwilling) to extradite anyone (their own citizens, United States citizens, or third country nationals) for parental child abduction. For extradition to be possible, therefore:

The local and/or federal prosecutor must decide to file charges and pursue the case, and you should be prepared to testify in any criminal trial;

There must be an extradition treaty in force between the United States and the country in question;

The treaty must cover parental child abduction or custodial interference;

If the person sought is a national of the country in question, that country must be willing to extradite its own nationals; and,

The country in question must be willing to extradite persons for parental child abduction/custodial interference (i.e., not refuse to do so for "humanitarian" or other policy reasons).

### **The Possibility of Prosecution of an Abductor in a Foreign Country**

A final possibility in the area of criminal justice is prosecution of the abductor by the authorities of the foreign country where he or she is found. In many countries (but not the United States), nationals of the country can be prosecuted for acts committed abroad if the same conduct would constitute a criminal offense under local law. United States law enforcement authorities can request such prosecution by forwarding to the foreign country the evidence that would have been used in a United States prosecution. United States witnesses may, of course, have to appear and testify in the foreign proceeding. Like the courses of action discussed above, this approach also risks being counterproductive and will not necessarily result in the return of the child.

## **PART VIII**

### **REFERENCES**

#### **Directory - Where to Go for Assistance**

##### **Consular Assistance**

United States Department of State  
The Office of Children's Issues  
2401 E Street, N.W., Room L127  
Washington, D.C. 20522

Phone: 202 736-7000

Fax: 202 312-9743

Fax-on-Demand: 202 647-3000

After hours: 202 647-5225

Web Site: [http://travel.state.gov/children's\\_issues.html](http://travel.state.gov/children's_issues.html)

##### **Children's Passport Issuance Alert Program**

United States Department of State  
The Office of Children's Issues  
2401 E Street, N.W., Room L127  
Washington, D.C. 20037

Phone: 202 736-7000

Fax: 202 312-9743

Fax-on-Demand: 202 647-3000

Web Site: [http://travel.state.gov/children's\\_issues.html](http://travel.state.gov/children's_issues.html)

##### **National Center for Missing and Exploited Children (NCMEC)**

699 Prince Street

Alexandria, VA 22314-3175

Phone: 703 522-9320

Fax: 703 235-4067

Web Site: <http://www.missingkids.org>

24-hour hot line for emergencies: 1-800-THE-LOST  
TTD: 1-800-826-7653

##### **For American Bar Association Publications**

American Bar Association (ABA)  
750 North Lake Shore Drive  
Chicago, IL 60611

Phone: 312 988-5555

Web Site: <http://www.abanet.org/store/catalog.html>

##### **Federal Parent Locator Service (FPLS)**

Note: The FPLS can be accessed through local and state Child Support Enforcement offices. The names of those offices are available in telephone books and from the address below.

##### **Department of Health and Human Services**

Office of Child Support Enforcement  
Federal Parent Locator Service (FPLS)  
370 L'Enfant Promenade, S.W.  
Washington, D.C. 20447

Phone: 202 401-9267

Web Site: <http://www.acf.dhhs.gov/programs/cse/>

#### Office of Victims of Crime (OVC)

United States Department of Justice

633 Indiana Ave., N.W.

Washington, D.C. 20531

Phone: 1-800-627-6872

Web Site: <http://www.ojp.usdoj.gov/ovc/>

#### International Social Services/American Branch

700 Light Street

Baltimore, MD 21230

Phone: 410 230-2734

Web Site: <http://www.iss-usa.org>

#### UNIFORM STATE AND FEDERAL LAWS ON CUSTODY, PARENTAL CHILD ABDUCTION, AND MISSING CHILDREN

**Uniform Child Custody Jurisdiction Act (UCCJA) (9 ULA at 123):** Determines when a state has jurisdiction to make a custody order and provides procedures for interstate enforcement of orders in custody conflicts.

#### Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

**(9 ULA at 115 (Part 1):** Enhances the UCCJA by awarding priority to the child's home state, clarifies the limits of emergency jurisdiction, and grants exclusive jurisdiction to the state making the original custody determination.

**MISSING CHILDREN ACT (28 USC 534):** Requires law enforcement to enter complete descriptions of missing children into the National Crime Information Center's (NCIC) Missing Person File, even if the abductor has not been charged with a crime.

**NATIONAL CHILD SEARCH ASSISTANCE ACT (42 USC 5779 & 5780):** Mandates elimination of waiting periods before law enforcement takes a missing child report, including family abduction cases; Requires immediate entry of information into the NCIC Missing Person file; Requires close liaison with the National Center for Missing and Exploited Children (NCMEC).

**INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (42 USC 11601 et seq.):** Establishes procedures to implement the Hague Convention. Empowers state and federal courts to hear cases under the Convention and allows the Central Authority access to information in certain American records regarding the location of a child and abducting parent.

**PARENTAL KIDNAPPING PREVENTION ACT (PKPA)(28 USC 1738A):** Requires authorities of every state to enforce and not modify orders made by the state court exercising proper jurisdiction. Authorizes the use of the Unlawful Flight to Avoid Prosecution (UFAP) warrant

and the Federal Parent Locator Service (FPLS) in family abductions.

**INTERNATIONAL PARENTAL KIDNAPPING CRIME ACT (IPKCA)(18 USC 1204):** Makes it a federal felony to remove a child under 16 from the United States, or to retain a child outside the United States with the intent to obstruct the lawful exercise of parental rights.

**FUGITIVE FELON ACT (18 USC 1073):** Enhances the ability of states to pursue abductors beyond state and national borders; Permits the FBI to investigate cases that would otherwise be under state jurisdiction and authorizes use of UFAP warrants in parental kidnapping cases.

**EXTRADITION TREATIES INTERPRETATION ACT of 1998 (Note 18 USC 3181):** Authorizes the United States to interpret extradition treaties listing "kidnapping" as encompassing the offense of parental kidnapping.

