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USA: Law and Practice & Trends and Developments

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USA

Law and Practice

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Krauss Shaknes Tallentire & Messeri LLP (KSTM) is dedicated exclusively to the practice of matrimonial and family law, representing clients in all aspects thereof, including divorce proceedings, paternity disputes, and prenuptial and postnuptial agreements, as well as custody, access, and support issues. The firm often advises high net worth and celebrity clients in sensitive and complex family matters and represents clients in highly contested interstate and international family disputes, including proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Hague Convention on the Civil Aspects of International Child Abduction. KSTM attorneys have achieved landmark victories in federal district and appellate courts, in addition to creating significant new law protecting the interests of parents and children suffering from domestic violence. The firm and its attorneys are recognised consistently in the annual Chambers and Partners' High Net Worth guide as top ranked for family/matrimonial law. KTSM's offices are located in New York City and Greenwich, Connecticut.

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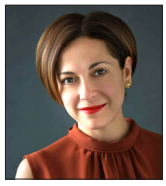
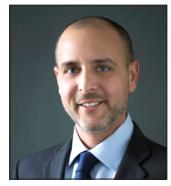


Valentina Shaknes is a founding partner at Krauss Shaknes Tallentire & Messeri LLP, who has practised exclusively in matrimonial and family law for nearly 20 years. Valentina represents clients in a variety of matrimonial matters (both domestic and international) involving equitable distribution and custody disputes, child and spousal support, and prenuptial and postnuptial agreements – with special expertise in international child abduction and custody disputes, including proceedings arising under the Hague Convention on the Civil Aspects of International Child Abduction. She is an active certified divorce mediator and a certified parent co-ordinator. Valentina is consistently ranked by Chambers and Partners' High Net Worth guide as a top family/matrimonial lawyer.



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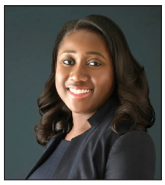

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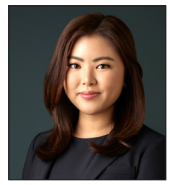

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1. The Care Provider's Ability to Take Decisions About the Child

1.1 Parental Responsibility

In the USA, a parent's right to make decisions about their child is protected by the Due Process Clause of the 14th Amendment to the US Constitution.

Although the exact term may vary across the 50 states of the USA, a parent's decision-making power with regard to a child is often referred to as "legal custody". A parent can have sole legal custody or joint legal custody with the other parent, which empowers the parent(s) to make important decisions affecting a child's life, including – but not limited to – a child's education, healthcare, religious upbringing, and extracurricular activities.

1.2 Requirements for Birth Mothers

A birth mother would automatically acquire parental rights or legal custody of the child. A birth mother can lose custody of her child to the authority of the state the mother gave birth in if a court determines that it is in the child's best interests and terminates or suspends the mother's parental rights. By way of example, a state can take protective custody of the child and commit guardianship to an authorised social services agency if parental rights are terminated owing to a finding of neglect, abuse, a newborn testing positive for drugs, etc.

1.3 Requirements for Fathers

A father's parental rights in the USA will depend on his relationship to the child's mother at the time of the child's birth. A father acquires parental rights over a child if the child was born of the marriage between the mother and father. In some states, including New York, a father acquires parental rights over a child if the child was born of a civil partnership between the mother and father.

Alternatively, parental rights can be acquired by unmarried fathers in other ways, including – but not limited to – by:

- being registered as the child's father on the birth certificate;
- obtaining a parentage/paternity order from a court (eg, an "Order of Filiation" in New York);
- entering into a custody agreement with the child's mother;
- obtaining a court order granting joint or sole legal custody; and
- entering into a marriage with the mother.

As regards parental rights for a father in a same-sex relationship, please see **1.4 Requirements for Non-genetic Parents**.

1.4 Requirements for Non-genetic Parents

There are various categories of non-genetic parents in the USA. Each category has different requirements for acquiring parental rights.

Adoption

US citizens who are at least 25 years old can legally adopt a child, subject to any additional requirements pursuant to specific state laws. Such requirements across various states throughout the USA regarding a person's eligibility to adopt a child include, but are not limited to, passing criminal background checks. In New York adoption is a legal proceeding whereby a person acquires the rights and responsibilities of a parent in all respects with regard to the child being adopted. Once the court grants an order of adoption, the parent and adopted child legally establish the relationship of parent and child.

