

THE HAGUE CONVENTION TWO DECADES LATER:
ASSESSING THE EFFECTIVENESS OF THE
INTERNATIONAL CHILD ABDUCTION REMEDIES
ACT

BY

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I. INTRODUCTION

As the our society becomes increasingly globally connected through the ease of international air travel, the advent of the internet, and the strength of international commerce, it is inevitable that family relationships will also enjoy international diversity. However, when parents from diverse national origins decide to dissolve their matrimonial ties, parental preferences concerning where to raise the children of that marriage can result in conflict. Disputes of this nature may lead one parent to abscond with one or more of the marital children to gain a custodial advantage in a home country where domestic relations law is beneficial to that parent.¹ In this situation, the left-behind parent's options to secure the return of his or her children are limited.²

¹ See generally Mary A. Ryan, Remarks at the Committee on International Relations U.S. House of Representatives, Concerning Implementation of the Hague Convention on the

In fact, the problem of child abduction is significant.³ At the present time there are about 1,000 reported cases of children who have either been kidnapped from the United States or are being wrongfully held abroad.⁴ Moreover, instances of child abduction have increased.⁵ Resolution 98, presented to the Senate in March, 2000, states that, “[t]he situation has worsened since 1993, when Congress estimated the number of abducted and wrongfully retained American children to be more than 10,000.”⁶

The Hague Convention on the Civil Aspects of International Child Abduction was adopted on October 24, 1980⁷ as a remedy for the left-behind parent.⁸ The United States codified the Convention into law on April 29, 1988, with the enactment by Congress of the International Child Abduction Remedies Act (ICARA).⁹

This paper will first begin with a review of the terminology specific to ICARA. Second, it will examine the provisions and purposes of ICARA, particularly as these

Civil Aspects of International Child Abduction (October 14, 1999), *available at* <http://travel.state.gov/101499mar.html>.

² *See generally Id.*

³ S. Con. Res. 98, 106th Cong. (2000), (urging compliance with the Hague Convention on the Civil Aspects of International Child Abduction).

⁴ *Id.*

⁵ S. Con. Res. 98, 106th Cong. (2000), (urging compliance with the Hague Convention on the Civil Aspects of International Child Abduction).

⁶ *Id.*

⁷ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 5, 99 U.S.T. 11 (codified as 42 U.S.C. §§ 11601-11610 (2001)) [hereinafter *Hague Convention*].

⁸ Hague International Child Abduction Convention; Text and Legal Analysis; 51 Fed. Reg. 10,498 (March 26, 1986) (codified at 42 U.S.C. § 11601(a)(4)).

⁹ *Id.* (codified at 42 U.S.C. §§ 11601-11610).

provisions and purposes apply to wrongful parental removal or retention of a child across international borders. Third, it will provide an analysis of the constitutional ramifications of ICARA. Family law matters and concerns about child custody issues traditionally fall within the purview of state law rather than federal law. This paper will address whether ICARA encroaches upon the Constitution when federal law preempts a state order concerning child custody.

Fourth, it will review the exceptions that provide the adjudicating authority the flexibility to refuse the return of the child, and thus defeat the purpose of ICARA. To a large extent, ICARA has been relatively effective in carrying out its goals.¹⁰ However, there are a number of exceptions within ICARA that grant a governmental authority wide discretion in adjudicating the return of the abducted child to the left-behind parent.¹¹ Fifth, this comment will also review the effectiveness of the Act in fulfilling its purpose, by considering the federal and state cases that have construed ICARA. Finally, it presents proposals for improving ICARA and provides suggestions to assist attorneys who are involved in ICARA litigation.

II. TERMINOLOGY

Provided below are definitions of selected terminology frequently used in ICARA. Knowledge of this terminology is necessary to understand the Act as intended by its drafters.¹²

¹⁰ Ryan, *supra* note 1.

¹¹ *Hague Convention*, *supra* note 7, art. 13.

¹² *ICARA*, *supra* note 8, at 10,503.

ABDUCTION.

The term “wrongful abduction” is not used in a criminal sense, but rather a civil sense.¹³ “[W]rongful abduction signifies a ‘[w]rongful removal or retention’ . . . refer[ring] to the taking of a child from the person who was actually exercising custody of the child. . . [or] keeping the child without consent of the person who was actually exercising custody. . . .”¹⁴

ABDUCTOR.

An abductor is “[t]he person alleged to have wrongfully removed or retained the child. This person is also referred to as ‘alleged wrongdoer’ or ‘respondent.’”¹⁵

PERSON.

Within ICARA, the word “person” means, “[t]he person, institution or other body who . . . actually exercised custody prior to the abduction and is seeking the child’s return. The ‘person’ seeking the child’s return is also referred to as the ‘applicant’ or ‘petitioner.’”¹⁶ For the purposes of this comment, the person is most often referred to as the left-behind-parent, but can also be someone other than a biological parent, such as a grandparent or foster parent who is exercising physical custody of the child at the time.¹⁷

COUNTRY OF ORIGIN.

¹³ *ICARA*, *supra* note 8, at 10,494.

¹⁴ *ICARA*, *supra* note 8, at 10,494.

¹⁵ *Id.* at 10,503.

¹⁶ *Id.*

¹⁷ *ICARA*, *supra* note 8, at 10,503.

The “Country of Origin” is the, “child’s country (‘State’) of habitual residence prior to the wrongful removal or retention.”¹⁸ “Country of Origin” is also described in the Convention as “requesting country.”¹⁹

COUNTRY ADDRESSED.

The Country Addressed is “[t]he country (‘State’) where the child is located or the country to which the child is believed to have been taken. It is in that country that a judicial or administrative proceeding for the child’s return would be brought.”²⁰

THE CONVENTION.

“The Convention” refers to the Hague Convention on Civil Aspects of International Child Abduction.²¹ The Convention was codified into U.S. law as the International Child Abduction Remedies Act (ICARA).²² ICARA is also referred to as “the Act.” The Convention and the Act are essentially the same, except that ICARA includes some reservations that were added when it was codified into U.S. law.²³ One reservation specifies that an English translation should be included with all foreign language correspondence related to the Convention.²⁴ A second reservation states that the U.S. Government will not assume the costs associated with returning a child wrongfully

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *ICARA, supra* note 8, at 10,503.

²¹ *Hague Convention, supra* note 7.

²² 42 U.S.C. §§ 11601-11610 (2001).

²³ *ICARA, supra* note 8, at 10,494-10,516, 42 U.S.C. §§ 11601-610.

²⁴ *Id.*

held in the U.S. to the Country of Origin.²⁵ These costs may include legal fees and court costs related to bringing litigation in the U.S.²⁶ Despite these slight differences, the U.S. courts often refer to the articles specified in the Convention when interpreting ICARA.²⁷

CENTRAL AUTHORITY.

The Convention mandates that Contracting States designate a “central authority” to assist in implementing the responsibilities described in the convention.²⁸ In the United States, the Department of State is the Central Authority.²⁹ As such, a left-behind parent seeking return of an abducted child may apply for assistance through the Department of State. They may also initiate judicial proceedings, as provided in ICARA.³⁰

CHILD.

