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The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction

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The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction

Maryl Sattler*

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I. Introduction

On September 28, 2009, thirty-eight year old Christopher Savoie made national news when he was arrested for child abduction just outside the U.S. Consulate in Fukuoka, Japan.¹ Savoie, a Tennessee resident and native, was charged with kidnapping for re-abducting his two children after his ex-wife detained the children in Japan in violation of a U.S. custody order.²

While Savoie's actions were certainly extreme, his desperation was not unwarranted.³ As the U.S. Department of State website on International

1. See Minoru Matsutani, *Custody Laws Force Parents to Extremes*, JAPAN TIMES, Oct. 10, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20091010f1.html> (last visited Nov. 16, 2010) (explaining the facts of the Savoie matter) (on file with the Washington and Lee Law Review); Sammy Rose Saltzman, *Christopher Savoie Follows Abducted Children to Japan, Gets Arrested*, CBSNEWS.COM, Sept. 29, 2009, http://www.cbsnews.com/8301-504083_162-5351308-504083.html (last visited Nov. 16, 2010) (same) (on file with the Washington and Lee Law Review).

2. See Michael Inbar, *U.S. Dad Jailed in Japan in Child Custody Battle*, MSNBC.COM, Sept. 30, 2009, http://www.msnbc.msn.com/id/33086856/ns/today-parenting_and_family (last visited Nov. 16, 2010) (explaining the facts of the Savoie matter) (on file with the Washington and Lee Law Review).

3. Cf., e.g., Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 59 (2006) (advising "aggressive measures in order to avoid removal of a child from the country" when parental abduction is suspected because "applications for return of children in international abductions from the United States likely will not have a satisfactory outcome"); U.S. Dep't of State, *International Parental Child Abduction Japan*, U.S. DEP'T OF STATE, http://travel.state.gov/abduction/country/country_501.html (last visited Nov. 16, 2010) ("In view of the difficulties involved in seeking the return of children from Japan to the United States, it is of greatest importance that all appropriate preventative legal measures be taken . . . if there is a possibility that a child may be abducted to Japan.") (on file with the Washington and Lee Law Review).

Child Abduction explains, "[t]he Department of State is not aware of any case in which a child taken from the United States by one parent has been ordered returned to the United States by Japanese courts, even when the left-behind parent has a United States custody decree."⁴ Not only did Savoie, who had been granted full custody of the children in U.S. court, have little hope of enforcing his custodial rights in Japanese court, it was unlikely that he would be granted visitation even within Japan's borders.⁵

Japan's philosophy of child custody after divorce is a far cry from the general American policy favoring continued contact between the child and both parents whenever possible.⁶ In Japan, the emphasis following a divorce is on a "clean break" for all parties involved.⁷ In over ninety percent of cases, this means that the divorced father must make a lifelong break not only from his former wife, but also from his children.⁸

4. U.S. Dep't of State, *supra* note 3 (emphasis added).

5. See Joint Press Statement from Canada, France, UK, and the United States (May 21, 2009), available at http://travel.state.gov/pdf/2009_symposium_on_ipca_and_japan_joint_press_statement.pdf ("The left-behind parents of children abducted to or from Japan have little realistic hope of having their children returned and encounter great difficulties in obtaining access to their children and exercising their parental rights and responsibilities."); U.S. Dep't of State, *supra* note 3 ("[I]n cases of international parental child abduction, foreign parents are greatly disadvantaged in Japanese courts, both in terms of obtaining the return of children to the United States, and in achieving any kind of enforceable visitation rights in Japan."); cf. *id.* (explaining that even within Japan, "compliance with [Japanese] Family Court rulings is essentially voluntary, which renders any ruling unenforceable unless both parents agree").

6. See Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1808-10 (2007) [hereinafter Weiner, *Inertia and Inequality*] (explaining that "partnership ideology" in American family law is partially responsible for the emphasis on "the importance of both parents' involvement in a child's life and the obligation of parents to share rights and responsibilities to the extent possible"); see also, e.g., *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 46 (Cal. Ct. App. 1998) (explaining that the only exception to "the public policy of California to assure minor children 'frequent and continuing contact' with both parents after the parents' separation or dissolution of marriage" is where "contact 'would not be in the best interests of the child'" (quoting CAL. FAM. CODE § 3020 (1997))).

7. See Mari Yamaguchi, *Divorced Fathers Fight for Right to See Children*, JAPAN TIMES, Oct. 10, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20091010f2.html> (last visited Nov. 16, 2010) (explaining that it is common in Japan for the non-custodial parent to completely lose contact with the children, often permanently) (on file with the Washington and Lee Law Review); Kyung Lah et al., *American Jailed in Japan for Trying to Reclaim His Children*, CNN.COM, Sept. 29, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/09/29/japan.father.abduction/index.html> (last visited Nov. 16, 2010) ("Japanese family law follows a tradition of sole custody divorces. When a couple splits, one parent typically makes a complete and lifelong break from the children.") (on file with the Washington and Lee Law Review).

8. See Yamaguchi, *supra* note 7 (explaining that Japanese courts almost always grant

Six months prior to his arrest, Savoie asked a Tennessee court to prevent the children from going to Japan for the summer.⁹ The children's mother had repeatedly threatened to cut Savoie off from his children by taking them to Japan, and Savoie was concerned that they would not return.¹⁰ The court ruled in favor of the mother, and released the children's passports to her to use solely for what was supposed to be a summer vacation.¹¹ The court justified its decision by insisting that the risk of losing alimony and child support if she absconded with the children would be sufficient to ensure compliance with the court's order.¹² Savoie discovered that the children were missing when the children's school called to report their absence on the first day of classes.¹³ Panicked, he contacted his ex-wife's parents, who confirmed his worst fear: The children were with their mother in Japan and would not be returning.¹⁴

While the situation in Japan is illustrative, Japan is not the only destination country from which a parent would have great difficulty recovering a child who had been abducted.¹⁵ A 2001 survey conducted by the American Bar Association found that children abducted by their parents were taken to a wide variety of countries.¹⁶ The ninety-seven parents who participated in the survey had missing children known or suspected to be in forty-six different countries. Approximately one-third of the reported countries were in Latin America; an additional one-fourth were Muslim countries.¹⁷ While the relatively small sample size of the study makes it difficult to draw conclusions based on these numbers, it is nonetheless clear that Japan is not the only safe haven for abductors.¹⁸

the mother sole custody of the children following a divorce).

9. See Inbar, *supra* note 2 (explaining the facts of the Savoie matter).

10. *Id.*

11. See Nashville News Channel Five, *Ex-Wife Abducts Two Children, Disappears to Japan*, NEWSCHANNEL5.COM (Sept. 21, 2009), <http://www.newschannel5.com/Global/story.asp?S=11171461> (last visited Nov. 16, 2010) (explaining the facts of the Savoie matter) (on file with the Washington and Lee Law Review).

12. *Id.*

13. See Lah et. al., *supra* note 7 (explaining the facts of the Savoie matter).

14. *Id.*

15. See Janet Chiancone, Linda Girdner & Patricia Hoff, *Issues in Resolving Cases of International Child Abduction by Parents*, JUV. JUST. BULL., Dec. 2001, at 1, 4 (explaining that recent child abductions have "occurred to locations throughout the world").

16. *Id.* at 3.

17. *Id.* at 4.

18. See *id.* (explaining that children abducted from the United States are known or believed to be located in a number of nations across the globe).

The question of whether to permit one parent to relocate with a child internationally over the other parent's objection is a difficult one, regardless of whether the issue is a temporary summer stay or a permanent move.¹⁹ Although courts have considered the problem of interstate relocation at length, less has been written on the topic of international moves. Clearly, international relocation presents unique concerns that do not arise even in a cross-country move.²⁰ Because the reach of an American court does not extend within the borders of a foreign country,²¹ an international relocation presents a risk that the moving parent will violate the custody order and attempt to block the other parent's access to the child.²² Thus, the problems of international relocation and international child abduction²³ are often interrelated.²⁴

19. See Elizabeth Bach-Van Horn, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIM. LAW. 171, 173 (2008) (explaining that relocation disputes require courts to "balanc[e] dueling rights: the right of a custodial parent to move freely . . . against the right of the noncustodial parent to maintain a close relationship with the child while remaining in the same place"); Weiner, *Inertia and Inequality*, *supra* note 6, at 1749 (characterizing relocation disputes as "zero-sum contests because the parents' positions seem irreconcilable").

20. See *Condon v. Cooper* (*In re Marriage of Condon*), 73 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1998) (explaining that international relocation cases present unique problems of culture, distance, and jurisdiction); Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 265-66 (1999) ("International relocations present unique jurisdictional problems in addition to the other factors influencing the outcome of these cases.").

21. See *Condon*, 73 Cal. Rpt. 2d at 42 (explaining that "California court orders governing child custody lack any enforceability in many foreign jurisdictions and lack guaranteed enforceability even in those which subscribe to the Hague Convention"); U.S. Dep't of State, *Enforcement of Judgments*, U.S. DEP'T OF STATE, http://travel.state.gov/law/judicial/judicial_691.html (last visited Nov. 16, 2010) ("There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.") (on file with the Washington and Lee Law Review).

22. See *Condon*, 73 Cal. Rpt. 2d at 42 (explaining that in international relocation cases, courts "cannot guarantee any custody and visitation arrangements they order for the non-moving parent will be honored"); Richards, *supra* note 20, at 266 ("If the proposed relocation is to a country that does not recognize custody orders of this country, the child may be beyond the protection of U.S. courts and may be subject to special risks such as being cut off from all contact with the nonrelocating parent.").