#### READING LIST

*This list is intended to give some idea of the relevant literature, but should not be regarded as complete or authoritative.*

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- Family Law Quarterly*, Spring 1994. (Special issue on international family law.)
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- United States Government Documents on the Hague Convention**
- Department of State notice in the *Federal Register* of March 26, 1986, pp. 10494-10516.
- Senate Treaty Doc. 99-11, 99th Congress, 1st Session.
- For the legislative history of the International Child Abduction Remedies Act, Public Law 100-300, see S.1347 and H.R. 2673, and H.R. 3971- 3972, 100th Congress, and related hearing reports.
- [Text omitted in the interest of brevity]

### Appendix 3

#### Children's Passport Issuance Alert Program

The Children's Passport Issuance Alert Program is a service for the parents and legal guardians of minor children. It enables the Department of State's Office of Children's Issues to notify a parent or court ordered legal guardian, when requested, before issuing a United States passport for his or her child. The parent, legal guardian, legal representatives, or the court of competent jurisdiction must submit a written request for entry of a child's name into the program to the Office of Children's Issues.

#### Passport Issuance to Children under Age 18

On July 2, 2001, the Department of State began implementation of a new law regarding the passport applications of minor U.S. citizens under the age of 14. A person now applying for a passport for a child under 14 must show that both parents consent to the issuance or that the applying parent has sole authority to obtain the passport. Passport applications made in the U.S. and at

consular offices abroad will both be covered by the new law. Exceptions to this requirement may be made in special family circumstances or exigent circumstances necessitating the immediate travel of the child.

Once a passport is issued, its use is not tracked or controlled by the Department of State. There are no exit controls for American citizens leaving the United States. If you believe that your child may be abducted internationally, immediately contact the Office of Children's Issues and inform appropriate law enforcement officials.

Information regarding the issuance of a passport to a minor is available to either parent, regardless of custody rights, as long as the requesting parents' rights have not been terminated. The Department of State's Children's Passport Issuance Alert Program is a program to alert us when an application for a United States passport is made. This is not a program for tracking the use of a passport. This program can be used to inform a parent or a court when an application for a United States passport is executed on behalf of a child. The alert program generally remains in effect until each child turns 18. It is very important that parents keep us informed in writing of any changes to contact information and legal representation. Failure to notify CA/ OCS/ CI of a current address may result in a passport issuance for your child without your consent.

### **Passports - General Information**

A passport is a travel document issued by competent authority showing the bearer's origin, identity, and nationality, which is valid for the entry of the bearer into a foreign country (8 United States C 1101(3)).

Under United States law, United States citizens must enter and depart the United States with valid United States passports (8 United States C 1185(b)). This requirement is waived, however, for travel from countries within the Western Hemisphere, with the exception of Cuba (22 CFR 53.2). However, each foreign country has its own entry requirements concerning citizenship, passports and visas. Information regarding those requirements may be obtained from the appropriate foreign embassy or consulate. The addresses and telephone numbers for the foreign embassy or consulate near you are found in our *Foreign Entry Requirements* booklet.

### **The Privacy Act and Passports**

*Passport information is protected by the provisions of the Privacy Act (PL 93-579) passed by Congress in 1974. Information regarding a minor's passport is available to either parent. Information regarding adults may be available to law enforcement officials or pursuant to a court order issued by the court of competent jurisdiction in accordance with (22 CFR 51.27). If you want us to forward to the Foreign Embassy the information contained in your request to the Office of*

*Children's Issues, please complete and sign the Foreign Embassy Contact Form. That form contains a waiver of your Privacy Act Rights and the rights of your minor children. For further information regarding the issuance or denial of United States passports to minors involved in custody disputes, or about international child abduction, please contact us at 202-736-7000 (this is a recorded message which provides access to country officers). General passport information is available on our home page. While we make every effort to be of assistance, the Office of Children's Issues can assume no legal responsibility for the services provided.*

### **Dual Nationality for Children**

*Many children, whether born in the United States or born abroad to a United States citizen parent, are citizens of both the United States and another country. This may occur through the child's birth abroad, through a parent who was born outside the United States, or a parent who has acquired a second nationality through naturalization in another country. There is no requirement that a United States citizen parent consent to the acquisition of another nationality.*

*The inability to obtain a United States passport through the Children's Passport Issuance Alert Program does not automatically prevent a dual national child from obtaining and traveling on a foreign passport. There is no requirement that foreign embassies adhere to United States regulations regarding issuance and denial of their passports to United States citizen minors who have dual nationality. If there is a possibility that the child has another nationality, you may contact the country's embassy or consulate directly to inquire about denial of that country's passport. The addresses and telephone numbers for the foreign embassy or consulate near you are found in our *Foreign Entry Requirements* booklet.*

*More information about the child-related services available to parents through the Bureau of Consular Affairs is available by calling the Office of Children's Issues at 202-736-7000 and speaking to an officer who deals with a specific country. You may prefer using the Fax-on Demand System by calling 202-647-3000 from the fax machine telephone. There is additional information about the prevention of International Parental Child Abduction on our web page.*

### **ENTRY INTO THE CHILDREN'S PASSPORT ISSUANCE ALERT PROGRAM**

**REQUEST FORM.** *Complete one form for EACH child, and submit the completed and SIGNED request to the Office of Children's Issues by mail or fax.*



Please provide information about each child in order to make the alert system effective. Please PRINT CLEARLY OR TYPE the information.

Child's Full Name:

Date of Birth:

Place of Birth:

Sex:

Social Security Number:

US Passport Number(s):

Foreign Passport Number(s), List any other country involved:

Please provide the following information about yourself so that we can acknowledge your request, and alert you in the future.

Your Name:

Relationship to the child shown above:

Mailing Address:

Telephone Numbers/Fax Numbers

I request that my child's name, as shown above, be entered into the Children's Passport Issuance Alert Program. Please notify me of any pending United States passport applications, and any United States passports still valid for travel.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

(Customary legal signature of parent or guardian)

Please read the Dual Nationality for Children information if your child has a claim to nationality from another country, in addition to United States citizenship. Please mail or fax the completed, signed form(s) to the Office of Children's Issues, 2401 E Street, NW, SA-1, Room L-127, Washington, DC 20037; FAX: 202-312-9743. You will receive written acknowledgement and information.

[The following document was taken from  
the web site of the U.S. Consulate General  
of Ciudad Juarez, Mexico  
July 1, 2002]

**INTERNATIONAL PARENTAL  
CHILD ABDUCTION - MEXICO**

**DISCLAIMER: THE INFORMATION IN THIS CIRCULAR RELATING TO THE LEGAL REQUIREMENTS OF SPECIFIC FOREIGN COUNTRIES IS PROVIDED FOR GENERAL INFORMATION ONLY. QUESTIONS INVOLVING INTERPRETATION OF SPECIFIC FOREIGN LAWS SHOULD BE ADDRESSED TO FOREIGN COUNSEL.**

The Hague Convention on the Civil Aspects of International Child Abduction came into force between the United States of America and Mexico on October 1, 1991. The Hague Convention provisions for return apply to children who were taken to Mexico after 10/1/91. Parents and legal guardians of children taken to Mexico before 10/1/91 may still submit applications for access to the child under the Hague Convention.