The term “[c]hild’ or ‘children’ means persons under the age of sixteen.³¹

CONTRACTING STATE.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See Brooke v. Brooke*, 907 F. Supp. 57, 62 (S.D.N.Y. 1995).

²⁸ Report on compliance with the Hague Convention on International Child Abduction Act, Oct. 21, 1998, P.L. 105-277, Div. G, Subdivision B, Title XXVIII, § 2803, 112 Stat. 2681-846; Nov. 29, 1999, P.L. 106-113, Div B, § 1000 (a) (7), 113 Stat. 1536 (enacting into law § 202 of Subtitle A of Title II of Division A of H.R. 3427 (113 Stat. 151A-420), as introduced on Nov. 17, 1999), provides for the definition of “Central Authority” in section (b)”. [t]he term ‘Central Authority’ for the United States has the meaning given the term in Article 6 of the Convention on Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980.”

²⁹ In Exec. Order No. 12648, 22 C.F.R. Part 94 (1988), President Reagan designated the Department of State as the Central Authority in the United States.

³⁰ *Roszkowski v. Roszkowski*, 644 A.2d 1150, 1156 (Ch. Div. 1993); 42 U.S.C. § 11606(b).

³¹ 22 C.F.R. Part 94 (1988).

A Contracting State is a signatory member that has enacted the Convention.³²

III. ICARA'S PURPOSE

The Convention's goals are to provide assistance to the left-behind parent and to the children who have been wrongfully abducted across international borders. Children who are wrongfully removed from their home of residence and transported across international borders are "deprived of the stable relationships" the convention was designed to restore.³³ The Convention was designed as a simplified process to assist the left-behind parent and protect the abducted child by facilitating the child's expedited return to the home of residence.³⁴

In general, Contracting States are required to carry out the responsibilities set forth in the Hague Convention. These responsibilities include: "(1) [Securing] the prompt return of children wrongfully removed to or retained in any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State is effectively respected in the other Contracting States."³⁵

Contracting States have wide discretion in implementing the Convention, however, there are several exceptions available to the Country Addressed if it wishes to block the return of abducted children.³⁶ These exceptions will be examined in more detail in Section V.

³² *ICARA*, *supra* note 8, at 10,504.

³³ *ICARA*, *supra* note 8, at 10,494.

³⁴ *Id.*

³⁵ *ICARA*, *supra* note 8, at 10,498.

³⁶ *ICARA*, *supra* note 8, at 10,509-11.

IV. ICARA PROVISIONS

The following overview of ICARA’s provisions is not intended to be a comprehensive examination of ICARA, but rather a summary of the basic assertions contained in the Act. The scope of the Act, the goal of expedited ICARA proceedings, and the Act’s civil limitations will be discussed. Additionally, this section considers court interpretations of the Act’s “wrongful removal or retention” and “breach of custody rights” provisions.

Initially, examples of how courts have applied custody orders during ICARA litigation will be presented. Secondly, this section will examine the obligations of a judicial authority in ordering the return of an abducted child. Court interpretations concerning jurisdiction for custody disputes will also be discussed. And lastly, this section will explore how courts have interpreted the provisions for awarding attorney’s fees and expenses during ICARA litigation.

SCOPE OF ACT.

The remedial mechanisms available in ICARA only apply if the child falls within the constraints of the Convention.³⁷ Under these constraints: (1) the child must have been taken to a Contracting State which has ratified the treaty; (2) the child must be below the age of sixteen; (3) the child must be taken from the place of habitual residence to another location across international borders; (4) application with the Central Authority must be made, or, when seeking a judicial remedy, a case must be filed after the Contracting State has agreed to enforce and implement the Convention.³⁸

³⁷ *ICARA*, *supra* note 8, at 10,504.

³⁸ *ICARA*, *supra* note 8, at 10,498-10,504.

In one example where the Convention was held inapplicable, an American mother, took her minor children across international borders to Seattle, Washington from their home in Greece.³⁹ The Washington Appellate court held that the Convention did not apply because Greece had yet not ratified the Convention.⁴⁰

Furthermore, the scope of the convention is limited to addressing only issues that concern child abduction, the subsequent return of the child, and visitation.⁴¹ An ICARA proceeding is not intended to serve as a hearing to resolve custody issues, but rather a determination of where the custody hearing will take place.⁴² The Convention provides that “[a] decision under this Convention concerning the return of the child shall not be taken to be a determination of the merits of any custody issue.”⁴³ In other words, the Central Authority must decide the “merits of an abduction claim, but not the underlying custody claim.”⁴⁴ For instance, in *Friedrich*, the Sixth Circuit Court of Appeals considered a dispute concerning a child born in Germany to an American mother and German father, which arose after the mother took the child to the United States.⁴⁵ The

³⁹ *In the Matter of the Marriage of Ieronimakis*, 66 Wn. App.83, 97, 831 P.2d 172, 180 (1992).

⁴⁰ *In the Matter of the Marriage of Ieronimakis*, 66 Wn. App. at 97, 831 P.2d at 180.

⁴¹ *ICARA*, *supra* note 8, at 10,498.

⁴² *ICARA*, *supra* note 8, at 10,508-10,509; Hague Convention, art. 14.

⁴³ *ICARA*, *supra* note 8, at 10,508-10509.

⁴⁴ *Friedrich v. Friedrich*, 983 F. 2d 1396, 1400 (6th Cir. Ohio 1993).

⁴⁵ *Id.* at 1401-1403.

Friedrich court determined that custody hearings should occur in the country of the child's habitual residence, which in this case was Germany.⁴⁶

EXPEDITED PROCEEDINGS.

The Convention's drafters envisioned a streamlined process that would lead to the abducted child's prompt return to his or her habitual residence. The Convention provides that "[c]ontracting [nation-]States shall act expeditiously in proceedings for the return of children."⁴⁷

The goal of ICARA is that the Country Addressed will reach a decision as to where the custody hearings will take place within six weeks.⁴⁸ If a determination has not been made in six weeks, then "[t]he applicant or the Central Authority of the requested State . . . shall have the right to request a statement of the reasons for the delay[ed proceedings]."⁴⁹ Moreover, a reply from the Country Addressed shall be provided as to the reason for the delayed proceedings.⁵⁰

In a case involving the return of children to a parent in Mexico, the *March* court interpreted the term "prompt" to apply to the nature of the court proceedings.⁵¹ This ruling was confirmed by the appellate court.⁵² The *March* court stated that "[ICARA]

⁴⁶ *Id.* at 1403.

⁴⁷ *ICARA*, *supra* note 8, at 10,499; Hague Convention, *supra* note 7, art. 11.

⁴⁸ *Id.* (See *supra* note 8, at 10,499).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *March v. Levine*, 249 F.3d 462, 475 (6th Cir. Tenn. 2001).

⁵² *Id.* at 466.

provides a generous authentication rule.”⁵³ “No 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.”⁵⁴ The *March* court clarified that, “the provision served to expedite rulings on petitions for the return of children wrongfully removed or retained. Expeditious rulings are critical to ensure that the purpose of the treaty—prompt return of wrongfully removed or retained children—is fulfilled.”⁵⁵

CIVIL AND NONEXCLUSIVE REMEDY.