23. See ANNE-MARIE HUTCHINSON ET AL., INTERNATIONAL PARENTAL CHILD ABDUCTION 3 (1998) (defining international abduction). The terms "abduction" and "kidnapping" are defined "to include cases where a child is retained in a foreign country contrary to the rights of another person." *Id.*

24. See Weiner, *Inertia and Inequality*, *supra* note 6, at 1830 ("The International Parental Kidnapping Crime Act makes it illegal to remove or attempt to remove a child from the United States, or retain a child abroad, with the 'intent to obstruct the lawful exercise of

This Note considers whether and to what extent the risk of parental abduction following an international relocation²⁵ is addressed by state and international custody law. Part II of this Note examines the current treatment of international relocation disputes by state courts and legislatures, as well as international agreements such as the Hague Convention on the Civil Aspects of International Child Abduction,²⁶ and examines the nature and limits of parental rights in international relocation disputes.

Part III of this Note argues that the requirements for relief under the Hague Convention limit its effectiveness as a remedy for parents left behind, and explains why judicial attempts to ensure that a U.S. custody decision will be followed overseas have generally been inadequate.

Ultimately, this Note takes the position that states should adopt specific factors to be considered in international relocation cases. These factors should include a presumption against permitting international relocation over one parent's objection unless it can be shown that the left-behind parent's rights will be protected in the destination country. Of course, the presumption would not apply in cases where the left-behind parent's parental rights had been terminated, and could be rebutted by evidence that continuing contact with the parent is contrary to the child's best interests.

Because custody law terminology varies among states, several definitions are necessary. For the purpose of this Note, "legal parents" include all biological and adoptive parents.²⁷ "Custody" refers to physical custody. The "custodial parent" is the parent who has physical custody of the child the majority of the time. In many cases, the "non-custodial parent" may have joint legal custody in addition to visitation rights. Some

parental rights. . . . [which] include visitation rights." (quoting 18 U.S.C. § 1204 (2007))).

25. See Richards, *supra* note 20, at 265–66 (acknowledging the risk that a child who is relocated to a foreign country may be completely cut off from one parent).

26. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention, or Convention].

27. See Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90, 90 n.2 (Robin Fretwell Wilson ed., 2006) [hereinafter RECONCEIVING THE FAMILY] (defining "legal parents"). Other individuals may have parental rights as "de facto parents" or "parents by estoppel." See *id.* (explaining that the American Law Institute has "propose[d] sweeping changes to the legal conception of parenthood").

states use the term "parenting time" in lieu of "custody" and "visitation."²⁸ For the purposes of this Note, "parenting time" refers simply to time a child spends in the physical custody of a particular parent. "Access rights" and "visitation rights" are used interchangeably.

II. The Abduction-Relocation Problem

A. Laws and Treaties Designed to Protect Against International Child Abduction

1. The Hague Convention

In 2008, the U.S. Department of State handled 1,082 new cases of international parental abduction involving 1,615 children.²⁹ International child abduction by parents is a complicated problem.³⁰ Parents following or anticipating a divorce may be motivated to flee to a country where they are assured of obtaining full custody and control of their child.³¹ In an effort to limit this type of international forum-shopping, the Hague Convention on Civil Aspects of International Child Abduction was signed on October 25, 1980.³² The purpose of the Convention is "to secure the prompt return of children

28. See Robert J. Levy, *Custody Law and the ALI's Principles: A Little History, a Little Policy, and Some Very Tentative Judgments*, in RECONCEIVING THE FAMILY 67, 70 (Robin Fretwell Wilson ed., 2006) ("In some states the terms 'custody' and 'custodian' as well as 'visitation' have been abolished and replaced with a concept of actual and shared parenting.").

29. U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 10 (2009). This statistic includes abductions by wrongful removal from the United States and abductions by wrongful retention in a foreign country. *Id.*

30. See Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L. 749, 764-67 (2003) [hereinafter Weiner, *Transnational Litigation*] (explaining that the problem of parental child abduction is complex, particularly in cases involving domestic abuse).

31. See Merle H. Weiner, *International Child Abduction and the Escape From Domestic Violence*, 69 FORDHAM L. REV. 593, 601 (2000) (explaining that in cases of parental child abduction, it is important to consider the abductor's motive for absconding with the child).

32. See Walsh & Savard, *supra* note 3, at 30 (describing the initial goals of the Hague Convention). The United States signed the Convention in 1981; however, the Convention was not fully applicable in the United States until the passage of necessary implementing legislation in 1986. JAMES D. GARBOLINO, INTERNATIONAL CHILD CUSTODY CASES: HANDLING HAGUE CONVENTION CASES IN U.S. COURTS 14 (3d ed. 2000).

wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."³³

The only available remedy under the Convention is the return of the child to his or her country of habitual residence.³⁴ The Convention does not confer jurisdiction or determine the merits of a custody dispute.³⁵ It has been described as "a fast-track extradition-type remedy,"³⁶ permitting the merits of the case to be decided in the country where the child is a habitual resident.³⁷ To seek relief under the Convention, a parent must initiate proceedings for the child's return within twelve months of the removal or retention.³⁸ The parent must be able to demonstrate that the removal or retention was "wrongful" under the meaning of the Convention.³⁹

The Convention applies only between contracting states.⁴⁰ If a child is detained in a country that is not a party to the Convention, the parent must seek access to his or her child through the normal legal channels of that country.⁴¹ In many countries, this may mean that one parent is effectively without a remedy to enforce his or her parental rights.⁴²

33. Hague Convention, *supra* note 26, at art. 1.

34. See Linda Silberman, *The Hague Children's Conventions: The Internationalization of Child Law*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE U.S. AND ENGLAND 589, 591 (Sanford N. Katz et al. eds., 2000) [hereinafter Silberman, *Hague Children's Conventions*] ("[T]he Convention operates only as a provisional remedy by returning children so that further action can be taken.").

35. See Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 44 (2003) [hereinafter Silberman, *Abduction Convention*] ("The Convention remedy can best be thought of as a 'provisional' remedy because it does nothing to dispose of the merits of the custody case.").

36. Silberman, *Hague Children's Conventions*, *supra* note 34, at 591.

37. See *id.* (discussing the return remedy of the Convention).

38. See HUTCHINSON ET AL., *supra* note 23, at 4–5 (explaining the requirements to have a child returned under the Convention).

39. See GARBOLINO, *supra* note 32, at 16 (explaining the legal requirements for return of a child under the Convention).

40. *Id.*

41. See Walsh & Savard, *supra* note 3, at 32 ("A remedy is only available under the Abduction Convention when the child was wrongfully removed from a signatory country and retained in another signatory country."); U.S. Dep't of State, *Possible Solutions: Using a Foreign Country's Civil Justice System*, U.S. DEP'T OF STATE, http://travel.state.gov/abduction/solutions/solutions_3855.html (last visited Nov. 16, 2010) (explaining that in child abductions where the Hague Convention does not apply, the case will be decided based on the domestic laws of the country where the child is located) (on file with the Washington and Lee Law Review).

42. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 43 (Cal.

When the Convention does apply, there are five defenses available to an action for return of a child.⁴³ First, if the requesting party has delayed for more than one year since the removal or retention, return will not be ordered if "the child has become settled in the new environment."⁴⁴ Second, if the party seeking return was not actually exercising custody rights at the time of the removal, return is not required.⁴⁵ Third, return is not required if the requesting party consented to the removal.⁴⁶ Fourth, return is not required if it would place the child at a grave risk of physical or psychological harm.⁴⁷ Finally, a defense is provided if return of the child "would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."⁴⁸

2. *The International Parental Kidnapping Crime Act*

Congress enacted the International Parental Kidnapping Crime Act⁴⁹ (IPKCA) in 1993, in part to acknowledge the serious problem created by the absence of a remedy for children abducted to non-Hague countries.⁵⁰ The IPKCA makes it a felony to "remove[] a child from the United States or retain[] a child . . . outside the United States with intent to obstruct the lawful exercise of parental rights."⁵¹ IPKCA provides a defense if the accused party was acting under a valid court order, fleeing to escape domestic violence, or "the child was removed under an exercise of custody rights, the failure to return the child was beyond the defendant's control, and the defendant subsequently notified the other parent and returned the child as soon as possible."⁵²

Ct. App. 1998) (explaining that an international move could serve as a "de facto termination of the non-moving parent's rights to visitation"); Walsh & Savard, *supra* note 3, at 59 (asserting that "applications for return of children in international abductions from the United States likely will not have a satisfactory outcome").

43. See GARBOLINO, *supra* note 32, at 17 (describing the five defenses to a return action under the Convention).

44. *Id.*

45. See *id.* (discussing available defenses to an action under the Convention).

46. *Id.* at 18.

47. *Id.*

48. Hague Convention, *supra* note 26, art. 13(a).

49. International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2003).

50. See GARBOLINO, *supra* note 32, at 26 (discussing the IPKCA).

51. 18 U.S.C. § 1204(a).