**Important:** Do not wait to get a custody order to begin the Hague process. Submit your completed application as soon as possible.

The Hague Convention application form and all supporting documents must be accompanied by complete Spanish translations. Translations do not have to be "official" or certified. A complete Hague application package should include the following:

1. Complete Hague application, found on pages 31-32 of the Department of State's brochure, "International Parental Child Abduction." A Spanish translation of the Hague application should be completed in Spanish and submitted. Please refer to pages 23-27 of the Department's brochure for instructions on completing the application form.
2. Copy of either the court order **in effect at the time the child was taken to Mexico** or the state law which establishes the applicant's right of custody. A Spanish translation of the law or applicable section of the court order should be included.

3. Any court orders issued after the child was taken to Mexico may be submitted for general information. A Spanish translation should also be included for the documents to be admissible in Mexican court.

4. Photos of the child and the taking parent. The pictures will not be returned to you.

5. A **certified copy** of the child's birth certificate and the parents' marriage certificate if they have not been divorced. If certified copies of these documents are not immediately available, **DO NOT WAIT TO SEND FOR THEM.** Send photocopies if you have them, and forward certified copies as soon as you can obtain them.

6. The entire application package submitted in triplicate, arranged in three complete packages, one marked "original" and two marked "copy". Please include photocopies of your photographs as well as your documents.

Applications for access (visitation) should include a statement from the applicant which specifies the dates, times, places and circumstances of the proposed visitation.

Applicants who anticipate that the taking parent will flee or hide the child if approached by the Mexican authorities should mention this concern and the specific reasons for it in section VIII of the application or on a separate page.

Occasionally, the taking parent will leave the child in Mexico with family or friends, and will return to the U.S. or go elsewhere. If this is the case, the applicant should explain the situation in section IV or VIII of the application or on a separate page.

**PLEASE TYPE YOUR APPLICATION.**

**Important:** Mexican courts require the original application form, signed and dated by the applicant. Please do not keep the original form for your own records.

**PLEASE NOTIFY THE U.S. CENTRAL AUTHORITY IMMEDIATELY IF A HAGUE CASE IS RESOLVED PRIVATELY.**

**MEXICAN HAGUE PROCEDURES**

**Location of the child:** Applicants should provide the most complete and specific information available regarding the location of a missing child in Mexico. If a child cannot be located based on the leads provided by the applicant, the Mexican Central Authority for the Hague Convention may work with state judicial police to conduct searches, the Secretariat of Education to determine if a child is attending school, and the Social Security Institute and state drivers' license issuing authorities for information on the taking parent. Unfortunately, the information is not computerized, and searching files can be a highly time-

consuming, lengthy process.

**Legal assistance and advice:** The Mexican Central Authority prepares a Hague case and presents it to the appropriate Mexican court, and provides information to the court concerning the operation, implementation and interpretation of the Hague Convention in Mexico. The Mexican Central Authority does **NOT**, however, serve as the applicant's advocate or legal representative. Applicants may wish to hire a Mexican attorney to represent their interests in a Hague case.

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249 F.3d 462

(Cite as: 249 F.3d 462)

United States Court of Appeals,  
Sixth Circuit.

Perry A. MARCH, in his capacity as father of Samson  
Leo March and Tzipora

Josette March, both minor children, Petitioner-  
Appellee/Cross-Appellant,

v.

Lawrence E. LEVINE; Carolyn R. Levine, Respondents-  
Appellants/Cross-Appellees.

Nos. 00-6326, 00-6551.

Argued March 14, 2001.

Decided and Filed April 19, 2001.

Rehearing En Banc Denied July 9, 2001.

American father who had moved to Mexico with his two biological children, of whom he had custody, petitioned for return of the children under the International Child Abduction Remedies Act (ICARA) after the maternal grandparents had removed the children to the United States. The United States District Court for the Middle District of Tennessee, Aleta A. Trauger, J., 136 F.Supp.2d 831, granted summary judgment to the father, after ruling against him on some subsidiary issues, and both parties appealed. The Court of Appeals, Suhrheinrich, Circuit Judge, held that: (1) father was not barred by the fugitive disentitlement doctrine from seeking return of the children under ICARA; (2) default judgment entered against father as a discovery sanction in grandparents' wrongful death action alleging he killed children's mother was not clear and convincing evidence that there was a grave risk of harm to the children in being returned to their father; and (3) the district court, did not abuse its discretion when it granted summary judgment in favor of father prior to discovery or an evidentiary hearing on the issue of the children's habitual residence.

Affirmed and stay vacated.

West Headnotes

[1] Child Custody k816

76Dk816

[1] Treaties k8

385k8

Under the Hague Convention on the Civil Aspects of International Child Abduction and ICARA, a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute. International Child Abduction Remedies Act, §§ 2-12, 42 U.S.C.A. §§ 11601-11610.

[2] Child Custody k802

76Dk802

[2] Treaties k8

385k8

The Hague Convention on the Civil Aspects of International Child Abduction is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.

[3] Federal Courts k47.1

170Bk47.1

Parties who invoked the jurisdiction of the Court of Appeals, seeking to overturn a district court order requiring them under ICARA to return their grandchildren to the children's father, could not secure abstention under *Younger*. International Child Abduction Remedies Act, §§ 2-12, 42 U.S.C.A. §§ 11601-11610.

[4] Child Custody k814

76Dk814

(Formerly 170Bk814.1, 170Bk814)

[4] Treaties k8

385k8

Father who had moved with children to Mexico before the children were taken back to the United States by grandparents was not barred by the fugitive disentitlement doctrine from seeking return of the children under ICARA, based on his fugitive status from state court contempt orders; none of these contempt orders were "criminal" contempts, orders were entered against father after he moved to Mexico, Illinois court had relinquished jurisdiction in visitation proceeding, thus indicating it has no interest in enforcing its contempt orders entered in that proceeding, and the other orders were entered in a probate proceeding and involved father's failure to return a beaded evening bag and a baby blanket, which were patently insignificant grounds for disentitling an ICARA

petitioner. International Child Abduction Remedies Act, §§ 2-12, 42 U.S.C.A. §§ 11601-11610.