Step-Parents

Step-parents who wish to acquire parental rights and responsibility for their step-children must formally adopt them. Once the step-children are adopted, the non-custodial parent no longer has any parental rights or responsibilities, including child support. Step-parent adoption is the most common type of adoption in the USA.

Same-Sex Relationships

In 2015, the US Supreme Court struck down all state bans on same-sex marriage, and legalised same-sex marriages in all 50 states. Same-sex couples can establish parental rights in various ways, including adoption, pregnancy, and surrogacy. In general, the biological parent automatically has legal custody of their child, and a child born into a marriage is subject to both spouses' legal custody.

Surrogacy

Gestational surrogacy is the process by which a woman agrees to become pregnant via in vitro fertilisation and embryo transfer and to carry and deliver a baby for intended parents, who will be declared to be the legal parents of the child immediately upon birth. Surrogacy is an important family-building option for many families experiencing fertility issues and/or for LGBTQ families.

The USA does not have federal laws regarding gestational surrogacy and thus each state has its own laws (or lack thereof), which vary widely from state to state. In New York, the Child Parent Security Act became law in 2021, which allows for compensated gestational surrogacy pursuant to surrogacy agreements and for parentage orders to be granted prior to the birth of a child. New York law is clear that this only applies to gestational surrogacy, whereby the surrogate's own egg is not used to conceive the subject child. Surrogacy arrangements in which the surrogate is biologically related to the child remain unenforceable in New York and are legally prohibited if the surrogate is being compensated.

1.5 Relevance of Marriage at Point of Conception or Birth

Whether the parents are married at the point of the child's birth, rather than at the point of conception, is relevant in the process of obtaining parental responsibility. In general, if a child is born of the marriage (and, in some states, born of a civil/domestic partnership), the parents of that child automatically obtain parental responsibility for the child.

Under New York law, a child born to parents who are married at the time of the child's birth is presumed to be "the legitimate child of both parents", which is also referred to as the "presumption of legitimacy". In addition, a recent decision by a New York Appellate Division Court held that a child's legitimacy is also presumed for a child born of parents who were not married at the time of the child's birth but who subsequently enter into a civil or religious marriage (see Tiwary v Tiwary, 189 AD 3d 518 (2d Dep't 2020)).

1.6 Same-Sex Relationships

See **1.4 Requirements for Non-genetic Parents**.

1.7 Adoption

See **1.4 Requirements for Non-genetic Parents**.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

When one parent wishes to relocate a child permanently to another country, the relocating parent generally needs the consent of the other

parent and/or any other individual who is a legal guardian of the child.

2.2 Relocation Without Full Consent

If a parent wishes to move a child of the family permanently out of the family home to a new country and they do not have the written consent of the non-relocating parent or legal guardian, the relocating parent may still seek to relocate by applying to a court with jurisdiction over the child. Under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), the court that has jurisdiction over the child is the court in the state where the child has resided for a period of six months or more. The court may grant permission for the relocation if it determines that the move is in the child's best interest.

2.3 Application to a State Authority for Permission to Relocate a Child

2.3.1 Factors Determining an Application for Relocation

When a relocating parent cannot obtain the consent of the non-relocating parent or guardian, they must apply to the relevant state court for permission to relocate. Courts across different states consider various factors when evaluating such requests, all anchored by the paramount concern: the best interest of the child.

In evaluating the request, the court typically considers the following:

- the relocating parent's stated reasons for wanting to move;
- whether the move would significantly enhance the child's educational or financial circumstances to the extent that it outweighs the potential disruption to the child's relationship with the non-relocating parent or guardian;
- the child's age, their relationships with any siblings who are not relocating, and their overall family structure and support in both locations; and
- each parent's capability to meet the child's overall needs, including their ability to foster and facilitate the child's relationship with the other parent or legal guardian.

By way of example, in New York, the relocating parent must make a prima facie case in their application to the court. New York courts often refer to the precedent set by Tropea v Tropea, 87 NY 2d 727, 665 NE 2d 145 (1996), and its progeny to evaluate the specifics of each case. If the court determines that a prima facie case has been established, a hearing will be held where both parties can present evidence supporting their positions on the proposed relocation. Depending on the child's age, the court will appoint an attorney to advocate for the child. Additionally, the presiding judge may arrange to speak with the child in chambers to determine the child's preference regarding which parent they would like to live with. After considering all the evidence, including the child's expressed wishes, the court will issue a decision.