ICARA is intended as a civil remedy. Although the term “wrongful abduction” suggests criminal conduct, ICARA is not designed as an extradition treaty. Unlike the extradition process, where the criminal is returned to the United States to face charges, ICARA was enacted to facilitate return of the child to the nation of habitual residence.⁵⁶ Upon the child’s arrival at the location of habitual residence, the courts of the habitual residence may further resolve custody disputes.⁵⁷

In addition, ICARA is a nonexclusive remedy.⁵⁸ The Convention provides the Central Authority with “[t]he power... to order [the] return of the child at any time.”⁵⁹ For instance, in *Zajackowski*, the court ordered the prompt return of the child, adopting the

⁵³ *Id.* at 475.

⁵⁴ *Id.* at 475 (citing 42 U.S.C. § 11605).

⁵⁵ *March*, 249 F.3d. at 475 (citing Hague Convention, art. 1).

⁵⁶ *See generally ICARA, supra* note 8, at 10,494.

⁵⁷ *ICARA, supra* note 8, at 10,498.

⁵⁸ *ICARA, supra* note 8, at 10,504.

writ of habeas corpus as a procedural device to be used in conjunction with ICARA remedies.^{60, 61}

WRONGFUL REMOVAL OR RETENTION.

The Convention provides guidance concerning wrongful removal or retention:

The removal or retention of the child is to be considered wrongful when: (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.⁶²

In *Roszkowski*, the court explained that in order to determine whether the child was wrongfully abducted, the court looks to the location where the child was living “‘immediately before any breach of custody [occurred],’ which encompasses wrongful removal.”⁶³ In *Roszkowski*, both parents were living in the United States with the child,

⁵⁹ *Id.*

⁶⁰ *Zajackowski v. Zajackowski*, 932 F. Supp. 128, 129-132 (D.Md. 1996).

⁶¹ The use of writs of habeas corpus within ICARA litigation will be discussed in more detail in Section VI.

⁶² The Hague Convention *supra* note 7, art. 3.

⁶³ *Roszkowski*, 644 A.2d 1150, 1157 (N.J. Super. 1993). (citing The Hague Convention *supra* note 7, at 10,498).

when the mother brought the child to live in Poland without the father's consent. The court determined that the child was wrongfully removed to Poland.⁶⁴

BREACH OF CUSTODY RIGHTS.

For ICARA to apply, there must have been a wrongful removal and a “breach of custody rights.”⁶⁵ Breach of custody rights are “[r]ights relating to the care of the . . . child and, in particular, the right to determine the child's place of residence.”⁶⁶ For example, if a parent sends a child to live in a boarding school,⁶⁷ or to live with a family during a parental illness, the parent has not revoked custody rights in taking such actions.⁶⁸

Procedurally, in order for the left-behind parent to seek return of the child, the left-behind-parent must prove, by the preponderance of the evidence, that the child was removed from the location of “habitual residence” and that the removal and subsequent retention was a breach of the custody rights exercised by the left-behind parent.⁶⁹ For instance, in *Slagenweit*, when a father brought his daughter from their home in Germany to live with him and to seek medical treatment in the U.S., the court determined that his

⁶⁴ *Id.* at 1157.

⁶⁵ *ICARA*, *supra* note 8, at 10,506.

⁶⁶ *Id.*

⁶⁷ *See ICARA*, *supra* note 8, at 10,506.

⁶⁸ *ICARA*, *supra* note 8, at 10,506.

⁶⁹ 42 U.S.C. § 11603(e)(1)(A).

actions were not wrongful or a breach of custody rights.⁷⁰ The child's mother had consented to the father's retention of the child in the U.S.⁷¹

Once the left-behind parent has met his or her burden of proving the child was wrongfully removed and there has been a breach of custody rights, the burden then shifts to the abductor who must prove that the left-behind parent did not exercise custody rights.⁷² For example, in *Zajackowski*, the left-behind father was able to demonstrate that the mother wrongfully removed the child to Poland.⁷³ Since the child's mother "[m]isrepresented the purpose of the child's departure to Poland" to the father, the court decided that the mother was unable to prove the father did not retain custody rights.⁷⁴ In fact, the court maintained that the mother "thwarted" the father's custody rights and decided the child should be returned to the U.S.⁷⁵

CUSTODY DECISION NOT COMPULSORY.

The existence of a custody order is not required to invoke the Convention.⁷⁶ In fact, child abductions often occur before a custody decree is obtained.⁷⁷ The focus of

⁷⁰ *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 268 (N. D. Iowa 1993).

⁷¹ *Id.* at 269.

⁷² *ICARA*, *supra* note 8, at 10,507.

⁷³ *Roszkowski*, 644 A.2d at 1158.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *ICARA*, *supra* note 8, at 10,505.

⁷⁷ *Id.*

ICARA is merely to secure rapid return of a child to his or her habitual residence, where custody decisions can then be addressed.⁷⁸

An illustration can be found in a case involving a father's wrongful retention of his children in the United States.⁷⁹ In this case, the Tyszkas were married in France and intended to reside in France indefinitely.⁸⁰ However, after a vacation with the children in Michigan, the father informed the children's mother that he intended to stay in Michigan with the children, and he filed for divorce and for custody of the children in a Michigan state court.⁸¹ The Michigan court rendered a judgment for divorce and custody arrangements.⁸² The *Tyszka* court found that the trial court erred in considering the child custody issues.⁸³ It held that the place of the children's habitual residence was France and, therefore, the resolution of custody issues should have been addressed in French courts.⁸⁴

CUSTODY ORDER NOT DISPOSITIVE.

ICARA will not automatically recognize a custody decree obtained by the abductor in the Country Addressed.⁸⁵ The Convention provides that "[t]he sole fact that a decision relating to custody has been given or is entitled to recognition in the requested

⁷⁸ *Id.*

⁷⁹ *Tyszka v. Tyszka*, 503 N.W. 2d 726, 727, (Mich. App. 1993).

⁸⁰ *Id.* at 727.

⁸¹ *Id.*

⁸² *Tyszka*, 503 N.W. 2d at 728.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *ICARA*, *supra* note 8, at 10,498.

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.”⁸⁶ It follows that, if the new custody decree were automatically recognized by the Central Authority, it would reward the abductor for wrongfully taking the child across international borders to seek a more favorable judicial remedy, rather than adjudicating the matter in the country of Country of Origin.⁸⁷

For instance, in *Shalit*, an American mother retained “legal and physical custody” of a child of the marriage after divorce from the child’s Israeli father.⁸⁸ Despite the custody decree, the parents agreed that the child would live temporarily in Israel with his father for three years.⁸⁹ However, before the three-year period was over, the child traveled to Alaska to visit his mother.⁹⁰ While in Alaska, the mother unilaterally decided not to return the boy to Israel.⁹¹ In response, the father initiated custody proceedings in Israel, followed by proceedings for visitation modifications in the United States.⁹² Despite the custody proceedings initiated in Israel, the court determined that under the requirements of the Convention, the father failed to show that the mother wrongfully

⁸⁶ *ICARA*, *supra* note 7, at 10,500.

⁸⁷ *See generally ICARA*, *supra* note 8, at 10,498.