52. See GARBOLINO, *supra* note 32, at 27–28 (listing the available defenses under the IPKCA).

Although the IPKCA was enacted partially in recognition of the problem created by the gap in Hague Convention coverage, it is not a replacement or substitute for the Convention.⁵³

By making parental abduction a federal offense, the IPKCA increases the chances that an abductor may be extradited, and strengthens diplomatic efforts to bring about a child's return.⁵⁴ The IPKCA also was intended to act as a deterrent, and to "verify [Congress's] serious concern over international parental kidnapping."⁵⁵ As a practical matter, the IPKCA has little value as a tool for seeking return of a child from a foreign country. Even in cases where the abductor is successfully extradited and prosecuted, the child is not necessarily returned.⁵⁶ The IPKCA is relevant to the analysis of international relocation mainly because it represents the clear intent of Congress to preserve the parent-child relationship against international abduction—including parental abduction.⁵⁷

B. Relocation Disputes in the United States

The difficulty in deciding whether to permit one parent to relocate with a child over the other parent's objection is not a novel problem.⁵⁸ In considering whether a parent may leave the state with a child over the other parent's objection, courts generally have adopted one of three approaches:⁵⁹ a presumption in favor of the move,⁶⁰ a presumption

53. See *id.* at 26 ("IPKCA is meant to be complementary to the Hague Convention. It is neither a replacement, nor an alternative to it.").

54. See *id.* (describing the purposes of the IPKCA).

55. *Id.*

56. See Silberman, *Abduction Convention*, *supra* note 35, at 42–43 (explaining that the IPKCA is a "federal criminal remedy [which]—even when the United States is able to prosecute the abductor—does not necessarily effectuate the return of the child").

57. See GARBOLINO, *supra* note 32, at 26 (discussing the IPKCA).

58. See Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 31 (2002) ("When the parents of a minor child live separately from each other, the courts are frequently called on to determine the living arrangements of the various family members in order to promote the child's best interests.").

59. See *id.* at 42 (describing three approaches that courts have developed in addressing relocation disputes); Richards, *supra* note 20, at 249 ("Certain states recognize a presumption in favor of relocation, while others recognize a presumption against relocation or focus on the interruption of the noncustodial parent's visitation. Other states do not recognize a presumption either way.").

60. See, e.g., *Downum v. Downum*, 274 S.W.3d 349, 356 (Ark. Ct. App. 2008) (Bird, J., concurring) (recognizing that a custodial parent is entitled to a presumption in favor of relocation with the child); Kindregan, *supra* note 58, at 42 (describing an "evolving model of

against the move,⁶¹ or a so-called "neutral" standard based on what the court determines will be in the child's best interests.⁶² During the late 1990s and early 2000s there was a movement in many states toward a permissive standard of granting relocation requests in the absence of a compelling reason not to do so.⁶³ More recently, some states have moved toward eliminating standards and presumptions in relocation cases in favor of a pure "best interests of the child" standard.⁶⁴

placing greater emphasis on allowing the custodial parent maximum flexibility to make life choices . . . even if relocation means diminishing the time the child spends with the noncustodial family"). This presumption has been criticized for "treat[ing] the children of divorce as virtual chattels whose possession had been awarded to the custodial parent, [such that] [l]ike their other possessions, custodial parents [are] free to take their children with them . . . to a foreign county." *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 40 (Cal. Ct. App. 1998).

61. See, e.g., Alabama Parent-Child Relationship Protection Act, ALA. CODE § 30-3-169.4 (2009) ("[T]here shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child. The party seeking a change of principal residence of a child shall have the initial burden of proof on the issue."); Kindregan, *supra* note 58, at 42 (explaining that the "traditional model" of relocation cases attempts "to maximize the child's contact with both families by emphasizing the visitation rights of the noncustodial parent" and "tends to result in restrictions on the choice to relocate the child away from the . . . noncustodial parent").

62. See, e.g., *Dupre v. Dupre*, 857 A.2d 242, 251-52 (R.I. 2004) ("[T]he Legislature has articulated no presumptions, standards or criteria that apply specifically to relocation issues. Few principles are more firmly established in the law, however, than that in awarding custody, placement, and visitation rights, the 'paramount consideration' is the best interests of the child." (citations omitted)); Kindregan, *supra* note 58, at 42 (explaining that the neutral model "at least in theory, does not give any presumptive advantage to either of the contesting parents in a relocation case"). This standard has been criticized because it is impossible to predict what a particular court will decide is in a child's best interests. See *id.* at 45 (explaining that under the neutral model, relocation disputes "become[] very fact intensive and thereby consume[] large amounts of judicial time and energy"); Richards, *supra* note 20, at 257-58 (arguing that states should adopt a presumption either in favor of or against permitting relocation of a child in contested cases because doing so will "greatly reduc[e] the indeterminacy of relocation decisions, thereby reducing the number of petitions filed and the number of children subjected to another contested proceeding").

63. See *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 658 (Ark. 2003) ("Some states that have traditionally been virulent to custodial-parent relocation have recently adjusted their criteria to make custodial-parent relocation more lenient."); Kindregan, *supra* note 58, at 32 (referring to "[t]he trend in contemporary family law that gives greater deference to the geographical choices of the custodial parent"); cf., e.g., *Burgess v. Burgess (In re Marriage of Burgess)* 51 Cal. Rpt. 2d 444, 444 (Cal. 1996) (eliminating the custodial parent's burden of showing that a relocation is necessary); *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 40 (Cal. Ct. App. 1998) (acknowledging that "California has followed the national trend" by moving from a position that was "generally hostile to relocation requests" to a more permissive standard); *Latimer v. Farmer*, 602 S.E.2d 32, 34-35 (S.C. 2004) (overruling past cases that had established a presumption against relocation).

64. See Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child*

1. *The Role of the Court*

Once a custody arrangement has been reached, generally it cannot be modified unless there has been a "substantial and material change of circumstances" since the time of the agreement.⁶⁵ States differ on whether relocation of a custodial parent is in itself a substantial and material change of circumstances.⁶⁶ As a practical matter, an international relocation will almost certainly require modification of an existing custody arrangement.⁶⁷ Even if there is no objection to the international move, any existing order regarding visitation likely will need to be modified to account for increased travel time and expenses.⁶⁸

In some cases, court approval for the child's relocation is required either by statute or by a provision in the custody agreement.⁶⁹ Some custody agreements include a *ne exeat* clause prohibiting one or both parents from removing the child from the jurisdiction without permission. In such cases, the parent will need to seek permission of the other parent or of the court before relocating.

The court in a child custody case is generally not in the position of actually prohibiting a parent from leaving the state;⁷⁰ rather, the court must determine whether the parent's move out of state will justify shifting primary custody to the parent remaining in the jurisdiction.⁷¹ If the court rules against the parent desiring the move, he or she must choose between

Emerging as the Standard of Relocation Cases, in RELOCATION ISSUES IN CHILD CUSTODY CASES 29, 40 (Philip M. Stahl & Leslie M. Drozd eds., 2006) (describing "a clear trend" away from presumptions and "toward using a case specific, fact sensitive, best interest analysis in every case").

65. See Richards, *supra* note 20, at 246–47 (describing the process for challenging a custody arrangement in a relocation dispute).

66. See *id.* at 246 ("[T]here is disagreement [among states] on the preliminary issue of whether, and to what extent, a proposed relocation constitutes a sufficient, substantial and material change of circumstances to justify a petition to modify custody.").

67. See Richard E. Crouch, *Resolving International Custody Disputes in the United States*, 13 J. AM. ACAD. MATRIM. LAW. 229, 267 (1996) (explaining that international relocation "is obviously a substantial change in circumstances, and thus permits the court to reexamine the whole best-interest question on a petition to modify custody").

68. See *id.* (explaining that international relocation is a substantial change in circumstances that will likely require a re-evaluation of the child's best interests).

69. See Richards, *supra* note 20, at 246–47 (describing the role of previous custody agreements in relocation disputes).

70. See *id.* at 255 ("Courts do not prohibit custodial parents from moving either, technically speaking.").

71. See *id.* (explaining that courts do not prohibit custodial parents from moving without their children).

retaining custody within the state and forfeiting custody by going through with the planned relocation.⁷²

2. General Considerations

There are many legitimate reasons for the decision to relocate.⁷³ Following a divorce or separation, a parent who previously had moved away from family and friends for the sake of her spouse may desire to return to an area where she has a more established support system.⁷⁴ Even if the parent initially wishes to remain in the area, career opportunities or a new relationship may motivate a move.⁷⁵ Victims of domestic violence may wish to escape the abuser.⁷⁶

Whatever the rationale behind the move, personal autonomy considerations weigh against restrictive relocation standards.⁷⁷ Normally, the decision to move is personal and not within the purview of the state.⁷⁸ Restricting a custodial parent's ability to relocate may restrict his or her ability to move on from the broken relationship and "seek a better life."⁷⁹

However, a child's relocation often places a substantial burden on the parent left behind.⁸⁰ The increased distance is likely to make visitation

72. See *id.* (explaining that a court may "order[] custody to be transferred to the other parent if the custodial parent relocates").

73. See *Burgess v. Burgess (In re Marriage of Burgess)*, 913 P.2d 473, 480–81 (Cal. 1996) ("Because of the . . . need[] for both parents . . . to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location. . . .").

74. See *id.* (discussing reasons for relocation).

75. *Id.*

76. See *Richards*, *supra* note 20, at 273–75 (explaining that "[i]n cases where the abuse is ongoing, the victim may seek to relocate to avoid the abuse").

77. See *MacKinnon v. MacKinnon*, 922 A.2d 1252, 1258 (N.J. 2007) (explaining that in both interstate and international removal disputes "the custodial parent has an interest in self-determination and maintains 'the freedom to seek a better life'" (citations omitted)); *Bach-Van Horn*, *supra* note 19, at 173 ("One parent's desire to relocate with his or her child . . . presents the issue of balancing dueling rights: the right of a custodial parent to move freely . . . against the right of the noncustodial parent to maintain a close relationship with the child while remaining in the same place."). Some parents have also raised constitutional issues based on the right to travel. See *infra* Part II.B.6 (discussing constitutional considerations); *infra* notes 170–77 and accompanying text (noting that the right to travel interstate has been recognized as a fundamental constitutional right).