In Massachusetts, if the party seeking relocation is the sole physical custodian of the children, the judge must consider the request under a two-prong test:

- first, whether there is a good reason for the move – ie, a real advantage; and
- second, whether the move would be in the best interests of the children.

Key precedents on relocation from other states include:

- Tropea v Tropea, 87 NY 2d 727, 665 NE 2d 145 (1996) – New York;
- Altomare v Altomare, 77 Mass App Ct 601, 933 N.E.2d 170 (2010) – Massachusetts; and
- in re Marriage of Burgess, 13 Cal 4th 25, 913 P 2d 473 (1996) – California.

2.3.2 Wishes and Feelings of the Child

The courts will generally consider the wishes and feeling a child as an important. However, this is not dispositive and is just one of many factors to be considered.

2.3.3 Age/Maturity of the Child

In New York, there is no set age for a child's expressed wishes and feelings to be the determining factor. The court retains final say over such matters until a child reaches 18, but may allow a child to decide under certain circumstances, taking into account the child's age, intelligence, and maturity level. The older and more mature the child is, the more weight will be given to the child's wishes and feelings. As a practical matter, a typical teenage child will be able to determine their own outcome.

2.3.4 Importance of Keeping Children Together

The courts generally favour keeping children together. However, there are exceptions, particularly where children are deemed old enough to decide with which parent they want to reside.

2.3.5 Loss of Contact

Significant weight is placed on the potential loss of contact between the children and the left-behind parent. The more involved the left-behind parent is in the children's lives, and the more parenting time they exercise with the children, the less likely relocation will be permitted. Conversely, if a left-behind parent rarely sees the children or is not involved in their day-to-day lives, the more likely relocation will be permitted. The court may also consider the extent to which lost contact can be mitigated, such as by granting the left-behind parent additional access during holidays and vacations.

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

Applications for relocation are very fact-specific, and no single reason for relocation would be viewed most favourably as a general matter. Some reasons that would engender sympathy by a court, however, would include where relocation is alleged to be necessary to:

- support the child financially;
- improve the child's educational opportunities – for example, where the child has special educational needs that are not adequately addressed by the child's current school district; and
- increase the parent's and child's access to emotional and physical support systems – for example, by moving closer to family members.

2.3.7 Grounds for Opposition to Relocation

There are no specific grounds for opposing a relocation. If a parent's custodial rights would be adversely affected by a relocation, they can set forth various reasons for opposition, with a focus on the child's best interests as the best strategy. Generally, courts are most sympathetic to opposition based on the decrease of frequent and meaningful access between the non-applicant and the child as a result of the relocation, and would consider the degree to which such a decrease would negatively impact the child and/or whether suitable alternative arrangements could be made to reduce the negative impact. The more significant access or parenting time that the non-applicant exercises with the child,

and the more involved the non-applicant is in the child's life, the more likely a court would find that a relocation is not in the child's best interests – although no factor alone is dispositive.

2.3.8 Costs of an Application for Relocation

The costs of an application for relocation will vary greatly depending on the facts and circumstances. Court fees for filing an application are generally not prohibitive. On the other hand, representation by competent counsel can cost tens of thousands of dollars or more and counsel will generally charge fees pursuant to an hourly billable rate.

Additionally, a litigant may need to hire an expert witness or witnesses to file report(s) with the court and testify with regard to any number of issues. Each expert witness will cost several thousand dollars and cause the other party to hire an expert witness to provide a different opinion. By way of example, an application based on better educational opportunities for the child would likely necessitate an expert in education to testify as to the educational benefits of the relocation, and the opposition would need an expert to testify to an opposing viewpoint.

A worthwhile consideration in many jurisdictions is that an application for relocation is considered a custody modification proceeding. In New York, for example, a court has the discretion to award the less-monied party counsel and expert fees to be paid by the more-monied party pursuant to Section 237(b) of the Domestic Relations Law and/or Section 651 of the Family Court Act. Indeed, in New York there is a statutory presumption that fees be awarded to the less-monied party, subject to the discretion of the court based on consideration of the facts and circumstances.

2.3.9 Time Taken by an Application for Relocation

Generally, there is no set time for relocation proceedings – although courts will generally prioritise relocation and other custody-related matters for adjudication, so as not to leave children and their parents or caretakers in limbo. The duration of proceedings will depend on many factors, including the witnesses and evidence required, and the schedule and availability of the court.