[5] Contempt k3

93k3

Contempt orders were not "criminal" contempts where the fines imposed were avoidable by performance of the required acts and no definite sentences were imposed.

[6] Action k13

13k13

The fugitive disentitlement doctrine will not be expanded to sanction by dismissal any conduct that exhibits disrespect for any aspect of the judicial system, and in deciding whether to disentitle a claimant, there must be restraint in resorting to inherent power, and its use must be a reasonable response to the problems and needs that provoke it.

[7] Child Custody k814

76Dk814

Applying the fugitive disentitlement doctrine will generally be too harsh a sanction in a case involving an ICARA petition. International Child Abduction Remedies Act, §§ 2-12, 42 U.S.C.A. §§ 11601-11610.

[8] Federal Civil Procedure k2546

170Ak2546

A mere scintilla of evidence is insufficient to preclude summary judgment and the evidence must be viewed through the prism of the substantive evidentiary burden.

[9] Child Custody k823

76Dk823

[9] Child Custody k825

76Dk825

[9] Treaties k8

385k8

Under the Hague Convention on the Civil Aspects of International Child Abduction and ICARA, once the petitioner established wrongful removal or retention, the respondents had to establish by clear and convincing evidence the narrow exceptions relating to grave risk of harm and fundamental freedom. International Child Abduction Convention, Arts. 13(b), 20, 1988 WL 411501; International Child Abduction Remedies Act, § 4(e)(2)(A), 42 U.S.C.A. § 11603(e)(2)(A).

[10] Child Custody k826

76Dk826

[10] Treaties k8

385k8

Default judgment entered against father in grandparents' wrongful death action alleging he killed children's mother was not clear and convincing evidence that there was a grave risk of harm to the children in being returned to their father in Mexico pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and ICARA; the default judgment was entered as a discovery sanction, the grandparents never proffered evidence of their allegations, father averred in a sworn declaration that he did not kill his wife, that she drove away one evening, and that he was appealing the default judgment, and there were no allegations that father had harmed or would harm the children. International Child Abduction Convention, Art. 13(b), 1988 WL 411501; International Child Abduction Remedies Act, § 4(e)(2)(A), 42 U.S.C.A. § 11603(e)(2)(A).

[11] Federal Courts k820

170Bk820

Court of Appeals reviews for an abuse of discretion a claim that summary judgment was prematurely entered because additional discovery was needed.

[12] Federal Courts k625

170Bk625

A claim that summary judgment was prematurely entered because additional discovery was needed is not preserved for appeal unless it is first advanced in the district court by the filing of an affidavit or by the filing of a motion for additional discovery. Fed. Rules Civ. Proc. Rule 56(f), 28 U.S.C.A.

[13] Federal Civil Procedure k2553

170Ak2553

Given the unique nature of the Hague Convention on the Civil Aspects of International Child Abduction, the district court, in a proceeding under the Convention and ICARA, did not abuse its discretion when it granted summary judgment in favor of petitioning father prior to discovery or an evidentiary hearing on the issue of the children's habitual residence, especially where the district court nonetheless entered a voluminous amount of evidence into the record from both parties, carefully considered the evidence both parties offered, and independently sought information on its own volition. International Child Abduction Remedies Act, §§ 2(a)(4),

6, 42 U.S.C.A. §§ 11601(a)(4), 11605; International Child Abduction Convention, Arts. 2, 11, 14, 18, 1988 WL 411501.

FN\* The Honorable Patricia A. Gaughan, United States District Judge for the Northern District of Ohio, sitting by designation.

[14] Federal Civil Procedure k2553

OPINION

170Ak2553

The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery.

SUHRHEINRICH, Circuit Judge.

[15] Federal Civil Procedure k2535

170Ak2535

Oral testimony is not favored in summary judgment proceedings and a court has discretion to hear evidence on motions by oral testimony or on affidavits. Fed. Rules Civ.Proc.Rules 43(e), 56, 28 U.S.C.A.

This appeal involves the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610 (2000), which is a codification of the Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature*, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 51 Fed.Reg. 10,493, 10,498 (app.B) (March 26, 1986) (hereinafter "Hague Convention"). The Hague Convention was adopted by the signatory nations "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, as well as to secure protection for rights of access." Hague Convention, pmbl.

[16] Child Custody k814

76Dk814

[16] Child Custody k827

76Dk827

[16] Treaties k8

385k8

There is no requirement under the Hague Convention on the Civil Aspects of International Child Abduction or under ICARA that discovery be allowed or that an evidentiary hearing be conducted, and the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing. International Child Abduction Remedies Act, §§ 2(a)(4), 6, 42 U.S.C.A. §§ 11601(a) (4), 11605; International Child Abduction Convention, Arts. 2, 11, 14, 18, 1988 WL 411501.

Under the ICARA, a petitioner must establish by a preponderance of the evidence that his children were wrongfully removed or retained in breach of his custody rights under the laws of the Contracting State in which the children habitually \*466 resided before they were removed or retained. Hague Convention, arts. 3, 12; 42 U.S.C. § 11603(e)(1)(A). Once wrongful removal is shown, the children must be returned. Hague Convention, art. 12. However, a court is not bound to order return of the children if the respondents establish certain exceptions under the treaty. Hague Convention, art. 13. The ICARA requires that a respondent establish by clear and convincing evidence the grave risk of harm exception under article 13(b), [FN1] and the protection of fundamental freedom provision of article 20. [FN2] 42 U.S.C. § 11603(e)(2) (A). Notwithstanding these exceptions, the treaty further provides that "[t]he provisions of this Chapter [pertaining to return of children] do not limit the power of a judicial or administrative authority to order the return of the child *at any time.*" Hague Convention, art. 18 (emphasis added).

\*465 John E. Herbison (argued and briefed), Nashville, TN, Robert S. Catz (briefed), Nashville, TN, for Perry A. March in Nos. 00-6326 & 00-6551.

Gregory D. Smith (briefed), James G. Martin, III (briefed), Stites & Harbison, Nashville, TN, Mark H. Levine (argued and briefed), Los Angeles, CA, for Lawrence E. and Carolyn R. Levine in No. 00-6326.