78. *Bach-Van Horn*, *supra* note 19, at 173.

79. *MacKinnon*, 922 A.2d at 1258.

80. See *Kindregan*, *supra* note 58, at 36–37 (explaining that "[w]hen the parents of a

more expensive and difficult to arrange.⁸¹ The parent may not be able to continue the same level of involvement in sports events, school activities, and other aspects of the child's day to day life.⁸² While the child may benefit if the move increases the happiness of one parent, he or she must adapt to both new physical surroundings and a completely changed relationship with the other parent.⁸³

Recognizing that there is no clear solution to what has been called the "custodial relocation conundrum,"⁸⁴ most states have developed specific statutory or common law factors to assist courts in the difficult task of balancing the competing interests at stake in a relocation dispute.⁸⁵ Common factors include the motives of the respective parties, the likelihood that a move will enhance the child's quality of life, the extent to which the nonmoving parent will be able to continue his involvement in the child's life following the move, and in some cases, past dealings between the parties.⁸⁶

3. Considerations Specific to International Moves

The relocation problem becomes even more difficult when one parent desires to move with the child to a foreign country.⁸⁷ Because most

young child live a considerable distance from each other, the difficulty of building and maintaining a relationship between the child and the noncustodial parent is complicated by the spatial divide").

81. *Id.*

82. *See id.* at 42 ("When relocation will result in a substantial geographic separation of the two families, it will be more difficult for one parent to maintain frequent or continuous physical contact with a child living far away.").

83. *See id.* (describing difficulties of increased distance between parent and child).

84. Richards, *supra* note 20, at 245.

85. *See id.* at 266–67 (discussing factors courts commonly consider in determining whether a proposed move is in the child's best interests); Weiner, *Transnational Litigation*, *supra* note 30, at 757 (explaining that "the victims of domestic violence are most often the abductors" in cases involving parental child abduction and domestic violence because the victims are attempting to escape the violence).

86. *See MacKinnon v. MacKinnon*, 922 A.2d 1252, 1258 (N.J. 2007) (listing enumerated factors courts in New Jersey are instructed to consider "in assessing whether to permit removal of a minor child" from the state); Richards, *supra* note 20, at 266–69 (recommending factors courts should consider when determining a child's best interests in a relocation dispute); Lawrence Katz, *When the ? Involves an International Move: The Answer May Lie in Retaining U.S. Jurisdiction*, 28 FAM. ADVOC. 40, 43 (2006) (discussing the different considerations required in international versus interstate removal cases).

87. *See, e.g., MacKinnon*, 922 A.2d at 1259 ("Admittedly, however, international removal is more complex than interstate removal and requires trial courts to consider other

jurisdictions have not designed a test specifically for use in foreign relocation cases, states generally have applied the factors used for interstate relocation to assess proposed international moves.⁸⁸ These factors are often insufficient to address the complex and unique concerns that inevitably arise in international relocation cases.⁸⁹

The most obvious problem posed by an international move is the increased physical distance between the left-behind parent and the child.⁹⁰ Difficulties inherent in maintaining a close relationship over long distances are not unique to international moves.⁹¹ Because concerns of distance frequently arise in interstate relocations, state statutes regarding relocations generally address the problem of increased physical distance.⁹² Still, the problem is often more severe in international cases.⁹³ International travel tends to be particularly expensive, burdensome, and time-consuming,⁹⁴ and

factors."); Katz, *supra* note 86, at 42 (explaining the unique considerations present in international relocation disputes); Richards, *supra* note 20, at 265–66 (discussing the special risks involved in cases involving a proposed relocation to a foreign country).

88. See MacKinnon, 922 A.2d at 1258 (ruling that the factors used to determine whether interstate removal is in the best interests of the child should be applied in cases involving disputes over international removal).

89. See Condon v. Cooper (*In re Marriage of Condon*), 73 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1998) (discussing the unique problems presented by international relocation disputes); Katz, *supra* note 86, at 43 ("The court [in *Condon*] found that there were three concerns that generate 'best interests' problems, which make foreign relocations different in kind from . . . most interstate relocations.").

90. See MacKinnon, 922 A.2d at 1260 (recognizing that distance often impacts visitation and the relationship between parent and child because "transportation and communication costs generally increase with distance, and long distances separating the non-custodial parent and the child limit the frequency with which [the] familial relationship can be nurtured"); Kindregan, *supra* note 58, at 42 ("When relocation will result in a substantial geographic separation of the two families, it will be more difficult for one parent to maintain frequent or continuous physical contact with a child living far away. A relocation decision . . . is essentially a choice between the competing interests of two different families.").

91. See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 282 (discussing issues that arise in relocation cases).

92. See MacKinnon v. MacKinnon, 922 A.2d 1252, 1258 (N.J. 2007) (listing enumerated factors courts in New Jersey are instructed to consider in relocation disputes); *id.* at 1260 (recognizing that "long distances separating the non-custodial parent and the child limit the frequency with which that familial relationship can be nurtured"); Richards, *supra* note 20, at 266–69 (recommending certain factors that courts should consider in determining a child's best interests in a relocation dispute, including the feasibility of future visitation).

93. See Condon, 73 Cal. Rptr. 2d at 42 (discussing the unique problems presented by international relocation disputes).

94. See *id.* at 43 ("[E]xcept for those of considerable means, any relocation to another

there may be other logistical concerns regarding a party's ability to leave a certain country or re-enter the United States.⁹⁵ Particularly if the parties lack substantial financial resources, it may be difficult or impossible to arrange frequent physical visitation following an international move.⁹⁶

By far the most difficult consideration in an international relocation dispute is the problem of enforceability.⁹⁷ While the Parental Kidnapping Prevention Act (PKPA) of 1980⁹⁸ ensures that a custody order will be given full faith and credit following an interstate move,⁹⁹ there may not be a realistic way of enforcing an American court order in a foreign country.¹⁰⁰ The moving parent may be able to effectively terminate the child's relationship with the left-behind parent simply by ignoring the court order and blocking access to the child.¹⁰¹

continent is likely to represent a de facto termination of the non-moving parent's rights to visitation and the child's rights to maintain a relationship with that parent.").

95. *Abargil v. Abargil* (*In re Marriage of Abargil*), 131 Cal. Rptr. 2d 429, 429 (Cal. Ct. App. 2003). In that case, the mother of a five year old child was barred from re-entering the United States after taking the child with her to Israel on a temporary visit with the permission of the child's father. *Id.* Due to a previous visa violation, the child's mother was prohibited from entering the United States for ten years. *Id.* At the same time, the father could not leave the United States for an extended period of time without putting his own status as a resident in jeopardy. *Id.* If he attempted to visit his child in Israel, he also risked indefinite detention in the country if his former wife were to challenge the United States custody order in Israeli court. *Id.*

96. *See Condon v. Cooper* (*In re Marriage of Condon*), 73 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1998) (discussing the unique problems presented by international relocation disputes).

97. *See id.* ("Third, and most difficult, is the jurisdictional problem. California court orders governing child custody lack . . . guaranteed enforceability even in those which subscribe to the Hague Convention. . . . Thus, the California courts cannot guarantee any custody and visitation arrangements they order for the non-moving parent will be honored.").

98. Parental Kidnapping Prevention Act (PKPA) of 1980, 28 U.S.C. 1738A (2000).

99. *See Patricia M. Hoff, Parental Kidnapping: Prevention and Remedies*, A.B.A. 2-4, <http://www.abanet.org/child/pkprevrem.pdf> (last visited Nov. 16, 2010) (discussing the PKPA) (on file with the Washington and Lee Law Review).

100. *See Condon*, 73 Cal. Rptr. at 42 (explaining that in international relocation cases, courts "cannot guarantee any custody and visitation arrangements they order for the nonmoving parent will be honored"); U.S. Dep't of State, *Enforcement of Judgments*, U.S. DEP'T OF STATE, http://travel.state.gov/law/judicial/judicial_691.html (last visited Nov. 16, 2010) ("There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.") (on file with the Washington and Lee Law Review).

101. *See Condon*, 73 Cal. Rptr. 2d at 43 (explaining that a court must "use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court").

4. Judicial Approaches to the Problem of Enforceability

Among courts that have considered international relocations, several approaches to the enforceability problem have emerged.¹⁰² Three principal approaches are discussed below.

The first approach is to ignore the enforceability problem and analyze the issue in the same manner as an interstate move.¹⁰³ For example, in *Osmanagic v. Osmanagic*,¹⁰⁴ the Supreme Court of Vermont upheld a family court determination to permit a mother's move to Bosnia with her eight year old son over the father's objection.¹⁰⁵ The court emphasized the broad discretion of the family court in custody matters, and stated that it would "disturb the family court's findings only if, viewing the record in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence in the record to support the findings."¹⁰⁶ The court also stated that it would uphold the legal conclusions of the family court "so long as they are supported by its findings."¹⁰⁷

The father objected to the findings of the lower court because its order did not consider the unique problems presented by foreign relocation.¹⁰⁸ The father requested that the court consider the cultural, geographical, and jurisdictional problems that would be created by the move.¹⁰⁹ The court dismissed this objection, stating that "[w]hile a trial court may have discretion to consider these or other factors . . . the statute does not require a court to consider them."¹¹⁰

102. See *infra* notes 103–32 and accompanying text (discussing various approaches to international relocation cases).

103. See *infra* notes 104–10 and accompanying text (explaining one approach to the problem of enforceability).

104. See *Osmanagic v. Osmanagic*, 872 A.2d 897, 898 (Vt. 2005) (upholding a family court's custody determination in spite of the mother's plans to move to Bosnia with the child).