2.3.10 Primary Caregivers Versus Left-Behind Parents

No presumption exists in favour of a primary parent or caregiver or the left-behind parent when relocation applications are considered. The best interest of the child is always the paramount consideration, which is determined by weighing the various facts and circumstances presented that are relevant to the child's welfare, including:

- the reasons for the proposed relocation; and
- the effects that the relocation would have on the child's relationship with the left-behind parent.

The weight afforded each factor will depend on the specific facts and circumstances of each case, as – ultimately – will the court's decision.

2.4 Relocation Within a Jurisdiction

Whether a proposed relocation is within the same area, to a different part of the state, or to different country, the same standard applies, which is generally the best interests of the child. The distance of a proposed relocation, however, is a major factor as it will determine the extent to which the proposed relocation will adversely affect the non-applicant's access to the child. The less effect on the other parent's relationship with the child, the more likely the court will allow the relocation. By way of example, if the pro-

posed relocation is to "the other side of town" (and this will minimally affect the non-applicant's ability to spend time with the child), a court will generally allow the relocation. If, however, the proposed relocation is of significant distance – such as to a different part of the state or to a different country – to the extent that the relocation significantly affects the non-applicant's access or parenting time with the child, then the court will be less likely to allow the relocation, subject to its decision as to whether the proposed relocation is in the child's best interests following consideration of the relevant facts and circumstances.

3. Child Abduction

3.1 Legality

In the USA, it is a federal criminal offence – punishable by a fine or up to three years in prison – to remove a child under the age of 16 from the USA with the intent to obstruct the lawful exercise of parental rights. The term "parental rights" refers to the right of physical custody of a child (including joint and sole custody) and whether such rights have been determined by a court order or by a binding agreement between the parents or whether they arise by operation of law.

In addition to this federal law, all states in the USA have enacted their own laws making it a crime to remove the child from the state without a court order or without the permission of the other parent, and with the intention of defeating such parent's custodial rights. In New York, for example, it is "custodial interference in the first degree" for a parent (or another relative) to take a child under the age of 16 with the intent to keep the child away permanently or for a protracted period of time. Custodial interference in the first degree is a Class E felony punishable by up to four years in prison.

Similarly, in California, any "person" who takes a child and "maliciously deprives a lawful custodial of a right to custody… or visitation" may be prosecuted for "deprivation of custody of a child or right to visitation" (Section 278.5 of the California Penal Code). Depending on the degree, deprivation of custody is punishable by up to three years in prison and a fine of up to USD10,000.

3.2 Steps Taken to Return Abducted Children

The USA is a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"). The 1980 Hague Convention is a multilateral treaty to which more than 100 other countries are signatories. It is designed to protect children internationally from the harmful effects of their wrongful removal by establishing an expedited process for the courts or administrative agencies of the country to which the child is removed to return the child to the child's home country ("state of habitual residence"). The 1980 Hague Convention is not a mechanism for resolving custody disputes and, in that expedited proceeding, custody issues are not to be addressed. Indeed, the fundamental purpose of the 1980 Hague Convention is to ensure – by promptly returning the child – that custodial issues are decided by the country of the child's habitual residence, rather than by the country to which the child was abducted by a parent.

Each of the signatory member states to the 1980 Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in

what are known as both "incoming" and "outgoing" cases. A proceeding pursuant to the 1980 Hague Convention may be brought directly in the courts of a member state or through the Central Authority of the state of habitual residence, which co-ordinates with the Central Authority of the country the child was taken to. Cases pursuant to the 1980 Hague Convention are brought in the country in which the children are located, seeking return to the state of habitual residence.

In the USA, the 1980 Hague Convention is implemented through the International Child Abduction Remedies Act (ICARA), a federal law enacted by the US Congress in 1988. Section 9001(a)(4) of ICARA mandates a prompt return of children "wrongfully removed or retained" within the definition of the 1980 Hague Convention, unless one of the narrow exceptions to the return applies. ICARA further establishes a uniform process for "prompt return" and directs that states must act "expeditiously" to return children to their "state of habitual residence". The Office of Children's Issues within the Department of State serves as the Central Authority for the US government.

If a child is removed from the USA without the appropriate consent or an order of the court permitting such removal, the left-behind parent can file a petition for the return of the child under the 1980 Hague Convention, provided that the country to which the child has been removed is a signatory to the 1980 Hague Convention. The Office of Children's Issues will assist in locating the child and with transmitting the request for the return of the child to the country where the child is located and with locating counsel in such country.