⁸⁸ *Shalit v. Shalit*, 182 F.3d 1124, 1126 (9th Cir. Alaska 1999).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

retained the child.⁹³ As such, the mother retained custody of the child. The court clarified that the existence of a custody order was only one factor among others that the court considered in making its decision.⁹⁴

NOT FOR RESOLUTION OF CUSTODY DISPUTES.

ICARA was created as a method for returning children who are victims of international child abduction.⁹⁵ ICARA was not established as an instrument for resolving custody disputes.⁹⁶ The Convention provides that, “[j]udicial 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.”⁹⁷ The *Tyszka* court determined that the Michigan trial court erred because it decided the custody issue.⁹⁸ The decision concerning custody should have been decided in France, the children’s habitual residence.⁹⁹

DUTY TO RETURN NOT ABSOLUTE.

The Central Authority is not obliged to return the child to his or her country of habitual residence if the child does not fall within the scope of the convention’s

⁹³ *Id.*

⁹⁴ *Shalit*, 182 F.3d at 1130.

⁹⁵ *ICARA*, *supra* note 8, at 10,495.

⁹⁶ 42 U.S.C. § 11601 et seq.

⁹⁷ *ICARA*, *supra* note 7, art. 16.

⁹⁸ *Tyszka*, 503 N.W.2d 726, 728.

⁹⁹ *Id.*

authority.¹⁰⁰ Specific situations where a Country Addressed is not required to return the child include; (1) when the child is over sixteen; (2) when the Convention is not in force in either of the contracting nation-states; and (3) when an application for assistance under the Convention is delayed for more than a year after the wrongful abduction.¹⁰¹ The Convention provides other acceptable reasons that justify a Country Addressed's decision not to return a child.¹⁰² Even if the left-behind spouse can establish that the child was wrongfully abducted, the Convention provides the abductor with several defenses that allow the abductor to retain a child.^{103, 104}

COSTS, FEES, AND EXPENSES.

The Convention gives the court discretion over the reimbursement of legal costs.¹⁰⁵ The court has the authority to order that the abductor pay all legal fees and expenses incurred by the applicant both in bringing legal proceedings and arranging for the return of the child.¹⁰⁶ The reasoning behind the award of costs is to place the left-behind spouse in the same financial footing he or she would have been had the abduction not occurred.¹⁰⁷ Additionally, the award of expenses serves as a financial deterrent to abductions.¹⁰⁸

¹⁰⁰ *ICARA, supra* note 8, at 10,504.

¹⁰¹ *ICARA, supra* note 8, at 10,509.

¹⁰² *ICARA, supra* note 8, at 10,509-10.

¹⁰³ *ICARA, supra* note 8, at 10,509-10.

¹⁰⁴ These defenses will be addressed in Section IV.

¹⁰⁵ *ICARA, supra* note 8 at, 10,500; Hague Convention, *supra* note 7, art. 26.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 10,511.

The *Freier* case is an example of how the courts have construed ICARA provisions concerning costs. The *Freier* court decided that the mother wrongfully retained her children in the U.S. against the consent of the children's father (the plaintiff) who lived in Israel.¹⁰⁹ Upon submission of proper documentation, the court awarded the father both attorney's fees and the transportation costs incurred in returning the child to Israel.¹¹⁰

V. EXCEPTIONS

Under ICARA, there are a number of exceptions a court may rely on to refuse to return a child to the left-behind-spouse, even if the child has been wrongfully abducted.¹¹¹

MATURITY EXCEPTION.

The Convention has two maturity exceptions. (1) ICARA does not apply to children who have reached age sixteen, and (2) it provides an exception that allows the court to consider the child's habitual residence preferences.¹¹² However, before applying the second maturity exception, the court must first take consider the child's maturity and ability to make a decision regarding his or her preferences.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ *Freier v. Freier*, 969 F. Supp. 436, 445, (E.D. Mich. 1996).

¹¹⁰ *ICARA*, *supra* note 8, at 10,509.

¹¹¹ *ICARA*, *supra* note 8, at 10,509-11.

¹¹² 42 U.S.C. §11602(e)(2)(B); *ICARA*, *supra* note 8, at 10,509-10,510.

¹¹³ *ICARA*, *supra* note 8, at 10,510.

In *Tahan*, the court decided that a nine-year-old child's preferences were not relevant to determining habitual residence because the child had not reached an age of maturity to make such a determination.¹¹⁴ On appeal, the appellant claimed the lower court erred where it failed to interview the child about his habitual residence preferences.¹¹⁵ The appellate court held "Article 13 of the Convention excuses the duty to return if a child of appropriate age and maturity objects. This standard simply does not apply to a nine year old child."¹¹⁶

TIME LIMITS APPLY TO FILING.

If an application is made for the return of a child before a year has passed since the wrongful abduction, the Central Authority is required to return the child.¹¹⁷ However, if an application is received after a year has expired, the court has the authority to refuse the return of the child if "the child is settled in its new environment."¹¹⁸

This time-limit exception was illustrated when a U.S. court refused to return wrongfully obtained children to Israel because the Convention proceedings brought by the Israeli father were initiated after one year had passed.¹¹⁹ The court found that the children had settled into a new environment with their mother in the United States.¹²⁰

¹¹⁴ *Tahan v. Duquette*, 613 A.2d 486, 490, (N. J. Super. 1992).

¹¹⁵ *Id.*

¹¹⁶ *Tahan*, 613 A.2d at 490.

¹¹⁷ 42 U.S.C. § 11603(e)(2)(B); *ICARA*, *supra* note 8, at 10,499.

¹¹⁸ *Id.*

¹¹⁹ *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998).

¹²⁰ *Id.*

And, because the children remained in the country for over a year, the court held that the U.S. became the children's new habitual residence.¹²¹

CHANGE OF HABITUAL RESIDENCE.

The convention does not specifically define "habitual residence."¹²² However, the American courts have developed guidelines for determining what is and what is not a habitual residence.¹²³ "'Habitual residence' is not a technical term, like 'domicile,'¹²⁴ instead it should be understood as the child's 'ordinary residence' at the relevant time."¹²⁵ "Moreover, in determining a child's habitual residence 'the court must focus on the child, not the parents, and examine past experiences, not future intentions.'"¹²⁶

In *Slageweit*, the court found that a child's habitual residence had changed after determining that the "child [was] settled in its new environment."¹²⁷ The child's habitual residence had changed from Germany to the United States because the child lived with her father in the United States for fifteen months, during which time the father served as the child's primary care-giver and the child received continual medical treatment from the local medical community.¹²⁸

¹²¹ *Id.*

¹²² *Id.* at 243.

¹²³ *Toren*, 26 F. Supp. 2d at 243.

¹²⁴ *Id.* (citing *Friedrich v. Friedrich*, 983 F. 2d 1396, 1401 (6th Cir. 1993)).

¹²⁵ *Toren*, 26 F. Supp. 2d at 243, (citing *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995)).

¹²⁶ *Id.* (citing *Friedrich*, 983 F. 2d at 1401).

¹²⁷ *Slagenweit*, 841 F. Supp. 264, 269 (N.D. Iowa 1993).

¹²⁸ *Id.*

CUSTODY RIGHTS EXERCISED AT TIME OF REMOVAL.