105. *Id.*

106. *Id.*

107. *Id.*

108. See *id.* at 899 (explaining the father's assertion "that the court abused its discretion by failing to consider all of the factors unique to a foreign relocation").

109. See *id.* (explaining the father's argument that the court should consider the factors set forth by the California court in *Condon*).

110. *Id.*

The second approach is to acknowledge and consider the problem of enforceability as one factor of a test designed for interstate relocations.¹¹¹ For example, a court that routinely considers the child's ability to maintain a relationship with the noncustodial parent following an interstate move may encounter the problem of enforceability as part of its analysis.¹¹²

This approach is illustrated by *MacKinnon v. MacKinnon*.¹¹³ In *MacKinnon*, the Supreme Court of New Jersey upheld a trial court's decision to permit relocation of a child, Justine, to Japan with her mother over her father's objection.¹¹⁴ The father, Ronald MacKinnon, had parenting time with his daughter every weekend prior to the decision.¹¹⁵ The trial court applied a test designed for analyzing interstate relocations, and determined that Justine's best interests would be served by the move "because Justine would benefit from her mother's increased 'stability and happiness' while retaining sufficient contact with her father."¹¹⁶

In making this determination, the court assumed that Mrs. MacKinnon would in fact follow the New Jersey court order regarding visitation.¹¹⁷ Although the reviewing court acknowledged that Mrs. MacKinnon was depressed and unstable, and that Mr. MacKinnon would not have recourse if Mrs. MacKinnon violated the American custody order, it nonetheless found Mr. MacKinnon's "fear that he would 'lose his daughter' to be unfounded"¹¹⁸ and granted permission for the move.¹¹⁹

A third approach to the problem of enforceability in international relocation is for the court to acknowledge the problem and attempt to ensure that an order will remain enforceable.¹²⁰ In the most prominent

111. See *MacKinnon v. MacKinnon*, 922 A.2d 1252, 1262 (N.J. 2007) (analyzing an international relocation using factors designed for interstate relocation cases).

112. See *id.* (applying interstate relocation factors to an international move).

113. See *id.* (ruling that a lower court properly applied the New Jersey standard for interstate removals in a child custody case involving an international removal).

114. *Id.*

115. *Id.* at 1254.

116. *Id.* at 1256.

117. See *id.* (explaining that Justine would benefit from the move because it would increase her mother's happiness without detracting from Justine's close relationship with her father).

118. *Id.*

119. See *id.* (acknowledging that Mr. MacKinnon would not have a practical remedy if Mrs. MacKinnon violated the terms of the custody agreement while in Japan).

120. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 33 (1998) (attempting to ensure that a California custody order would remain enforceable following the children's move to Australia with their mother).

example of this approach, *Condon v. Cooper*,¹²¹ the California Court of Appeals considered the case of two children who had been abducted by their mother from the United States following their parents' divorce.¹²² After months of searching, the father located the children and their mother in Australia.¹²³ He successfully filed a claim under the Convention, and the children were returned to the United States.¹²⁴ Following their return, the children's mother petitioned the California court and was granted permission to take the children back to Australia permanently.¹²⁵ In reviewing the order of the trial court, the court upheld the determination with some hesitation¹²⁶ but remanded the case to the trial court to impose conditions intended to ensure the enforceability of the court's order in Australia.¹²⁷

The court in *Condon* recommended several measures to ensure enforceability and to facilitate continued contact between the children and their father.¹²⁸ First, the court attempted to discourage the mother from relocating at all by decreasing the amount of spousal and child support she would receive if she moved away with the children.¹²⁹ The difference was placed in a "travel trust fund" to be used for visitation and travel costs.¹³⁰ In addition, the mother was required to post a bond which she would forfeit if she failed to comply with the court's order regarding visitation.¹³¹ Finally,

121. See *id.* (upholding an order permitting the relocation of two children to Australia with their mother over their father's objections but remanding the case to the trial court to obtain concessions ensuring continued jurisdiction and enforceability of the court's order).

122. *Id.*

123. *Id.*

124. *Id.* Although Australia is a party to the Hague Convention, a remedy under the Convention would not be available once the children had lived in Australia for a year. See Walsh & Savard, *supra* note 3, at 32-34 (explaining the importance of a child's "habitual residence" under the Hague Convention).

125. *Condon*, 73 Cal. Rptr. 2d at 35.

126. See *id.* ("With some reluctance we conclude this court should not interfere at this late date with the trial court's carefully constructed order allowing this relocation . . .").

127. See *id.* (remanding the case "for the trial court to obtain an enforceable concession of jurisdiction from respondent wife"); *id.* at 53 ("An unenforceable order is no order at all, and thus is void.").

128. See *id.* at 52-53 (recommending measures to increase the chances that the custody order would be followed).

129. See *id.* at 38 (explaining that Ms. Cooper would be entitled to more spousal and child support if she remained in California than if she chose to move).

130. See *id.* (ordering that a travel trust fund be established if the mother chose to go through with the move).

131. See *id.* at 52 (explaining that a bond was necessary even if the mother conceded to the continuing jurisdiction of the court because of the possibility that such a concession

the court required the mother to consent to the continuing jurisdiction of the California court following the move.¹³²

5. Model Approaches

Like most states, the model approaches to relocation disputes do not specifically address international relocation. These proposals, therefore, offer little guidance in handling the enforceability problem that may arise in cases involving an international move.¹³³

a. American Law Institute: Principles of the Law of Family Dissolution

The American Law Institute (ALI) published the Principles of the Law of Family Dissolution (Principles) in 2002.¹³⁴ The Principles, which the ALI developed over an eleven-year period, include proposed model approaches to a wide array of issues in the family law context.¹³⁵

Under the ALI recommendations, the relocation of a parent justifies modification of a custody agreement "only when the relocation significantly impairs either parent's ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan."¹³⁶ Once this threshold standard has been met, the ALI suggests that a court should attempt to accommodate the relocation without changing the proportion of custodial responsibilities of each parent under the plan.¹³⁷ If it is not practical to do so—as it rarely will be in an international relocation case—the ALI recommends modifying the parenting plan in accordance

would not be enforced in Australia).

132. See *id.* (explaining that the mother offered to concede the continuing jurisdiction of the California court even after the move).

133. See *infra* notes 134–47 and accompanying text (discussing model approaches to the international relocation problem).

134. See Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 573–74 (2008) (examining the impact of the Principles on legislatures and courts).

135. See *id.* (describing the Principles).

136. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17 (LexisNexis 2002).

137. See *id.* ("[I]f practical the court should revise the parenting plan to accommodate the relocation without changing the proportion of custodial responsibilities each parent is exercising.").

with the child's best interests.¹³⁸ The ALI suggests that if the parent seeking to relocate "has been exercising the clear majority of custodial responsibility," the move should be permitted upon a showing "that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose."¹³⁹ The Principles cite *Condon*, but otherwise do not distinguish international from interstate relocations.¹⁴⁰

b. American Academy of Matrimonial Lawyers Model Relocation Act

The American Academy of Matrimonial Lawyers' (Academy) proposed approach to relocation disputes can be found in its Model Relocation Act.¹⁴¹ Like the Principles, the Model Relocation Act requires that the nonmoving parent receive sixty days' notice before the principal residence of the child may be changed.¹⁴² This waiting period is intended to give the parent an opportunity to object to the move.¹⁴³

Members of the Academy were unable to reach an agreement on several critical issues, including whether a relocation request justifies opening a full custody modification hearing, and which party in a relocation dispute should bear the burden of proof.¹⁴⁴ Thus, the Model Act simply lays out possible alternatives, leaving states to decide for themselves which approach is preferable.¹⁴⁵ Like the ALI, the Academy

138. *See id.* ("When a relocation . . . renders it impractical to maintain the same proportion of custodial responsibility to each parent, the court should modify the parenting plan in accordance with the child's best interests . . .").

139. *Id.*

140. *See id.* (summarizing *Condon*).

141. Am. Acad. of Matrimonial Lawyers, *Proposed Model Relocation Act: An Act Relating to the Relocation of the Principal Residence of a Child*, 15 J. AM. ACAD. MATRIM. LAW. 1, 1 (1998).

142. *See id.* at 3–4 (describing the waiting period provision).

143. *See id.* at 6–9 (explaining the purpose of the waiting period provision).

144. *See* Theresa Glennon, *Divided Parents, Shared Children: Conflicting Approaches to Relocation Disputes in the USA*, 4 UTRECHT L. REV. 55, 62 (2008) (explaining that "members of the Academy were unable to reach agreement on the standard that should be applied to [a relocation] dispute, and instead, it provides states various options").