If the country to which the child has been taken is not a signatory to the 1980 Hague Convention (eg, China, Russia or India), the Office of Children's Issues may still be able to assist with the return of the child. However, this process if far more complicated and the resources of the Office of Children's Issues are more limited.

3.3 Hague Convention on the Civil Aspects of International Child Abduction

When a child is taken to the USA from another country that is a signatory to the 1980 Hague Convention, the left-behind parent seeking the return of the child will need to file a petition under the 1980 Hague Convention. The petition can be filed in the child's state of habitual residence and will be transmitted through such country's Central Authority to the USA. Pursuant to the 1980 Hague Convention, a proceeding for the return of the child must be filed in the country where the child is located.

The Office of Children's Issues maintains a network of attorneys who provide legal assistance to the parents seeking the return of their children and will assist with obtaining legal representation. Depending on the applicant's financial circumstances, these attorneys may accept incoming 1980 Hague Convention cases for a reduced fee or no fee. Eligible Hague applicants may request pro bono (no fee) or reduced fee legal assistance and the Office of Children's Issues will also assist with interpreting. There is, of course, no guarantee that an attorney will volunteer to take the case. In addition, the Office of Children's Issues will provide a list of full-fee attorneys upon request. These attorneys can work on incoming 1980 Hague Convention cases and some may work on non-Hague cases as well.

Ultimately, a petition for the return of the child under the 1980 Hague Convention must be filed with the court. In the USA, state and federal courts have concurrent jurisdiction to hear such

cases and make a determination. The courts in the USA take these proceedings very seriously and will order the return the child unless the parent opposing such return can establish one of the narrow defences. The 1980 Hague Convention provides five narrow exceptions to return:

- one year and well settled defence – one year has passed and the child is now well settled in the new environment;
- consent or acquiescence – the parent seeking the child's return consented or otherwise acquiesced to the removal or retention;
- grave risk or intolerable situation – the return poses a grave risk that the child will be exposed to "physical or psychological harm" or otherwise placed into an "intolerable situation";
- mature child objection – the child objects to return and is mature enough to have their objection considered; and
- human rights and fundamental freedoms – the return contravenes basic human rights and fundamental freedoms.

All of these defences are narrowly construed and the burden is on the parent opposing the return to establish that one of the defences applies.

The proceedings under the 1980 Hague Convention are always expedited and take priority over other cases. Even though the 1980 Hague Convention calls for the child's return within six weeks, in practice, these cases may take several months (and sometimes longer). Free legal assistance is not routinely available to the parents opposing the return and legal costs may become quite high. Moreover, pursuant to Section 9007 of ICARA, although the parent seeking the return of the child is initially responsible for all costs in connection with such petitions, including travel and legal costs), if the return is granted, ICARA permits the court to reallocate all such costs to the respondent.

For further information, see the May 2022 Report of the US Department of State on Compliance With the Hague Convention and the HCCH Global Report – Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction Convention.

3.4 Non-Hague Convention Countries

This is not applicable in this jurisdiction. The USA is a signatory to the 1980 Hague Convention.

Trends and Developments

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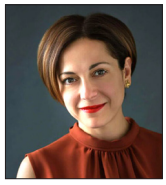

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New Developments at the Intersection of Domestic Violence and the Hague Convention on International Child Abductions: a Historic Forum in South Africa

From 18 June 18 to 21 June 2024, the Permanent Bureau of the Hague Conference on Private International Law (*Hague Conference – Conférence de La Haye*, or HCCH) held the first-ever Forum on Domestic Violence and the Related Operation of Article 13(1)(b) of the Hague Convention on Civil Aspects of International Child Abduction (the "Forum on Domestic Violence", or "the Forum"). Co-hosted by the South African government and the University of Pretoria's Centre for Child Law in Sandton, South Africa, the Forum brought together more than 100 participants, including legal practitioners, judges, psychological experts, policymakers and advocates, along with – perhaps most importantly – survivors of domestic violence who shared their experiences living through a Hague Convention proceeding. This historic event focused on the intersection of domestic violence and Article 13(1)(b) of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the "1980 Hague Convention"), which allows a court to refuse the return of a child if such a return would expose the child to a "grave risk of physical or psychological harm".