Gregory D. Smith (briefed), James G. Martin, III (briefed), Stites & Harbison, Nashville, TN, for Lawrence E. Levine in No. 00-6551.

FN1. This exception provides that a court is not bound to return a child if the person opposing return establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b).

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; GAUGHAN, District Judge. [FN\*]

FN2. This provision states that return of a child "may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, art. 20.

Respondents Lawrence E. Levine and Carolyn R. Levine ("the Levines"), the grandparents of two minors, Samson Leo March and Tzipora Josette March, appeal the order entered by the district court in this action under the ICARA and the Hague Convention which directed the Levines to immediately return the two minor children to their father in Mexico. Petitioner Perry A. March ("March"), the biological father of Samson and Tzipora, cross-appeals portions of the order decided adversely to him. We AFFIRM the district court's order, adopting its well-reasoned opinion. See *March v. Levine*, 136 F.Supp.2d 831 (M.D. Tenn. 2000).

#### I.

This case involves an American father who moved to Mexico with his two biological children, of whom he had custody. It also involves two American maternal grandparents who obtained court-ordered visitation rights, then removed the children from Mexico and returned with them to the United States, and then retained them after the end of the court-ordered visitation. The father seeks return of his children under the ICARA and the Hague Convention.

The mother of the children disappeared in 1996 and her parents, the Levines, believe she was murdered by her husband, March. This is the basis for the Levines' fervent belief that March should not have custody of their grandchildren. However, there have also been allegations that the maternal grandfather, Mr. Levine, killed his own daughter. [FN3] March has not been charged, nor apparently has anyone else has been charged, with the murder of the children's mother. The Levines were nevertheless successful in obtaining a default judgment as a discovery sanction against March in a wrongful death action which held that he killed his wife. March vehemently objects to being characterized as a killer and asserts that his wife disappeared, abandoning him and the children.

FN3. This is acknowledged by the Levines. Final Br. on Behalf of Appellants at 28.

Additional facts are set forth in the district court's opinion. *March*, 136 F.Supp.2d 831.

On or about June 15, 2000, the Levines arrived in Jalisco, Mexico, to visit the \*467 March children pursuant to an *ex parte* order entered by an Illinois court on May 17, 2000. [FN4] This Illinois order granted them a thirty-nine day period of uninterrupted visitation with Samson and Tzipora. Although the visitation order did not restrict the Levines' ability to travel with the children, the order did not authorize the Levines to remove the children from Mexico for visitation. The Levines obtained a Mexican court order giving effect to the Illinois visitation order, but the Mexican order explicitly required that the visitation occur in Guadalajara, Mexico. The Levines went to the children's school, accompanied by the Mexican judge and armed police, and took physical possession of the children pursuant to these orders on June 21, 2000. That same night, contrary to the Mexican court order, they left Mexico with the children and returned with them to Tennessee, where the Levines reside. There is an outstanding Mexican arrest warrant against the Levines and their adult son, who is also one of their attorneys on appeal, for the kidnapping of the children.

FN4. March moved with his children from Tennessee to Illinois in 1996 after his wife's disappearance. Shortly after he relocated to Illinois, the Levines sought grandparent visitation there. In 1999, March relocated to Mexico.

The Illinois court-ordered visitation period expired July 30, 2000. Since that time, the Levines have refused to return the children to their father in Jalisco, Mexico, where the children had resided for more than one year prior to their removal. Instead, the Levines have sought termination of March's parental rights and custody of their grandchildren by instituting proceedings in Tennessee.

March filed his Petition for Return of Children under the ICARA on August 3, 2000, asserting that they were wrongfully removed from their habitual residence in Mexico in violation of his custody rights and the Hague Convention. In addition to the return of his children, March requested that the district court expedite matters; enter a provisional order directing the Levines to return his children pending a hearing, or alternatively, that the court grant him immediate rights of access, including telephone contact with the children and a schedule for the children to have time with him until a hearing on the merits; that trial be set in advance of the children's school year; and other relief.

The Levines filed a sworn Answer on August 22, 2000. Among numerous defenses raised, the Levines asserted that March should be disentitled from bringing his petition before the court under the fugitive disentitlement doctrine. They also asserted that Mexico is not the habitual residence of the children, as required for the return of children under articles 3 and 12 of the Hague Convention. They further asserted exceptions to return of children under articles 13(b) and 20 of the treaty, i.e., that return of the children to March would present a grave risk of psychological and physical harm as well as place them in an intolerable situation, and that return of the children would violate human rights and fundamental freedoms. In addition, they asserted that full faith and credit were due to various state and Mexican court decisions under a variety of legal theories, including "abstention."

On August 30, 2000, March moved for summary judgment or partial summary judgment on the question whether the Levines wrongfully removed or wrongfully retained the children under the ICARA. The next day, the Levines moved to dismiss the petition based on March's inability to establish that Mexico was the children's habitual residence, and the fugitive disentitlement doctrine.

\*468 On September 1, 2000, the district court ruled that it would decide these pending motions prior to allowing any discovery. More than a month later, and after the court allowed a voluminous amount of evidence into the record in conjunction with the parties' briefs and independently sought information under the terms of the treaty, [FN5] the district court entered a fifty-two page opinion and an order in which it granted March's petition and ordered the Levines to immediately return the children to him. Specifically, the district court held that March had met his burden of establishing wrongful retention. It further held that the Levines had not met their burden of showing exceptions to return of children under the treaty. In addition, it declined to disentitle March from bringing his petition. However, the court, in aid of appellate jurisdiction, stayed its order until October 10, 2000, or until further direction from this Court.

FN5. The Hague Convention requires a court to consider social background information of the children provided by the Central Authority of the children's country of habitual residence. Hague Convention, art. 13. Here, the district court requested a variety of such information. It also conducted separate *in camera* interviews of Samson and Tzipora with the assistance of a licensed clinical psychologist.

Both parties appealed. A panel of this Court ordered a temporary stay of the district court's order until the Levines filed a substantive motion seeking a stay. After the Levines filed such a motion, this Court granted a stay of the district court's order pending resolution of the instant appeal and cross- appeal.

Regarding the merits, on appeal before this Court the Levines argue that the district court erred when it declined to disentitle March from pursuing his petition under the fugitive disentitlement doctrine based on various state court orders of contempt. They also contend that the district court erred when it refused to allow discovery or a hearing on the merits prior to ruling on the petition, or otherwise permit them to develop their affirmative defenses. They further argue that the district court erred when it granted summary judgment in favor of March. Finally, in their combined brief replying to March's response to their appeal and responding to March's cross-appeal, the Levines assert that the *Younger* abstention doctrine is applicable to this case.