145. Am. Acad. of Matrimonial Lawyers, *supra* note 141, at 21 ("Rather than attempt to promulgate a proposal commanding an insignificant majority, it was determined the serious disagreement on this apparently crucial issue should be forthrightly stated and left for each legislature to determine for itself.").

does not acknowledge a distinction between interstate and international moves.¹⁴⁶

6. Constitutional Considerations

a. Parental Rights

"[T]he interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme] Court."¹⁴⁷

The exact boundaries of the constitutional right to parent have not been defined.¹⁴⁸ Nonetheless, it is clear that parents have a recognized liberty interest in the custody of their children.¹⁴⁹ This interest has been cited to invalidate a state statute granting visitation rights to nonparents,¹⁵⁰ and to require states to demonstrate that a parent is unfit before removing a minor child from his or her care.¹⁵¹

As with all constitutional rights, the right to parent is not absolute.¹⁵² The interest in custody of one's child may be overcome by countervailing rights of other parties or compelling state interests.¹⁵³ In general, the right

146. See *id.* at 11 (discussing relocation in the context of intrastate and interstate moves).

147. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

148. See David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in *RECONCEIVING THE FAMILY* 47, 53–54 (Robin Fretwell Wilson ed., 2006) [hereinafter Meyer, *Partners*] (discussing the possible limits of parental rights).

149. See *id.* (describing the interest of parents in the custody of their children as fundamental).

150. See *Troxel*, 530 U.S. at 72–73 (invalidating a Washington nonparental visitation statute on the basis that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made").

151. See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1983) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

152. See *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) ("Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits."); David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 *HOFSTRA L. REV.* 1461, 1466 (2006) [hereinafter Meyer, *Non-Custodial Parents*] ("Even within the ongoing 'intact' family, the Constitution must be understood to leave room for sensitive accommodation by the state of the potentially conflicting interests of various family members.").

153. See Glennon, *supra* note 144, at 68 ("However, courts have clearly held that while

of a parent who has been actively involved in the child's life will be deemed superior to the right of a third party.¹⁵⁴

It is unclear what due process requirements, if any, apply in a custody case between two legal parents.¹⁵⁵ For one, it is possible that any interest in family privacy may not apply in a case brought by a member of the family rather than by the state.¹⁵⁶ Second, and more importantly, the constitutional rights of one parent are offset by the constitutional rights of the other.¹⁵⁷ When parents separate or divorce, time and access that was previously shared must be divided.¹⁵⁸ When parents cannot agree on how parenting time should be allocated, courts are put in the difficult position of balancing the rights of one parent against the rights of the other.¹⁵⁹

The general rule is that courts will grant at least a minimal amount of parenting time to each parent unless one is unfit.¹⁶⁰ Although the Supreme Court has never explicitly stated that a fit parent is always entitled to access, the Court has stated that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause."¹⁶¹ There is

both parents have equal and fundamental rights at stake in custody determinations, it is constitutional for courts to make those decisions based on the best interests of the children.").

154. See Meyer, *Partners*, *supra* note 148, at 49 (explaining that "the law in every state strongly prefers, in some fashion, parents over nonparents in deciding child custody").

155. See Meyer, *Non-Custodial Parents*, *supra* note 152, at 1474–75 (explaining that an argument for equal custody based on the Due Process Clause is "doctrinally plausible, and has been endorsed by some academic commentators" but nonetheless "has found little success in the courts").

156. See *id.* at 1493 (explaining that "where the state's intervention is relatively small or has in fact been invited by some members of a divided family, constitutional protection of family autonomy is necessarily weaker").

157. See *id.* at 1466 (arguing that "constitutional protection of parental rights—of custodial and non-custodial parents alike—is always necessarily qualified by the competing interests of other family members").

158. See Bruch, *supra* note 91, at 283 ("Yet once a couple separates, things cannot remain as they were. As a matter of logic, this is the inevitable price of separations and divorce.").

159. See Elrod, *supra* note 64, at 31–32 (explaining that relocation cases frequently involve competing constitutional rights).

160. See Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 147 (1996) (explaining that reasonable visitation is "an important right" ordinarily granted).

161. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

support for the proposition that a committed parent has some entitlement to reasonable parenting time with his or her child.¹⁶²

It is questionable whether substantive due process is implicated in the relocation context at all. Unlike an adoption or official termination of parental rights, the state has not taken official action with the intention of ending the parent-child relationship.¹⁶³ It is the moving parent who chooses—albeit with the state's permission—to take the child out of the jurisdiction. Because visitation is technically ordered, it is the refusal to comply with the court order that interferes with the parent-child relationship.¹⁶⁴ The left-behind parent would continue to have theoretical parental rights; in the unlikely event that the moving parent should choose to return willingly to the United States with the child, the left-behind parent presumably could exercise his or her parental rights.¹⁶⁵ Courts generally avoid applying constitutional protections in a child custody case, and are likely to conclude that any rights of access to the child the parent loses are a result of the other parent's independent illegal action.¹⁶⁶

Practically, however, the access right of a parent whose child has been taken to certain foreign countries has no more force than the privilege of an unrelated party seeking access to the child.¹⁶⁷ The custodial parent may include him in the child's life if she chooses; if she

162. See *id.* (stating that an unwed father may have a constitutionally-protected interest in personal contact with his child); LaFrance, *supra* note 160, at 19 ("The right to visitation is important, indeed, constitutionally protected.").

163. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 86 (Stevens, J., dissenting) (explaining that "the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment *by the State*" (emphasis added)).

164. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (distinguishing state action from the independent criminal action of an individual).

165. See Parental Kidnapping Prevention Act (PKPA) of 1980, 28 U.S.C. 1738A (2000) (ensuring that court custody orders are given full faith and credit within the United States).

166. See Meyer, *Non-Custodial Parents*, *supra* note 152, at 1465 (explaining that "[t]o date, non-custodial parents have met mostly with frustration in their resort to constitutional law"); cf. *DeShaney*, 489 U.S. at 195 (1989) (explaining that the Due Process Clause does not "impose an affirmative obligation on the State" to "protect the life, liberty, and property of its citizens against invasion by private actors").

167. See U.S. Dep't of State, *Enforcement of Judgments*, U.S. DEP'T OF STATE http://travel.state.gov/law/judicial/judicial_691.html (last visited Nov. 16, 2010) ("There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.") (on file with the Washington and Lee Law Review).

does not, no legal recourse is available.¹⁶⁸ Arguably, the parent's right to access his or her child is forfeited when it no longer can be enforced—the moment the child leaves the country.¹⁶⁹

b. Right to Travel

There is some disagreement about whether state efforts to prevent relocation of a child are constitutional.¹⁷⁰ The right to travel interstate has been recognized as a fundamental constitutional right.¹⁷¹ The freedom to travel internationally has been recognized as "an important aspect of the citizen's 'liberty'";¹⁷² however, "[t]he [U.S. Supreme] Court has made it plain that the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States."¹⁷³

Courts are divided on whether the right to travel includes the right to travel with one's child.¹⁷⁴ Courts upholding relocation restrictions in custody cases generally have dismissed objections based on the right to travel by explaining that the parent still may move if she chooses to do so.¹⁷⁵ Others have rejected this sort of analysis, arguing that this "choice" is illusory.¹⁷⁶

168. Cf. Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY 90, 98 (Robin Fretwell Wilson ed., 2006) ("A mother can always decide voluntarily to provide visitation to those men she thinks will enrich her child's life.").

169. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1998) (explaining that an international move could serve as a "de facto termination of the non-moving parent's rights to visitation").

170. See LaFrance, *supra* note 160, at 67–81 (arguing that limiting relocation violates the custodial parent's right to travel).

171. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (recognizing three components of the right to travel interstate); *United States v. Guest*, 383 U.S. 745, 758 (1966) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.").

172. *Kent v. Dulles*, 357 U.S. 116, 127 (1958).

173. *Haig v. Agee*, 453 U.S. 280, 306 (1981).

174. See *Elrod*, *supra* note 64, at 32 (explaining that courts have reached different conclusions regarding the impact of the right to travel on relocation cases).

175. See *id.* (describing how some courts have avoided constitutional arguments by "disingenuously finding that the parent is free to travel, but without the child").

176. See *Richards*, *supra* note 20, at 255–56 (explaining that a rule prohibiting a parent from taking his or her child out of the jurisdiction "generally has the same practical effect as an order prohibiting the custodial parent from relocating").

III. Why the Current Law Does Not Adequately Address the Problem

A. The Hague Convention

As previously explained,¹⁷⁷ one important purpose of the Hague Convention is to deter custody litigants from engaging in international forum-shopping.¹⁷⁸ Because the primary remedy under the Convention is to return the child to his or her country of habitual residence, international abductors no longer stand to gain the benefit of what may be a more friendly forum by fleeing the country.¹⁷⁹ In theory, the Hague Convention applies to cases where a child is detained in a foreign country in violation of a shared custody agreement.¹⁸⁰ However, there are several aspects of the Convention that limit its availability in many international relocation cases.¹⁸¹

The first and most obvious difficulty is that the Convention applies only between member states.¹⁸² Parents whose children have been abducted to or wrongfully detained in countries not parties to the Convention must rely completely on the law of the destination country in seeking access to their children.¹⁸³ In many countries, this may mean that one parent is effectively without a remedy to enforce his or her parental rights.¹⁸⁴

177. See *supra* notes 32–42 and accompanying text (discussing the Convention).

178. See Walsh & Savard, *supra* note 3, at 29 (explaining the goals of the Convention).

179. See Silberman, *Abduction Convention*, *supra* note 35, at 44 ("In addition to 'reversing' abductions that have taken place, the Convention helps deter future abductions because parties are made to understand that wrongfully removing a child to another country will not give the abductor a new forum in which to get the custody dispute resolved.").

180. See Hague Convention, *supra* note 26, art. 1 (stating that the Convention is to apply in cases where a child is wrongfully detained in a country other than his or her country of habitual residence).