The significance of the Forum cannot be overstated. Domestic violence in the context of the 1980 Hague Convention presents complex challenges for the legal system. The original salutary goal of the 1980 Hague Convention – namely, to return children wrongfully removed from their home country – seemed completely unobjectionable. Yet, in practice, when children are moved cross-border to protect them from abuse, the wisdom of their return becomes questionable.

Indeed, Article 13(1)(b) cases now represent the majority of the 1980 Hague Convention cases that go to trial, and harm from domestic violence is invoked in the great majority of those. Although the drafters of the 1980 Hague Convention anticipated that the typical abductor would be a non-custodial parent disappointed by or fearing an adverse custody decision, practice has shown that more than 75% of the taking parents are mothers – the vast majority of whom (94%) are the primary carers of their children.

Domestic violence is inherently complex as compared to other forms of violence. Not only are its victims often reluctant to report their abusers, but cultural norms and societal attitudes play a crucial role in what counts as impermissible violence between family members in the first place, as well as how a country responds to it. While any modern society considers certain acts – such as forced sex or the corporal punishment of women or children –criminal in other contexts, it may deem them acceptable if they happen at home, between members of a family.

Thus, for a country to provide victims of domestic violence with effective protection, there must be a proper recognition of the problem not only at the national level – leading to the adoption of laws specifically tailored to address domestic violence – but also an implementation and proper enforcement of such laws at the local level, through the court system, state enforcement and social services agencies. Officers of these systems must all be trained to recognise and understand the problems and complexities of domestic violence, and be willing and equipped to help victims of this abuse.

However, the system for addressing domestic violence varies from country to country, often dramatically. This variation poses an especially difficult challenge for courts in international child abduction cases tasked with ordering measures designed to protect a child upon being returned to the child's home country. The issuing court often lacks the necessary understanding of the legal system in the child's country of habitual residence and may be powerless to enforce these measures once the parties leave its jurisdiction.

This article provides a brief overview of the 1980 Hague Convention and the Article 13(1)(b) defence in the context of domestic violence. It also highlights the main points of discussion and the takeaways from the Forum.

1980 Hague Convention and Article 13(1)(b) defence

The 1980 Hague Convention is a multilateral treaty to which the USA and more than 100 other countries are signatories. It is designed to protect children internationally from the harmful effects of their wrongful removal by establishing an expedited process for the courts or administrative agencies of the country to which the child is removed to return the child back to the child's home country ("state of habitual residence"). The 1980 Hague Convention is not a mechanism for resolving custody disputes and, in that expedited proceeding, custody issues are not to be addressed. Indeed, the fundamental purpose of the 1980 Hague Convention is to ensure that – by promptly returning the child – custodial issues are decided by the child's state of habitual residence, rather than by the country to which the child was abducted by a parent.

Each of the signatory member states of the 1980 Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in what are known as both "incoming" and "outgoing" cases. In the USA, the Office of Children's Issues within the Department of State serves as the Central Authority for the US government.

The 1980 Hague Convention requires that a child determined to have been "wrongfully removed or retained" be promptly returned. The taking or retention is considered "wrongful" if the petitioner proves by a preponderance of the evidence that:

- the child was removed from or retained outside the child's country of habitual residence;
- the removal or retention was in breach of the petitioner's custody rights; and
- those custody rights were actually exercised at the time of removal or retention or would have been exercised but for the removal or retention.

If this burden is met, the 1980 Hague Convention requires that the child be returned.

Despite the emphasis on the return, the 1980 Hague Convention also recognises that "the interests of children are of paramount importance". As the Explanatory Report to the 1980 Hague Convention explained, "the interest of the child in not being removed from its habitual residence… gives way before the primary interest of any person in not being exposed to physical or psychological danger…". Guided by this consideration, the 1980 Hague Convention allows a court of a country to which a child has been wrongfully removed to refuse the mandatory return under certain circumstances, including – in the Convention's Article 13(1)(b) – where such return would expose the child to a "grave risk of physical or psychological harm or otherwise place the child in an intolerable situation". This is known as the "Article 13(1)(b) defence" or the "grave risk of harm" defence.

Most cases invoking the "grave risk of harm" defence arise in the context of domestic abuse. In the USA, the International Child Abduction Remedies Act (ICARA) – through which the 1980 Hague Convention is implemented – adds an extra burden on the parent opposing the return, requiring that the grave risk of harm be proven by "clear and convincing evidence". It is a high bar, which until recently could be met only in cases of severe physical abuse directed at the child. The USA is the only signatory to the 1980 Hague Convention to impose this heightened evidentiary standard.