A court can refuse return of a child if custody rights were exercised at the time of a removal, or if the left-behind-spouse gave consent for the removal and retention of the child.¹²⁹ The facts in *Slagenweit* illustrate this point. In that case, the mother consented to the father's removal of the child from Germany and delivering to the United States so that the child could obtain medical treatment.¹³⁰ In reaching its decision, the court noted that the father was exercising his custody rights at the time of the child's removal.¹³¹

GRAVE RISK OF HARM.

A tribunal has the authority to refuse return of the child if the return would cause the child to face “[a] grave risk . . . [and] would expose the child to physical harm or otherwise place the child in an intolerable situation.”¹³² However, “the ‘grave risk’ exception must be narrowly construed and the court must engage in some evaluation of the people and circumstances awaiting the child in the country of habitual residence.”¹³³

For example, in a case where an abductor had previously been the victim of frequent physical abuse by the applicant, and this abuse occurred in the presence of the couple's two children, the court ruled that the children should not be returned.¹³⁴ The

¹²⁹ 42 U.S.C. § 11603(e)(2)(B); *ICARA*, *supra* note 8, at 10,510.

¹³⁰ *Slagenweit*, 841 F. Supp. at 268.

¹³¹ *Id.* See also *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 795 (9th Cir. Ariz. 2001) (clarifying the point that the applicants lose the right to assistance under the Convention when they consent to the child's removal and retention).

¹³² 42 U.S.C. § 11603(e)(2)(A); *ICARA*, *supra* note 8, at 10,510.

¹³³ *Blondin v. Dubois*, 78 F. Supp. 2d 283, 294 (S.D. N.Y. 2000).

¹³⁴ *Id.* at 298-99.

court's refusal to return the children was based on medical testimony that return would expose the children to a "grave risk" and "physical or psychological harm or otherwise place them in an intolerable situation."¹³⁵

FUNDAMENTAL PRINCIPLES OF THE REQUESTED STATE.

The Convention also allows a Country Addressed to refuse to return an abducted child, if the principles of the Country of Origin would fail to protect the human rights and fundamental freedoms of the child.¹³⁶ This is a rare exception, seldom granted in the United States.¹³⁷

In *Roszkowski*, the court determined that this exception did not apply in Poland, because the children's fundamental rights would also be protected in Poland.¹³⁸ In fact, the research on this subject revealed no known cases where U.S. courts have granted this exception. This is probably because the U.S. courts believe that the human rights protections afforded to citizens and aliens residing in Contracting States are within reasonable expectations. However, the *Roszkowski* court cited examples where the

¹³⁵ *Id* at 285; *Cf. In re Walsh*, 31 F.Supp. 2d 200 (D. Mass. 1998) (where the court ordered return of the children despite the fact that the mother was the frequent victim of the father's abuse, while children observed. The court concluded that this situation was not intolerable within the meaning of the statute because the abuse was not directed at the children, and because safeguards would be established to protect against threats in the home of the left-behind spouse); *Freier*, 969 F. Supp. 436, (the mother's affirmative defense that the children should not be returned to Israel because it was a "zone of war," was not sufficient to warrant the refusal of the children's return to Israel. The court reasoned that the fighting was not located in areas where the child would be living, schools were open, and business was continuing, and petitioner was able to leave the country).

¹³⁶ 42 U.S.C. § 11603 (e)(2)(A); *ICARA*, *supra* note 8, at 10510.

¹³⁷ *See Roszkowski*, 644 A.2d 1150, 1159; *see generally supra* note 135.

¹³⁸ *Id.*

exception would apply.¹³⁹ Such examples may include the return of a child to either Somalia or Iraq.¹⁴⁰ Both are countries where the basic human rights of a child could not be guaranteed by the countries' governmental authorities, and refusal to return a child would be warranted.^{141, 142}

VI. CONSTITUTIONAL APPLICATIONS: CHILD CUSTODY TRADITIONALLY GOVERNED BY THE STATES.

Issues concerning domestic relations and family law have traditionally been governed by the states.¹⁴³ The Tenth Amendment of the U.S. Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved by the States respectively, or to the people.”¹⁴⁴ Some scholars interpret this to mean that since the Constitution did not discuss laws relating to family law, then family law issues are solely within the states' purview.¹⁴⁵ The Supreme Court stated in *In re Burrus* that, “[t]he whole subject of the domestic relations of husband and

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Roszkowski*, 644 A.2d 1150, 1159.

¹⁴² For instance, in 1990, Iraq invaded Kuwait, and the Kuwaiti government was overthrown. *Iraq Disputes Kuwaiti Borders, Lays Claim to Territory*, LOS ANGELES TIMES, Jan. 15, 1999, at A8. Additionally, in 1991, the unrest in Somalia began after severe famine; warring tribal leaders toppled the legitimate governmental authority. *But Much of Africa struggles to Feed Itself*. USA TODAY, Feb. 27, 1995, at 2A.

¹⁴³ *In Re Burrus*, 136 U.S. 586, 593-94 (1890).

¹⁴⁴ U.S. CONST. amend. X.

¹⁴⁵ *Family Law*, CONN. L. TRIB., Mar. 17, 1997, at 3.

wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.”¹⁴⁶

That being said, constitutional questions sometimes arise in situations where state decisions concerning custody are pre-empted by federal law.¹⁴⁷ ICARA is an international treaty that has been codified by federal law. An example of a circumstance that would raise concerns about the federal infringement on state rights¹⁴⁸ is a federal court’s denial of parental custody rights, after a state court has resolved a child custody dispute.¹⁴⁹

The *Diorinou* case illustrates this potential conflict.¹⁵⁰ *Diorinou* concerned the custody rights of an American father and Greek mother.¹⁵¹ A New York trial court determined that the State of New York was the children’s home state, and that the mother had wrongfully removed the children to Greece.¹⁵² However, the appellate court

¹⁴⁶ *In Re Burrus* at 593-94.

¹⁴⁷ The seminal case, *Missouri v. Holland*, considered a Tenth Amendment conflict, however the conflict did not concern child custody. 252 U.S. 416 (1920)(The state of Missouri sued the federal government to enjoin the federal warden from enforcing the Migratory Bird Treaty regulations, which infringed upon the state’s Tenth Amendment rights. The Supreme Court held that national issues such as the protection of migratory birds are best handled by the federal government.).

¹⁴⁸ In *Reid v. Covert*, Justice Black stated, “[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” 354 U.S. 1, 16 (1957). Thus, the scope of treaty power is limited by constitutional constraints. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.6 (6th ed. 2000).

¹⁴⁹ See *Diorinou v. Mezitis*, 132 F. Supp. 2d 139 (S.D.N.Y 2000).

¹⁵⁰ *Id.* at 139.

¹⁵¹ *Id.* at 141.