On cross-appeal, March argues that the district court erred when it failed to address his argument that the Levines have no standing to assert any defenses. He also argues that the district court erred when it considered certain audiotapes as admissible evidence for purposes of ruling on his petition.

## II.

[1][2] In addressing the questions raised in this appeal, we must keep in mind the following general principals inherent in the Hague Convention and the ICARA:

First, a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute. Second, the Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.

*Friedrich v Friedrich*, 78 F.3d 1060, 1063-64 (6th Cir.1996) (citations omitted).

## A.

[3] As a preliminary matter, we need not address the Levines' abstention argument. Having invoked the jurisdiction of \*469 this Court, and in light of their goal to overturn the district court's order to return the children, the Levines' argument that "this court ... abstain" is absurd. Final Combined Reply and Resp. Br. on Behalf of



the Appellants at 43.

B.

[4] The Levines also argue as a threshold matter that the district court erred in declining to disentitle March from bringing his petition based on his fugitive status from various state court contempt orders.

Having carefully reviewed the parties' briefs in light of the applicable law, we hold that the district court did not abuse its discretion when it declined to disentitle March for the reasons set forth in its opinion. *See March*, 136 F.Supp.2d at 855-61 (applying the factors set forth in *Degen v. United States*, 517 U.S. 820, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996) (discussing application of the fugitive disentitlement doctrine), in light of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) (discussing the liberty interests of parents in the care, custody, and control of their children as being "perhaps the oldest of the fundamental liberty interests")). We therefore incorporate and adopt the district court's reasoning as the holding of this Court. However, we wish to comment briefly on the matter.

In arguing that March should have been disentitled from accessing the district court to seek return of his children, the Levines point to various state court contempt orders entered in both Illinois and Tennessee. The Illinois contempt orders arose during grandparent visitation proceedings, and stem primarily from March's failure to appear with the children. [FN6] The Tennessee orders, on the other hand, pertain to a probate proceeding. These contempt orders stem from March's alleged misconduct in a deposition and orders requiring him to repair some furniture and return various items of personal property, including a beaded evening bag and a baby blanket. The Tennessee contempt orders, among other penalties, ordered March to be imprisoned and fined, and ordered the court clerk to take appropriate action to enforce collection of the \$50 per day fine (that then totaled \$22,300) for March's failure to deliver the items. [FN7]

FN6. Most of the Illinois contempt orders were entered *after* March moved to Mexico. An earlier contempt order was vacated on appeal. *See In re Visitation of March*, No. 96-D-15334, slip op. at 20-21, 26-27 (Ill.App. Ct. 1st Dis. June 30, 1998) (holding that March's due process rights were violated when the court conducted a hearing without notice to March; that the court improperly granted the grandparents equal, if not superior, visitation rights over those

of the natural father; that an injunction preventing March from removing the children from Illinois was improperly entered without notice to him; and vacating the contempt for violation of the injunction).

FN7. In his sworn declaration pursuant to 28 U.S.C. § 1746, March avers that he is unable to purge himself of the contempt despite his sincere desire to do so because he has looked for the items and has been unable to find them.

He also avers that he personally testified to this and submitted sworn affidavits to this effect before the Tennessee court who imposed the contempt orders.

[5] At the outset, we note that, however labeled, none of these contempt orders were "criminal" contempts because the fines at issue were avoidable by performance of the required acts and no definite sentences were imposed. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988) (holding that the substance of the proceedings and the character of relief determines whether a contempt is of a civil or criminal nature). Furthermore, March is arguably not a fugitive \*470 given that the orders were entered against him *after* he moved to Mexico, especially when no order limited his travel at the time he moved. *Cf. Degen*, 517 U.S. at 823-24, 828, 116 S.Ct. 1777 (declining to resolve the question whether Degen was a fugitive in all senses of the word where he had moved to Switzerland about one year prior to being indicted by a federal grand jury). Moreover, the Illinois court relinquished jurisdiction in the visitation proceeding before March filed his ICARA petition invoking the protections of the Hague Convention. The Illinois court thus indicated it has no interest in enforcing its orders.

[6] To the extent that civil contempts have formed the basis for disentitlement, such cases are inapposite to the facts here because they involved appellate-level application of the doctrine to an appellant who was a fugitive from contempt orders entered by the district court in the case sub judice. *United States v. Barnette*, 129 F.3d 1179 (11th Cir.1997); *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278 (2d Cir.1997); *Stern v. United States*, 249 F.2d 720 (2d Cir.1957) (per curiam). Here, all the contempt orders were entered by state courts and involved other kinds of proceedings than the Hague Convention petition at issue here. We decline to expand the fugitive disentitlement doctrine "to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 246, 113 S.Ct. 1199, 122

L.Ed.2d 581 (1993).

[7] It is worth re-emphasizing the *Degen* Court's guidance to courts in deciding whether to disentitle a claimant: there must be "restraint in resorting to inherent power" and its use must "be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823-24, 116 S.Ct. 1777 (citations omitted). As the First Circuit recently recognized in an ICARA case,

[A]pplying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights. Parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationships with their children. To bar a parent who has lost a child from even arguing that the child was wrongfully removed to another country is too harsh.

*Walsh v. Walsh*, 221 F.3d 204, 216 (1st Cir.2000) (citations omitted). Given the fundamental rights at issue, we agree that disentitlement will generally be too harsh a sanction in a case involving an ICARA petition.

Here, even if the contempt was criminal in nature and March was clearly a fugitive from them, had the district court disentitled March from even arguing his ICARA petition because he did not return a beaded evening bag and a baby blanket it would have been an unreasonable response and an abuse of discretion. An ICARA petitioner should not be disentitled on such patently insignificant grounds. The district court therefore properly rejected the Levines' vindictive attempt to deprive March of his day in court. *Malitiis hominum est obviandum*.