181. See Walsh & Savard, *supra* note 3, at 32–36 (discussing the limitations of the Hague Convention).

182. See GARBOLINO, *supra* note 32, at 16 (explaining the basic provisions of the Convention).

183. See Walsh & Savard, *supra* note 3, at 32 ("A remedy is only available under the Abduction Convention when the child was wrongfully removed from a signatory country and retained in another signatory country."); U.S. Dep't of State, *Possible Solutions: Using a Foreign Country's Civil Justice System*, U.S. DEP'T OF STATE, http://travel.state.gov/abduction/solutions/solutions_3855.html (last visited Nov. 16, 2010) (explaining that when a child has been abducted to a non-Hague country "the foreign court will decide a child custody case on the basis of its own domestic laws—it is at the discretion of that court whether or not to give any weight to a U.S. court order") (on file with the Washington and Lee Law Review).

184. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1998) (explaining that an international move could serve as a "de facto termination

Even if the child is taken to a member country, the Convention is available only if the requesting country is considered the child's "country of habitual residence."¹⁸⁵ The habitual residence requirement presents a problem in cases where the child has been residing outside the requesting country for a period of time before the wrongful detention occurs.¹⁸⁶ Once the child's country of habitual residence has shifted to the destination country, the Convention no longer applies.¹⁸⁷ In theory, a custodial parent could relocate with the child and continue to comply with court-ordered visitation for the requisite period of time until the child's "habitual residence" has shifted to the new location.¹⁸⁸ Once the shift has occurred, the left-behind parent no longer qualifies for relief under the Convention.¹⁸⁹

Even when the abduction occurs between member countries and the requesting country has established that it is the child's habitual residence, the Hague Convention may not be an adequate avenue to obtain return of the child.¹⁹⁰ An initial question in any Hague Convention action is whether the removal or retention of the child was "wrongful" under the meaning of the Convention.¹⁹¹ A removal or retention is considered wrongful if it breached the custody rights of the applicant.¹⁹²

There are two types of parental rights recognized by the Convention, "custody rights" and "access rights." Custody rights are defined as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."¹⁹³ Access rights "include the

of the non-moving parent's rights to visitation").

185. See Walsh & Savard, *supra* note 3, at 32 (explaining the significance of a child's habitual residence).

186. See *id.* (discussing the habitual residence factor).

187. See *id.* at 37-38 (describing a Swedish court's refusal to return a child to the United States under the Convention because the court found that the child's habitual residence had shifted to Sweden).

188. *Id.*

189. See GARBOLINO, *supra* note 32, at 88 ("A finding of habitual residence can be determinative in a case, because if the child is already located in the country of the child's habitual residence, then the Convention does not mandate the child's return to another jurisdiction.").

190. See *id.* at 16 (explaining the legal requirements for return of a child under the Hague Convention).

191. *Id.*

192. See HUTCHINSON ET AL., *supra* note 23, at 4-5 (1998) (explaining the requirements to have a child returned under the Hague Convention).

193. Hague Convention, *supra* note 26, art. 5.

right to take a child for a limited period of time to a place other than the child's habitual residence."¹⁹⁴

Article 12 of the Convention states that in cases where a child has been wrongfully removed or retained "the authority concerned shall order the return of the child forthwith."¹⁹⁵ Because the Convention defines wrongful removal or retention as a breach of *custody* rights, a parent with access rights is not eligible for the automatic return provision of Article 12—even if the custodial parent is clearly in violation of a court order regarding visitation.¹⁹⁶

The Convention does purport to grant some assistance to a parent with access rights, directing countries to "take all appropriate measures . . . to secure the voluntary return of the child or bring about an amicable resolution of the issues" and "in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access."¹⁹⁷ The effectiveness of these measures depends on the law of the country where the child is found, leaving the requesting parent in essentially the same position as one litigating in a non-Hague country.¹⁹⁸ As a result, whether a parent's entitlement is characterized as a right of custody or a right of access likely will determine whether he or she has a realistic chance of succeeding in an action under the Convention.¹⁹⁹

It is not always easy to determine whether a parent has a right of custody or a right of access.²⁰⁰ Courts attempting to achieve fair and

194. *Id.*

195. *Id.* at art. 12.

196. *See, e.g.,* Croll v. Croll, 229 F.3d 133, 137 (2d Cir. 2000) ("The Convention provides recourse in the event a child is removed from an habitual residence in breach of access rights, but those remedies *do not* include an order of return to the place of habitual residence.").

197. Hague Convention, *supra* note 26, art 7.

198. *See* Peter Nygh, *The International Abduction of Children*, in CHILDREN ON THE MOVE 29, 43 (Jaap Doek et al. eds., 1996) (explaining that because the Convention "does not impose a direct obligation on the Central Authority to secure access[,] some Central Authorities believe that they have "discretion to choose not to assist"); *id.* at 43–44 (explaining that the obligation imposed on Central Authorities in cases where a parent has access rights "is only one of giving administrative assistance in the institution of proceedings"); Silberman, *Abduction Convention*, *supra* note 35, at 49 ("Whatever remedies exist for violation of access rights are the province of national law.").

199. *See* Nygh, *supra* note 198, at 44 (explaining that because the Convention "does not provide for the recognition of access orders and once [access] proceedings . . . are instituted the child's welfare has to be treated as the paramount consideration," it is possible for the "court of the requested State [to] vary or even discharge the access . . . rights").

200. *See* Croll, 229 F.3d at 137–39 (attempting to distinguish between rights of custody and rights of access).

equitable custody arrangements in the best interests of the child generally do not consider whether a parent will later fit into the "custody" or "access" boxes presumed under the Convention.²⁰¹ This uncertainty requires a court litigating a Hague case to do, to a certain extent, exactly what the drafters of the Convention were seeking to avoid: The court must evaluate the substance of the underlying dispute.²⁰²

The problem is exacerbated by the lack of a clear definition of "custody" in the Convention's language.²⁰³ The Convention counsels courts to give particular attention to whether the party has the right to "determine the child's place of residence."²⁰⁴ But even this distinction can be difficult to make.²⁰⁵ There is widespread disagreement as to whether a *ne exeat* clause in the custody agreement amounts to a right to determine the child's place of residence.²⁰⁶ Some countries interpret the type of negative "veto" right that accompanies a *ne exeat* clause as a custody right, while others interpret this type of provision as a limitation on the custodial parent's rights.²⁰⁷

Consistency is important for purposes of the Convention because the wronged party is likely to find himself or herself effectively engaging in a "mini-litigation" in the destination country.²⁰⁸ Whether or not a child is

201. Cf. Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 304 (2002) [hereinafter Weiner, *Uniformity and Progress*] (explaining that the terms of the Convention may not "coincide with the particular concept of custody in a domestic law").

202. See Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III 426, 428 (1980) (discussing the basic characteristics of the Hague Convention).

203. See Hague Convention, *supra* note 26, art. 5 (providing a minimal definition of "custody rights"); cf. *Croll v. Croll*, 229 F.3d 133, 138 (2d Cir. 2000) (looking to various dictionaries for a workable definition of "custody"). But see Silberman, *Abduction Convention*, *supra* note 35, at 45 (stating that "Article 5 of the Convention quite specifically defines 'rights of custody'").

204. See Hague Convention, *supra* note 26, art. 5 ("['R]ights of custody' shall include rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence.").

205. See *Croll*, 229 F.3d at 139 (analyzing whether a parent's rights amount to a right of custody or right of access).

206. Compare *id.* (ruling that a *ne exeat* right is not a custody right), with *id.* at 146 (Sotomayor, J., dissenting) ("A parent's *ne exeat* rights fit comfortably within the category of custody rights the Convention seeks to protect.").

207. See *id.* at 139 (ruling that a *ne exeat* right is not a right of custody under the meaning of the Convention).

208. See TREVOR BUCK, *INTERNATIONAL CHILD LAW* 144-45 (2005) (describing the role of judicial discretion in Convention cases).

returned under the Convention will rest on the interpretation of the country where the child is located at the time of the dispute.²⁰⁹ Although the Convention intentionally avoids addressing the merits of a custody dispute, as Elisa Perez-Vera explains, "the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent."²¹⁰ The Convention does not completely preclude the possibility that the abductor may capitalize on the advantage of a more friendly forum in the destination country.²¹¹

Regardless of the forum, a parent who has lost a contested relocation dispute likely will have an uphill battle convincing a court that he or she has the right to determine the child's place of residence.²¹² The fact that the parent objected to the move demonstrates that if he or she truly was able to determine the child's place of residence, the relocation would not have taken place.²¹³ Because this aspect of custody is specifically enumerated in the Convention, it is often given great weight by courts.²¹⁴ Therefore, the very fact that a parent has lost a contested relocation dispute weighs against his or her ability to rely on the Convention for a remedy if his or her rights are ignored.²¹⁵

Even a parent who can make the requisite showing to have a child returned under the Convention is not wholly assured relief.²¹⁶ The Convention includes several defenses that can be invoked to avoid the return remedy.²¹⁷ As previously explained, the application of these

209. See Perez-Vera, *supra* note 202, at 428 (discussing the basic characteristics of the Hague Convention).

210. *Id.*

211. See *id.* (describing the "delicate balance" between determinations on the merits and determining a party's custodial status under the Convention).

212. See *infra* notes 213–16 and accompanying text (explaining why a parent who unsuccessfully objected to a relocation may not be able to prove he or she has the ability to determine the child's place of residence).