¹⁵² *Id.* at 142.

disagreed with the trial court's decision.¹⁵³ It observed that, under ICARA, the mother had rightfully exercised her custodial rights in Greece; she had lived there with her children for the previous five years and Greece had become the children's habitual place of residence.¹⁵⁴ The appellate court reasoned that the children had become acclimatized to Greece during their five-year stay.¹⁵⁵ The court also deferred to the Greek court's judgment holding that the mother's detention of the children in Greece was not wrongful because the father intended for the children to remain in Greece permanently.¹⁵⁶

Although the above situation appears to involve a conflict between states' rights and a federal law, ICARA is not intended to preempt child custody decisions established by the state courts.¹⁵⁷ Separate and apart from the Parental Kidnapping Prevention Act,¹⁵⁸ which mandates that state authorities give full faith and credit to custody decisions from other states, ICARA was designed as a tool for the left-behind parent to obtain assistance from foreign governmental adjudicating authorities to locate the child and quickly determine where the custody hearings should take place.¹⁵⁹ Under ICARA, the adjudicating tribunal does not have the authority to determine custody issues, unless one of the Convention's Article XIII defenses can be invoked.¹⁶⁰ As such, potential conflicts

¹⁵³ *Id.*

¹⁵⁴ *Diorinou*, 132 F. Supp. 2d at 143.

¹⁵⁵ *Id.* at 143 (citing *Feder v. Evans*, 63 F.3d 217, 218 (3d. Cir. 1995)).

¹⁵⁶ *Diorinou*, 132 F. Supp. 2d at 143.

¹⁵⁷ *See ICARA*, *supra* note 8, at 10,506-10,507.

¹⁵⁸ 28 U.S.C. § 1738(A) (2000).

¹⁵⁹ *ICARA*, *supra* note 8, at 10,505; Hague Convention, *supra* note 7, art. 8.

¹⁶⁰ *ICARA*, *supra* note 8, at 10,509.

are less likely because a Country Addressed is not empowered by ICARA to resolve custody disputes.

Theoretically, as long as the child's habitual residence remains the same as the child's state of residence, state laws that govern the custody for the child will not be overturned.¹⁶¹ Once the child is abducted, a left-behind parent can ensure that the child's habitual residence is maintained in his or her home state by enacting ICARA remedies in a timely fashion. This way the child does not become "settled" in his or her new environment in the Country Addressed.

VI. ICARA'S EFFECTIVENESS

This section will discuss the effectiveness of the Convention since its enactment in 1980, and will review some of the Convention's strengths and weaknesses. It will also present some proposals for improving ICARA's effectiveness and some suggestions for family law practitioners who deal with international child abduction cases.

In the twenty-some years after the Hague Convention was signed,¹⁶² the Convention has been enacted as law in 54 nation-states.¹⁶³ The U.S. State Department considers the Convention "a success story."¹⁶⁴ Its positive assessment of the Convention is based in part on the fact that 2,000 children have been returned to their left-behind-

¹⁶¹ *ICARA*, *supra* note 8, at 10,509.

¹⁶² Hague Convention, *supra* note 7. The United States codified the convention into law in 1988.

¹⁶³ Ryan, *supra* note 1.

¹⁶⁴ *Id.*

parents since 1988, when the Convention was codified by the U.S.¹⁶⁵ The Convention's strength is that it is considered a deterrent to an "untold number of abductions" that are impossible to account for statistically.¹⁶⁶ The left-behind parent now has an international forum and a legal procedure for addressing grievances, neither of which existed prior to the enactment of the convention.¹⁶⁷ It is estimated that "[a]pproximately 60% of the cases in which [the State Department] provide[s] assistance" [relating to abducted children] can now be adjudicated under the law of the Convention."¹⁶⁸

However, some U.S. Senators stated in their proposal for a concurrent resolution on March 23, 2000, that the situation concerning child abduction had worsened, and that "contracting states [to the Convention] . . . routinely invoke the Article 13 exceptions as a justification for non-return, rather than resorting to [the exceptions] in a small number of . . . cases."¹⁶⁹ The Senators emphasized that two of the Convention's exceptions are overly used by some nation-states to justify this refusal to comply with the Convention. The two exceptions most often evoked are the "grave risk" exception and the "child objection" exception.¹⁷⁰ The concurrent resolution asserted that the most notorious abusers of these exceptions are: Austria, Germany, Honduras, Mexico, and Sweden.¹⁷¹

¹⁶⁵ *Id.*

¹⁶⁶ Ryan, *supra* note 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ S. Con. Res. 98, 106th Cong. (2000), Urging compliance with the Hague Convention on the Civil Aspects of International Child Abduction.

¹⁷⁰ *Id.* In this work, the "child objection" exception was explained in terms of a child preference exception. Both of these and other exceptions are described, *Supra*, § III; *ICARA*, *supra* note 8, at 10,509-11.

PROCEDURAL CONSIDERATIONS.

According to Allen Gauper,¹⁷² a family law practitioner who recently represented a left-behind parent in a case involving ICARA, one of the Convention's major shortcomings relates to how ICARA is implemented procedurally.¹⁷³ Specifically, Mr. Gauper's criticism of ICARA relates to evidentiary rules.¹⁷⁴

Evidentiary Rules.

The left-behind parent faces a difficult situation in bringing an ICARA suit in a foreign country, because "the abandoned parent is required to transport the evidence to a new forum."¹⁷⁵ Transporting evidence across international lines to the new jurisdiction can be a very expensive and complicated endeavor for the left-behind-spouse.

Additionally, the rules of procedure in an ICARA action are not clearly defined.¹⁷⁶ This causes uncertainty for family law practitioners. For example, there is

¹⁷¹ S. Con. Res. 98, 106th Cong. (2000), Urging compliance with the Hague Convention on the Civil Aspects of International Child Abduction.

¹⁷² Allen Gauper is a family law practitioner based in Spokane, Washington. He recently tried a case involving international child abduction and ICARA in the Federal District Court of the Eastern District of Washington. Mr. Gauper represented the husband in the case that was remanded by the 9th Circuit, *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E. D. Wash. 2001).

¹⁷³ Interview with Allen Gauper, Attorney at Law, Salina, Sanger & Gauper, Spokane, Washington (18 October, 2001).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

uncertainty about the procedure for admittance of evidence.¹⁷⁷ Although one of the ICARA goals is to provide a simplified process for the return of an abducted child, there is nothing in the ICARA that indicates evidence should be limited to affidavits or that the right to confrontation is waived.¹⁷⁸

In Mr. Gauper's recent ICARA trial, the Federal court denied the husband's motion to allow testimony to be taken over the telephone or to be presented in the form of affidavits.¹⁷⁹ In making its decision, the court reasoned that nothing in ICARA specifically indicates that evidence should be treated differently than a normal trial, with a longer discovery process.¹⁸⁰ Instead, the court decided that evidence should be presented in the form of video taped depositions.^{181, 182} This can be an expensive proposition.^{183, 184}

¹⁷⁷ *Id.*

¹⁷⁸ Interview with Allen Gauper, Attorney at Law, Salina, Sanger & Gauper, Spokane, Washington (18 October, 2001).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; Interview with Peter Karademos, Attorney at Law, Spokane, Washington (September 21, 2001). Peter Karademos is also a family law practitioner based in Spokane, Washington. Mr. Karademos represented the husband in the initial hearing, and during the *Tsarbopoulos* appeal before the 9th Circuit. *Tsarbopoulos v. Tsarbopoulos (In Re Tsarbopoulos)*, 2000 U.S. App. LEXIS 29729 (9th Cir. 2000) (unpublished). Mr. Karademos commented that two federal judges treated this issue differently. He suggested that there should be a uniform procedure for how discovery should be handled. A long discovery period negatively impacts the court's ability to meet the Convention's goal of expedited proceedings, that the hearings should take place within six weeks.