### C.

The Levines also argue that the district court erred in granting summary judgment in favor of March. Again, having reviewed the parties' briefs in light of the applicable law, we also hold that the district court did not err in granting summary judgment in favor of March for the reasons set forth in its opinion. *March*, 136 F.Supp.2d at 838-55. In brief, the district court found that March met his \*471 burden of establishing his custody rights in his children, that they were wrongfully retained by the Levines beyond the period of court-ordered visitation, and that the children habitually resided in Mexico at the time of their removal and wrongful retention and that the Levines failed to establish genuine issues of material fact on these issues. *March*, 136 F.Supp.2d at 836, 837, 841, 842. In regard to the Levines' assertions that the exceptions to return of children under the treaty were applicable, the court found that they had not carried their

burden, under the heightened clear and convincing evidence standard, of establishing that there were genuine issues of material fact regarding the treaty exceptions they raised. *March*, 136 F.Supp.2d at 853, 854.

We therefore incorporate and adopt the district court's thorough reasoning as the holding of this Court in regard to this issue as well. We pause only to comment briefly on the Levines' treaty exceptions and the highly unusual nature of this case.

[8] When a motion for summary judgment is made and supported by competent admissible evidence, the nonmovant may not rest on his pleadings, but must come forward with affidavits or other admissible evidence setting forth "specific facts showing there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (quoting Fed.R.Civ.P. 56(e)). To determine whether a factual dispute is genuine the court inquires "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. 2505. A mere scintilla of evidence is insufficient. *Id.* at 252, 106 S.Ct. 2505. Moreover, the evidence presented must be viewed through the prism of the substantive evidentiary burden, i.e., by the preponderance of the evidence or by clear and convincing evidence. *Id.* at 254, 106 S.Ct. 2505. The evidence of the non-movant must be believed and all reasonable inferences must be drawn in the non-movant's favor. *Id.* at 255, 106 S.Ct. 2505.

[9] Under the treaty and the ICARA, once the petitioner establishes wrongful removal or retention, as here, the respondent must establish by clear and convincing evidence the narrow exceptions under articles 13b and 20. Hague Convention, arts. 13b, 20; 42 U.S.C. § 11603(e)(2)(A); *Friedrich*, 78 F.3d at 1067. In dicta, the *Friedrich* court stated:

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

*Id.* at 1069.

[10] The Levines principally argued, pursuant to article 13(b) of the treaty, that the children should not be returned to March because to return them would present

a grave risk of psychological and physical harm to Samson and Tzipora and place them in an intolerable situation. The Levines rely in large part on a default judgment they obtained in a wrongful death action against March after the disappearance of their daughter.

We find the circumstances surrounding the entry of this default, like the circumstances \*472 surrounding the Tennessee contempt orders, highly unusual, and suggestive of the home court advantage that the treaty was designed to correct. Specifically, this default judgment was entered as a discovery sanction. The Tennessee court denied a request by March to have his deposition conducted by telephone or videotape. [FN8] Then, when March did not present himself for the deposition locally, the Tennessee court ordered March's answer stricken and precluded him from presenting any testimony regarding defenses, declared that all the Levines' declarations in their petition were true and correct, and entered a default solely on the basis of the allegations contained in the Levines' pleadings. The default judgment declared Janet Levine March dead and that March killed her. Thus, the Levines never proffered evidence of their allegations in the state court proceedings. March, on the other hand, has averred in a sworn declaration that he did not kill his wife, that she drove away one evening, that there is no evidence of which he is aware that she is deceased, and that he is appealing the default judgment.

FN8. At the time, March was living and working in Mexico trying to support his family while defending against the wrongful death claim. March avers that his finances and the necessity of caring for his children did not allow him to travel to Nashville, Tennessee, for the deposition.

Even assuming that the default judgment would be upheld on appeal, that it should be given preclusive effect in these proceedings, and that it is sufficient to show that there is some risk of harm to the children in being returned to March, this default judgment is not clear and convincing evidence that there is a *grave* risk of harm to the children in being returned to their father. Our review of the record, like that of the district court, shows no allegations by the Levines over the many years that they pursued visitation with the children that March has harmed them or would harm them. Nor have the Levines made any showing of serious abuse much less neglect of the children by March. At best, the default judgment might raise a tenuous inference that he might hurt his children. Even that inference, however, does not rise to the level of an imminent risk of grave harm. Further, the

children are not being returned to any other type of circumstances that would place them in imminent harm, such as to a war zone, or to an area of rampant disease or famine. The Levines also have not shown the Mexican authorities incapable of or unwilling to protect the children. Indeed, the Levines were successful in obtaining the assistance of the Mexican authorities to enforce a visitation order. This demonstrates that the foreign authorities will hear and consider the Levines' arguments should they seek relief under the visitation and custody laws of Mexico.

The Hague Convention and the ICARA were specifically designed to discourage those who would remove or retain children in the hopes of seeking a "home court advantage" by ensuring that children wrongfully removed or retained would be returned to their place of habitual residence so that custody determinations are made there.

By invoking the treaty's exceptions in this case, what the Levines truly seek is a determination regarding the adequacy of March as a parent in light of his wife's disappearance. This falls squarely within the "forbidden territory" of deciding the merits of the parties' custody dispute. *Friedrich*, 78 F.3d at 1065. The district court properly recognized the Levines' argument for what it is, and declined to enter this forbidden territory.

\*473 D.

The Levines argue that the district court erred when it granted summary judgment in favor of March without allowing discovery or an evidentiary hearing. They also complain that they were not allowed to develop their treaty defenses under articles 13 and 20 of the Hague Convention prior to the court's grant of summary judgment in favor of March.

We adopt the district court's opinion on this point also. We take a few moments to elaborate, however, since this is apparently a question of first impression.

[11][12][13] We review for an abuse of discretion a claim that summary judgment was prematurely entered because additional discovery was needed. *Vance ex rel. Hammons v. United States*, 90 F.3d 1145, 1149 (6th Cir.1996). However, such an argument is not preserved for appeal unless it is first advanced in the district court by the filing of an affidavit pursuant to Federal Rule of Civil Procedure 56(f), or by the filing of a motion for additional discovery. *Id.* (citing *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196 (6th Cir. 1995)). Assuming that a motion for discovery without an accompanying affidavit is sufficient, [FN9] the Levines filed such a motion. Nevertheless, the

Levines' motion sought discovery only to develop proof regarding the narrow issue of the children's habitual residence, not any of the treaty exceptions to return of the children or any other issue. Therefore, we review the issue raised only as it pertains to their discovery request.