Domestic violence in the USA: a complex legal landscape

Domestic violence is a complex, persistent and pervasive problem. The response to it across the country is complicated, in part, by the lack of a uniform definition and understanding of what constitutes domestic violence. Mental health professionals define domestic violence as a long-standing pattern of control and intimidation in the context of an intimate relationship. It is recognised that this dynamic in a relationship is created and maintained through multiple vehicles of control across many areas of the victim's personal life, including physical, sexual, emotional and psychological abuse, medical neglect, financial and legal manipulation, social isolation, threats to a child of the relationship, and threats to deploy others in service of the abuser's goals.

In contrast, there is no one accepted legal definition in the USA. Each state uses its own standards and procedures for addressing domestic violence. In many US states, the legal definition of domestic violence is narrowly focused on physical abuse and thus neglects other forms of control and intimidation, such as emotional, psychological or financial abuse. These forms of non-physical abuse are often harder to prove in court, yet they are just as damaging to victims, particularly when children are involved. The variability in state definitions and the often-narrow focus on physical violence contribute to the legal system's inadequate response to the complexities of domestic violence.

California, for example, has one of the broadest definitions of domestic violence, which includes physical harm, the threat of harm, and

behaviours such as harassment, stalking, and the destruction of personal property. The state's definition also encompasses both current and former spouses, cohabitants, and individuals in dating relationships, as well as a child of a party. Similarly, in Florida, domestic violence is defined as any assault, battery, sexual assault, or other forms of physical harm between family or household members. Florida law also allows for protective orders based on the reasonable belief of imminent danger of becoming the victim of any act of domestic violence. This takes into account numerous factors, including prior attempts to harm and patterns of abusive, threatening, intimidating or controlling behavior.

Even though South Carolina's definition of domestic violence is more limited, focusing – like Florida – primarily on physical harm or the threat of harm between household members, it does also consider a reasonable fear of imminent peril (although it does not explicitly include non-physical forms of abuse such as emotional or psychological coercion). Conversely, Alabama's legal definition is more restrictive still, breaking domestic violence down into three statutory degrees. Alabama's first two degrees of domestic violence are the most restrictive and extreme, primarily emphasising physical violence and specific criminal acts such as assault or sexual abuse, with less emphasis or recognition to emotional or physical violence. Its third degree of domestic violence recognises not only physical injury, but also menacing (or the threat of physical injury), and the victim can be connected to a defendant merely by dating. And New York does not have any explicit statutory definition of domestic violence at all – although it is recognised through various family offences and real property matters.

The US legal system's historical tendency to minimise or overlook allegations of domestic violence, especially when it involves non-physical forms of abuse, has further compounded these issues. Courts often require evidence of severe physical harm to the child, ignoring the broader spectrum of abuse that can have equally devastating effects on the victim and their child.

The lack of uniformity leads to a patchwork of protections that can vary dramatically depending on the jurisdiction. The inconsistency in the definition of domestic violence is even greater at an international level, where it is further complicated by the divergent legal, social and cultural norms and standards. This lack of common understanding poses significant challenges domestically and internationally in the context of the 1980 Hague Convention, with the outcome of a particular case often depending on which US state the case is litigated and which country constitutes the child's "state of habitual residence". In essence, the same victims subjected to the same abuse may or may not be protected depending in large part on the forum and the victims' country of origin.

The legal community has also been slow to recognise the impact of domestic violence on children, especially in cases where the children are not direct targets of the violence but are exposed to it. This lack of recognition has contributed to the misguided reliance on protective measures in 1980 Hague Convention cases, even when domestic violence is a factor.

Moreover, until recently, even after finding a grave risk of harm, the US courts required that the parent opposing the return prove that there were no "protective measures" that would mitigate such risk. Protective measures, also frequently referred to as "ameliorative measures"

in court decisions and scholarly articles, are usually in the form of voluntary undertakings by the left-behind parent. They typically consist of promises to provide financial assistance, stay away from the other parent and the child, and not co-operate in the criminal prosecution of the "abductor" parent. Such promises may be reduced to an order issued by the court deciding the return petition, with mirror orders in the country of the child's habitual residence. The insistence on protective measures after finding a grave risk of harm underscores the emphasis US courts placed on granting the return petition. The Permanent Bureau's Guide to Good Practice on Article 13(1)(b) also strongly recommends protective measures when considering returning children to their habitual residence.