¹⁸¹ Gauper, *supra* note 174.

¹⁸² Interview with Amy Rimov, Associate Attorney, Mary Schultz & Associates, Spokane, Washington (25 April, 2002). Ms. Rimov is an associate attorney who assisted Mary Schultz, the wife's attorney with this case. Ms. Rimov clarified that Judge Shea only allowed evidence through live testimony or deposition testimony to be taken through teleconferences and videoconferences, since only some witnesses were located in foreign

Obviously, the expense of bringing an ICARA proceeding may prohibit many left-behind spouses from seeking a judicial remedy through ICARA.¹⁸⁵ However, the expense is not the only obstacle to seeking a remedy through ICARA, uncertainty concerning how the evidentiary rules might be implemented during an ICARA proceeding, and the ability of an abductor to invoke one of the several exceptions to the Convention may result in a lengthy trial process.¹⁸⁶ As such, the Convention's objective of providing a speedy remedy becomes difficult to implement.

Expedited Judicial Process Sometimes Difficult.

As previously mentioned, even though a left-behind spouse has established that the child was wrongfully abducted, an abductor can invoke several defenses through

countries at the time of trial. The wife's attorney believed that videoconferences allowed presentation of more persuasive evidence and elected to use videoconferences for this reason.

¹⁸³ Gauper, *supra* note 174. Prior to the District Court trial, the wife claimed she spent a total of \$150,000 in the initial hearing, and the appellate review. Mr. Gauper believes that together the husband and wife have spent \$350,000 plus through trial. Mr. Gauper estimates that a majority of the expenses related to the trial at the district court level related to discovery.

¹⁸⁴ Rimov, *supra* note 184. The wife paid \$300 per hour for video conferencing and that the wife, Ms. Tsarbopoulos, spent over \$100,000 in bringing this case, including the appeal. Despite the expense, Mr. Rimov believes the videoconferences were important to proving the wife's case, and provided the fact-finder with the additional visual element, which assists in determining the credibility of a witness.

¹⁸⁵ Interview with Priscilla Vaagan, Attorney at Law, Spokane, Washington (14 September, 2001). An example of the prohibitive expense of bringing an ICARA suit in another country involves an unpublished case, *In Re Marriage of Cummings*. In this case, the father, who did not exercise full custody rights, abducted two of his children to Germany. The German courts awarded the father custody of the two children. Unfortunately, the left-behind-mother did not pursue an appeal under ICARA, in part because she did not have the requisite financial resources to bring such an appeal.

¹⁸⁶ Gauper, *supra* note 174.

which the court can justify refusal to return the child to his or her home of habitual residence.¹⁸⁷ The defenses are properly invoked in situations where, for example, a left-behind spouse was physically abusive to the abductor and the children.¹⁸⁸ However, they were not designed to be routinely invoked.¹⁸⁹

This provision was not intended to be used by defendants as a vehicle to litigate (or re-litigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical harm or otherwise place the child in an intolerable situation is material to the court's determination.¹⁹⁰

Nonetheless, it appears that ICARA defenses are frequently used to appeal a summary judgment.¹⁹¹ Such a use can cause delays in the judicial process.¹⁹² The passage of time benefits the abductor, as the children become acclimatized and more settled in the Country Addressed, and it increases the likelihood that courts will find that the habitual residence has changed to this new location.¹⁹³

For example, Mr. Gauper's client, the left-behind-parent, Mr. Tsarbopoulos waited two-and-a-half years for the judicial determination of his case.¹⁹⁴ During which time, Mr. Gauper was concerned that the children would be acclimatized to the United

¹⁸⁷ *Id.*

¹⁸⁸ 42 U.S.C. § 11603(e)(2)(A); *ICARA*, *supra* note 8, at 10,510.

¹⁸⁹ *ICARA*, *supra* note 8, at 10,510.

¹⁹⁰ *Id.*

¹⁹¹ *E.g. March*, 249 F.3d 462 (6th Cir. 2001); *Tsarbopoulos*, 176 F. Supp. 2d 1045.

¹⁹² *Gauper*, *supra* note 173.

¹⁹³ *Id.*

¹⁹⁴ *Karademos*, *supra* note 180.

States.¹⁹⁵ He feared that it would be much easier for the court to determine that the children had changed their habitual place of residence to the Country Addressed.¹⁹⁶ In this case, Mr. Tsarbopoulos argued that the United States was the Country Addressed and that Greece was the Country of Origin.¹⁹⁷

The *Tsarbopoulos* court ultimately held “the Hague Convention did not apply because the parents did not share a settled intent to change the family’s habitual residence from the United States to Greece . . . Ms. Tsarbopoulos did not remove the children from their habitual residence, so that removal was not actionable in a Petition for Return under the Hague Convention.”¹⁹⁸ Additionally, the court ruled that the “grave risk of harm exception” also applied to the Tsarbopoulos children.¹⁹⁹ The court believed the children would be subject to physical and emotional abuse if returned to Greece.²⁰⁰ Therefore, the court determined the children would remain in the U.S. with their mother.²⁰¹

IMPROVING ICARA.

The effectiveness of ICARA could be significantly improved if the text of ICARA were changed in two areas. First, adjudicating authorities should be given discretion to allow discovery through telephonic depositions and affidavits in cases involving great

¹⁹⁵ Gauper, *supra* note 173.

¹⁹⁶ Gauper, *supra* note 173.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Tsarbopoulos*, 176 F. Supp. 2d at 1062.

²⁰⁰ *Id.*

²⁰¹ *Id.*

distances between the trial court and the witnesses. This change would reduce costs of bringing the case to trial, and aid in a speedy resolution of the dispute.²⁰²

Second, ICARA should be amended to award mandatory attorney's fees and expenses to the party that does not prevail.²⁰³ This would serve as a powerful deterrence to potential abductors, thus aiding in accomplishing the principle goal of the Convention.²⁰⁴ The weakness in the ICARA provision awarding costs to the left-behind parent, is the court's hesitancy to award such fees unless the abductor's actions are clearly inappropriate.²⁰⁵ Courts might be more willing to award costs if the language were more strongly worded.²⁰⁶ Awarding costs would further the goal of the Convention.

TRYING ICARA CASES.

There are four issues that practitioners should consider when trying child abduction cases involving ICARA. First of all, the practitioner should be mindful of the one-year statutory limitation in seeking a civil remedy through ICARA. The clock starts running from the time the child is abducted across international borders.²⁰⁷ It is strongly

²⁰² Gauper, *supra* note 173; Karademos, *supra* note 180.

²⁰³ *Id.* Mr. Karademos added that the abductor should be required deposit a bond with the court, to cover fees and costs if the abductor does not prevail at trial. Moreover, the burden should be on the abductor to show that the child's new location is the appropriate place for the child to remain.

²⁰⁴ *ICARA*, *supra* note 8, at 10,511.

²⁰⁵ Gauper, *supra* note 174.