FN9. This Court has recently noted that the plain language of Rule 56(f) requires an affidavit, and that other Circuits have strictly construed the Rule. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488-89 (6th Cir.2000) (declining to address the issue whether an affidavit is necessary because the plaintiffs did not comply with the requirements of the rule). The plain language of Rule 56(f) requires an affidavit that "the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed.R. Civ. P. 56(f). The Levines did not file a Rule 56(f) affidavit. They filed a motion for discovery. Moreover, although their motion contained a statement that it was signed and verified by the Levines "as an affidavit," the Levines did not sign the document. Thus, if Rule 56(f) requires an affidavit that explains why the party "cannot for reasons stated present by affidavit facts essential to justify the party's opposition," the Levines' argument about discovery as it pertains to the issue of habitual residence is not preserved for review. Nevertheless, because we are constrained to follow *Vance*, we assume the motion the Levines filed is sufficient to preserve this issue for review.

[14] "The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery." *Vance*, 90 F.3d at 1148. "If the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion." *Id.* at 1149. Thus, although *Vance* indicates that summary judgment is improper without discovery, it acknowledges that this is only a general rule.

[15] At the same time, however, the plain language of Rule 56 "does not specifically require or even expressly authorize receipt of oral evidence and other types of evidence in a hearing setting." 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.15[1][a], at 56-200 to 56-201 (3d ed.2000). Moreover, "oral testimony is not favored in summary judgment proceedings due to the well founded reluctance to turn a summary judgment hearing into a trial." *Id.* at 56-202. Further, a court has discretion

to hear evidence on motions by oral testimony or on affidavits. Fed.R.Civ.P. 43(e). Here, the court properly elected the latter.

\*474 [16] However, these are not the only concerns at issue in this case. As the district court properly observed, the Hague Convention and the ICARA raise unique concerns:

[T]his type of case is appropriate for resolution by summary judgment. Indeed, the language of the Convention supports resolution by such means. Article 11 provides that a court, when faced with a petition under the Convention, should "act expeditiously in proceedings for the return of children." Courts are to place these cases on a "fast track" in order to expedite these proceedings and carry out the purposes of the Convention.

The language of the Convention also authorizes courts to "take notice directly of the law of, and of judicial and administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

There is no requirement under the Hague Convention or under the ICARA that discovery be allowed or that an evidentiary hearing be conducted. Thus, under the guidance of the Convention and the statutory scheme, the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing.

*March*, 136 F.Supp.2d at 833-34 (citations omitted).

We agree. The petition for return of children at issue here is not a run-of-the-mill case that falls within the general rule so that it may be said that the district court abused its discretion. Rather, this case involves a petition under a unique treaty and its implementing legislation, neither of which expressly requires a hearing or discovery. In fact, the treaty requires not only expeditious action by courts under article 11, as the district court properly noted, but use of "the most expeditious procedures available." Hague Convention, art. 2. Indeed, the drafters of the treaty stressed the emergency nature of these cases: "Its nature is one of emergency because it seeks a speedy and immediate solution to the cases involved." Elisa Perez Vera, *Report of the Special Commission, in 3 Actes et documents de la Quatorzieme Session* 172, 179 ¶ 25 (Permanent Bureau of the Hague Conference on Private International Law ed. and trans. 1980) (official English translation). [FN10]

FN10. According to the Legal Analysis of the

Hague Convention prepared by the Department of State, the Perez Vera Report "is recognized ... as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed.Reg. 10,494, 10,503 (March 26, 1986); *see also Whallon v. Lynn*, 230 F.3d 450, 455 n. 5 (1st Cir.2000).

In addition to the requirement of expeditious action, the treaty has a number of provisions to help ensure that return proceedings are handled in such a manner and that return of children to their country of habitual residence is likely. For example, the treaty sets forth generous rules regarding authentication of documents and judicial notice. Hague Convention, art. 14. The treaty further provides rights to petitioners when a decision is not rendered within a mere six weeks of filing their petition. Hague Convention, art. 11. Importantly, the treaty also provides that a court may order return of a child at any time, notwithstanding proof of treaty defenses. Hague Convention, art. 18 ("The \*475 provisions of this Chapter [pertaining to return of children] do not limit the power of a judicial or administrative authority to order the return of the child at any time.").

Likewise, the ICARA repeatedly uses the word "prompt" to describe the nature of proceedings for the return of a child wrongfully removed or retained. 42 U.S.C. § 11601(a)(4). Like the treaty itself, the implementing legislation also provides a generous authentication rule. 42 U.S.C. § 11605 ("[N]o authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court."). Such a provision serves to expedite rulings on petitions for return of children wrongfully removed and retained. Expeditious rulings are critical to ensure that the purpose of the treaty--*prompt* return of wrongfully removed or retained children--is fulfilled. Hague Convention, art. 1.

We further note that courts in other Contracting States to the treaty have also upheld summary proceedings on review. For example, an Australian court has held that the Convention's primary purpose "is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return [of children] to the country of their habitual residence." *In the Marriage of*

*Gazi*, (1992) 16 Fam. L.R. 180, ¶ 9, available at <http://scaletext.law.gov.au/html/famdec/0/92/0/FM000720.htm> (last visited March 22, 2001). The Australian court therefore ruled that the trial court "properly adopted a summary form of procedure." *Id.* (opining that allowing cross-examination of deponents of affidavits may be appropriate in rare cases; noting that it was apparent that the trial court had considered all relevant material before it, including affidavits).

Finally, we note that although the district court ruled that it would decide the motions before it without discovery, it nonetheless entered a voluminous amount of evidence into the record from both parties. Indeed, over 1,300 pages were filed with the district court and made part of the record on appeal. Moreover, review of the district court's opinion reveals that the court carefully considered the evidence both parties offered and independently sought information on its own volition. In sum, given the unique nature of this treaty, we hold that the district court did not abuse its discretion when it granted summary judgment in favor of March prior to discovery or an evidentiary hearing.

E.

Given our affirmance of the district court's rulings, we need not reach the issues raised in March's cross-appeal.

III.

The district court's order that the children be immediately returned to their father in Mexico is AFFIRMED, and our prior order issuing a stay of the district court's order pending resolution of these appeals is VACATED. Because Samson and Tzipora have been separated from their father for almost one year now, we further order that our mandate issue forthwith pursuant to Fed. R.App. P 41(a), and that the district court take appropriate action to ensure that the children are reunited with their father with all due speed.

249 F.3d 462

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