Research shows, however, that abusers are prone to recidivism and are likely to ignore or defy interventions (such as court orders) intended to mitigate the recurrence of abuse. Many domestic violence offenders revert to their abusive behavior within months following law enforcement or social service interventions. Thus, reliance on protective measures to facilitate return in cases involving domestic violence despite a finding of grave risk reflects a fundamental lack of understanding of the complexity of domestic violence and the needs of its victims (the children and their caretaker parents), putting children in real danger.

Three studies of the effectiveness of protective measures provide ample reason to be hesitant to ever rely on such measures. By way of example, the Reunite International Child Abduction Centre's study of cases in the UK revealed that two-thirds of the undertakings issued – including all of those focused on a child's safety upon return – were not implemented in the country of habitual residence (see The Outcomes for Children Returned Following an Abduction (Reunite International Child Abduction Centre, UK, 2003)). Even when judges issued mirror orders in the child's home country, only one in five of those mirror orders was implemented as planned.

Research into US incoming cases has also revealed that judges and attorneys were skeptical of the enforcement of these orders by another country's courts and that mothers who returned with their children to the country of habitual residence would frequently face violations of previously agreed undertakings by their abusive ex-husbands or find that mirror orders were seldom enforced. Finally, in the recent online survey conducted by two UK charities, mothers from a number of countries reported that protective measures – even those in which mirror orders were obtained – were not enforced or were very difficult to enforce.

Fortunately, in the USA, there has been a significant shift away from reliance on protective measures. In 2022, the US Supreme Court recognised the complexity of domestic violence and the limitation of US courts to issue orders that would protect victims of domestic violence overseas. In the seminal case of Golan v Saada, 142 S Ct 1880 (2022) ("Golan"), the US Supreme Court rejected the appropriateness of protective measures in cases involving domestic violence: "A court may decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse of a child is one example of an intolerable situation. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated. A court may also decline to consider imposing ameliorative

measures where it reasonably expects that they will not be followed."

Main takeaways from the forum on domestic violence

Several main themes emerged in discussion at the Forum.

First, while there was no immediate agreement on whether victims of domestic violence and their children are already sufficiently protected under the 1980 Hague Convention, there was a uniform recognition that domestic violence harms and endangers children. Decades of research have clearly established that exposure to domestic violence, including adult-to-adult violence, has significant negative physical and psychological outcomes for children. These outcomes include depression, anxiety, sleep disturbances, lower social and emotional competence, poorer academic performance, and a higher tolerance for aggression and violence. The effects are particularly severe when the violence is directed at the child's primary caregiver.

Second, the fragmented legal framework results in a child's exposure to domestic violence being viewed differently depending on the location in which the case is heard. Some member states may prioritise the child's well-being and recognise the harmful impact of witnessing domestic violence, whereas others may focus solely on direct physical harm to the child. This inconsistency can lead to vastly different outcomes, even when the facts of the case are similar. By way of example, if a protective measure is issued in one state with a broad definition of domestic violence, but the child is returned to a state or country with a narrower definition or weaker enforcement mechanisms, the protection may be rendered ineffective. This disconnect between different legal jurisdictions can leave victims and their children vulnerable to ongoing abuse.

This is a highly unsatisfactory outcome. There is no doubt that a uniform definition of domestic violence in the 1980 Hague Convention context (both nationally and internationally) – a definition which is expansive enough to encompass all of the vehicles of abuse, including physical, psychological, emotional, financial and legal – would be of great benefit to the implementation of the Article 13(1)(b) defence.

Third, the appropriateness of reliance on protective measures is another issue that was discussed in detail at the Forum. Although no consensus was reached, given the prevalence of the protective measures, it was an important conversation to begin. The international community should take note of the US Supreme Court's decision in Golan and prioritise the safety of the children over their return. As Secretary General Christoph Bernasconi specifically acknowledged in his closing remarks, "it is not about the sheer number of returns but really about the correct application of the [1980 Hague] Convention". Given the volume of evidence that protective measures are ineffective and do not adequately protect the victims, reliance on these measures is misplaced and should be discontinued.

The journey toward adequately protecting victims of domestic violence in international child abduction cases is far from complete. Importantly, the conversation will continue in 2025, when the Forum will convene again – this time hosted by the Brazilian government. Ongoing education, legal reform, and societal changes are essential to ensuring that the legal system can effectively address these issues and protect those most vulnerable, while balancing important competing interests.

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