²⁰⁶ *Id.*

²⁰⁷ *ICARA*, *supra* note 8, at 10,509.

suggested that clients apply for assistance under ICARA as soon as possible after the abduction occurs so that the one-year temporal limitation can be met.

Next, practitioners may contact the Department of State concerning questions about the “invocation and implementation of the Convention” through the Office of Citizens Consular Services, and to apply for assistance.²⁰⁸ The Department of State Office of Children’s Issues serves as a point of contact because it was designated as the Central Authority in the United States for matters concerning child abduction and the obligations of Contracting States as set forth in the Convention.²⁰⁹

Additionally, practitioners who believe a client’s child may be abducted across international borders by a non-custodial parent should contact the Department of State and request assistance.²¹⁰ For instance, the Department of State may assist by revoking and requiring the surrender of a parent’s passport in some circumstances.²¹¹ The Department of State can also assist parents of minor children through the Children’s

²⁰⁸ *ICARA*, *supra* note 7, at 10,494. The telephone number for the Office of Citizens Consular Services is at the Department of State is (202) 736-7000, and web address located at <http://travel.state.gov/abduct.html>. *See generally*, PATRICIA M. HOFF ET. AL., 1990 SUPPLEMENT TO INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING POLICY, PRACTICE, AND LAW. (National Center on Women and Family Law, Inc. New York, 1990) (1982).

²⁰⁹ Exec. Order No. 12648, 22 C.F.R. 94 (1988), President Reagan designated the Department of State as the Central Authority in the United States.

²¹⁰ 22 C.F.R. § 40.103 (2002); 22 C.F.R. §§ 51.71-50.71 (2002).

²¹¹ 22 C.F.R. § 40.103; 22 C.F.R. §§ 51.71-50.71; *Weinstein v. Albright* 261 F.3d 127, 2001 (2d. Cir. N.Y. 2001) (describing narrow instances for the revocation or denial of passports, for example, a passport may be revoked for failure to pay child support or a felony conviction).

Passport Issuance Alert Program. Through this program, parents can be alerted prior to issuance of a minor's passport.²¹²

Third, once a child has been abducted across international borders, practitioners should consider implementing procedural devices such as a warrant in lieu of a writ of habeas corpus as a method to expedite the process for the return of the abducted child. The writ of habeas corpus can be brought in both state and federal courts, by the court ordering the prompt return of the child.²¹³ However, the applicability of the writ of habeas corpus in a state court will vary depending upon that state's constitution and statute relating to writs of habeas corpus.²¹⁴

Finally, practitioners should consider bringing ICARA-related cases in state court rather than federal court.^{215, 216} This is advised because legal practitioners who typically

²¹² Children's Passport Issuance Alert Program, *available at* http://travel.state.gov/pia_program.html.

²¹³ *See Zajackowski v. Zajackowski*, 932 F. Supp. 128, 129-132; *Brooke*, 907 F. Supp. 57, 57-62; *In re Henches*, No. 41887-4-1, 2000 LEXIS 2146 (Wash. Ct. App., Nov. 6, 2000) (Unpublished).

²¹⁴ *See generally Id.* Interview with Thomas H. Speedy Rice, Professor and Director, Externship program, Clinical law program, Director of Int'l Crim. Justice Law Clinic, Gonzaga Univ. School of Law, Spokane, WA (26 October 2001).

²¹⁵ Gauper, *supra* note 174.

²¹⁶ Rimov, *supra* note 184. However, Ms. Rimov believes the federal courts a more appropriate venue for ICARA proceedings than state courts. *Cf.* Jan Rewers McMillan, Current International and Domestic Issues Affecting Children: GETTING THEM BACK: THE DISAPPOINTING REALITY OF RETURN ORDERS UNDER THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 14 J. Am. Acad. Matrimonial Law 99 (Summer 1997). Ms. Remov added: the present state of the Hague Convention in the United States turns children back, nearly automatically, even if the exceptions are alleged by the parent with the children. This has been a nightmare for U.S. citizens attempting to return to this country with their children following a separation, often from abusive relationships and very bad situations in other countries. Contrarily, the same relief is not afforded the left-behind parents in this country. Other countries read the exceptions

try ICARA-related cases are family law attorneys. Family law attorneys are often more familiar with litigating cases in state courts.²¹⁷ As such, this may benefit clients as the attorney will likely be more familiar with the court procedures and possibly judges in state court systems rather than the federal system.²¹⁸ Furthermore, cases in state court tend to be tried more quickly, and in general, there is less delay involved in scheduling time on the court's calendar.²¹⁹ This means the client's case may be handled more expeditiously, which is one of the Convention's goals.²²⁰ Furthermore, economic efficiency is increased if the matter is resolved promptly.

SUMMARY.

In sum, ICARA's strength is that the Convention has worldwide recognition among a growing number of Contracting States, and the left-behind-parent now has an avenue of recourse in international child abduction situations. The Convention has been relatively effective since it was enacted in 1980,²²¹ particularly in view of the increase in

much more broadly, allowing children coming into their country to stay much more readily. This is a basic flaw in the carrying out of the Hague Convention. Congress requested that in carrying out the precepts of the convention, our country compare with other countries how the convention is applied, so as to have uniform application among the signatories. The *Tsarbopoulos* case and other recent 9th circuit case, *Blondin*, decided in early 2001, do just that. The difference makes all the difference in the application of the Hague Convention. The *Tsarbopoulos* case, in fact, has recently used at a judges forum to teach judges how to apply the Hague Convention, not the outdated, and poorly reasoned *Fredick* decision.

²¹⁷ Gauper, *supra* note 174.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ The Convention was codified into U.S. law in 1988.

number of children who have been returned to foreign countries after being abducted to the United States.

However, some U.S. Senators believe the problem of child abduction is an increasing problem. These Senators are concerned that many Contracting States are not in compliance with the Convention. Additionally, some family law practitioners have identified procedural weaknesses relating to how the Convention is implemented at home and abroad. Furthermore, the costs of bringing an ICARA action in a foreign country can be financially prohibitive.

This paper offered practical suggestions for legal practitioners who litigate ICARA cases. Some of the practical suggestions included a discussion of assistance available from the State Department, a review of the temporal limitations in bringing an ICARA action, and the use of procedural devices to expedite an ICARA petition.

Finally, it was suggested that ICARA could be improved with enhanced descriptions of how evidentiary rules and expedited procedures should be implemented. Some practitioners have asserted that in order to meet ICARA's goals to simplify and expedite the return of an abducted child, adjudicating authorities should authorize discovery through the use of affidavits and telephonic depositions in cases when witnesses and other evidence is located abroad. This change would reduce the financial burden of bringing an ICARA petition and assist in expediting the process.^{222, 223} Lastly, some practitioner's suggest ICARA's language should be amended to clearly authorize

²²² Gauper, *supra* note 174.

²²³ Rimov, *supra* note 184. The use of video conferencing is a viable alternative to affidavits and telephonic conferences. While expensive, video conferencing provides the fact-finder the opportunity to observe the witness, and is more closely comparable to live witness testimony.

the award of mandatory attorney's fees and expenses to the non-prevailing party, in hopes that potential abductors will be discouraged from engaging in such acts.