213. See Lah et al., *supra* note 7 (explaining that Mr. Savoie was unsuccessful in petitioning the court to prevent his wife from taking his children to Japan).

214. See, e.g., *Croll v. Croll*, 229 F.3d 133, 139 (2d Cir. 2000) (analyzing the choice of residence right).

215. See *supra* notes 193–215 and accompanying text (discussing the significance of the distinction between custody rights and access rights).

216. See *infra* notes 217–23 and accompanying text (describing the available defenses to the Convention).

217. See, e.g., HUTCHINSON ET AL., *supra* note 23, at 5 (describing the available defenses to return under the Convention).

exceptions will be decided in the country where the child is presently located.²¹⁸

Two of these exceptions are particularly likely to apply in an international relocation case. A country is not obligated to return a child under the Convention if a year has passed and "it is demonstrated that the child is now settled in its new environment."²¹⁹ As long as the moving parent could show that the child had acclimated to his or her new environment, the Convention would not mandate the child's return.²²⁰

The Convention also provides a defense if return would place the child at grave risk of physical or psychological harm.²²¹ It is difficult to criticize this provision of the Convention, as it is certainly beyond dispute that a child should not be returned to a potentially harmful situation. Nonetheless, it is worth noting that again it will be the court of the destination country making this determination.²²²

B. Why Judicial Attempts Have Fallen Short

Courts that have recognized the problem of enforceability in international relocation cases have taken several approaches to address the problem.²²³ Three principal approaches to the problem have emerged, none of which fully ensures that the rights of left-behind parents are protected.²²⁴

218. See *supra* notes 209–13 and accompanying text (explaining the importance of the destination country's interpretation of the Convention).

219. Hague Convention, *supra* note 26, art. 12.

220. See *id.* (explaining that the return of an abducted child should be ordered unless more than a year has passed and "it is demonstrated that the child is now settled in its new environment").

221. See *id.* at art. 13 ("Notwithstanding the provisions of the preceding Article, the . . . requested State is not bound to order the return of the child if . . . there is a grave risk that . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.").

222. See Silberman, *Abduction Convention*, *supra* note 35, at 50–51 (discussing the grave risk of harm exception).

223. See *supra* Part II.B.4 (describing three judicial approaches to international relocation disputes).

224. See *infra* notes 225–70 and accompanying text (discussing the problems with the current judicial approaches to international relocation).

1. The Osmanagic Approach

The first approach is to ignore the problem of enforceability altogether.²²⁵ This was the approach taken in *Osmanagic v. Osmanagic*, in which the Supreme Court of Vermont upheld a family court's refusal to consider the enforceability problem in considering a mother's petition to move to Bosnia with her eight-year-old son over the father's objection.²²⁶ The problems with this approach are apparent. By ignoring the problem of enforceability altogether, the court fails to consider a critical aspect of the relocation.²²⁷ It is questionable whether a court that does not consider the risks of the move can ascertain the child's best interests.²²⁸ In addition, the interests at stake for both parties in an international move are markedly different from a move within the United States.²²⁹ For this reason, several criticisms of restrictions on relocation do not apply with the same force in a case involving an international move.²³⁰

As previously explained, restrictions on interstate moves have been criticized for infringing on the custodial parent's right to travel.²³¹ Yet a clean line can be drawn between the right to travel interstate and the freedom to travel internationally.²³² The first has been described as "virtually unqualified," while the second "has been considered to be no more than an aspect of the 'liberty' protected by the Due Process

225. See *supra* notes 104–10 and accompanying text (describing the facts and decision in *Osmanagic*).

226. See *Osmanagic v. Osmanagic*, 872 A.2d 897, 898 (Vt. 2005) (upholding a family court's custody determination in spite of the mother's plans to move to Bosnia with the child).

227. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1998) (explaining the difficulty and importance of the enforceability problem).

228. See Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 306 (1996) (explaining that a court attempting to determine a child's best interests must consider the potential impact of a decision either way).

229. See *Katz*, *supra* note 86, at 43 (discussing the different considerations required in international versus interstate removal cases).

230. See *infra* notes 231–45 and accompanying text (discussing criticisms of restrictive relocation standards).

231. See *supra* Part II.B.6.b (discussing the right to travel). But see *Kindregan*, *supra* note 58, at 48 ("The Supreme Court has given no indication that the constitutional right to travel should be paramount to the state's interest in preserving the best interests of the children. Indeed, the state's duty to protect the interests of minor children has been recognized . . . as a 'duty of the highest order.'" (citations omitted)).

232. See *Haig v. Agee*, 453 U.S. 280, 306 (1981) (distinguishing the *right* to interstate travel from the *freedom* to travel internationally).

Clause."²³³ Moreover, the moving parent's right to travel may be less burdened by an order restricting him or her from moving to a particular country than it would be in a case where the court requires the parent to remain in a particular state.²³⁴ In the first instance, the lesser burden on the parent's interest may make it more likely to be outweighed by countervailing considerations.²³⁵

Courts have been criticized for failing to consider the mobility of the left-behind parent in relocation cases.²³⁶ In the international context, however, even a parent able to relocate to the destination country to be with his or her child may not be assured contact with the child in the new location.

Another major criticism of restrictive relocation standards is that they are unfair to the custodial parent, most often the mother.²³⁷ Critics correctly point out that noncustodial parents traditionally have been able to move at will without asking anyone's permission.²³⁸ A custodial parent, on the other hand, may need to petition the court or even request the permission of the noncustodial parent, placing her to some extent under the continued control of her former partner.²³⁹

This legitimate criticism does not apply in the case of international relocation.²⁴⁰ Because the paramount concern is enforceability rather than convenience, the need for a restrictive standard arises whether the parent

233. *Califano v. Gautier Torres*, 435 U.S. 1, 4 n.6 (1978).

234. *See Kindregan, supra* note 58, at 46–49 (discussing the impact of the right to travel on relocation cases).

235. *See id.* at 49 ("When the relocating parent has invoked the right to travel, most courts have qualified this right by treating it as a subsidiary issue within the larger complex of family law policies.").

236. *See Weiner, Inertia and Inequality, supra* note 6, at 1750 ("The normative question—whether a noncustodial parent should follow the custodial parent when the custodian wants to move with the child—is rarely, if ever, considered.").

237. *See LaFrance, supra* note 160, at 147 (arguing that placing restrictions on a custodial parent's ability to relocate grants an unconstitutional preference to fathers).

238. *See Kindregan, supra* note 58, at 49 ("The custodial parent cannot challenge the right of a noncustodial parent to relocate out of the area of the child's residence for educational or financial opportunities.").

239. *See LaFrance, supra* note 160, at 73 (asserting that preventing a custodial parent "from exercising rights of national citizenship simply because she has . . . the misfortune of being opposed by a former husband, is, indeed . . . to stigmatize her and consign her to a caste system").

240. *See infra* notes 241–45 and accompanying text (explaining that international relocation standards may avoid the inequality inherent in interstate relocation restrictions).

wishing to move has primary custody or minimal visitation rights.²⁴¹ The risk that a noncustodial parent living overseas will detain the child following a scheduled visit is certainly as real as the risk that a custodial parent living overseas will obstruct visitation. Arguably, a noncustodial parent may be particularly motivated to ignore the order of the American court.²⁴² Any effective restriction on certain international moves must apply equally to either parent, regardless of what percentage of custody, parenting time, or visitation he or she had been awarded.²⁴³ This reality levels the playing field and avoids concerns about fairness and equal protection that have been raised in interstate relocation cases.²⁴⁴

2. The MacKinnon Approach

The second approach is to consider the problem of enforceability under factors normally applied in interstate relocation cases.²⁴⁵ In such a case, enforceability may be considered as an aspect of another enumerated factor, such as the child's ability to maintain a continued relationship with the nonmoving parent.²⁴⁶ This approach is illustrated by *MacKinnon v. MacKinnon*.²⁴⁷ The lack of specific guidance on the issue from the ALI and American Academy of Matrimonial Lawyers makes it difficult to say with any certainty what position these groups would advocate; however, both approaches appear to fall most closely into this second category.²⁴⁸

241. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1998) (explaining the problem of enforceability that is unique to international relocation cases).

242. See Weiner, *Uniformity and Progress*, *supra* note 201, at 278 (explaining that the Convention was initially designed to "discourage abductions by parents who either lost, or would lose, a custody contest").

243. *Id.*

244. See Kindregan, *supra* note 58, at 49–50 (explaining the argument that the custodial parent should be entitled to the same freedom to relocate as the noncustodial parent).

245. See *supra* notes 111–19 and accompanying text (explaining the approach taken by the court in *MacKinnon*).

246. See *MacKinnon v. MacKinnon*, 922 A.2d 1252, 1258–59 (N.J. 2007) (explaining that courts can employ a state "catch-all" factor "to sufficiently address other concerns implicated by international removal, such as Hague Convention membership, cultural and social concerns, feasibility of visitation, and enforceability of parental rights").

247. See *supra* notes 111–19 and accompanying text (explaining the facts and decision in *MacKinnon*).

248. See *supra* Part II.B.5 (describing the approaches taken by the ALI and the Am. Acad. of Matrimonial Lawyers).

This category gives somewhat more consideration to the enforceability problem than the *Osmanagic* approach, but is nonetheless troublesome because it fails to address the significant differences between interstate and international moves and minimizes the importance of the enforceability problem.²⁴⁹ Unlike the other interests weighed by the court in *MacKinnon*, the possibility that the parent-child relationship will be terminated is a risk of constitutional magnitude.²⁵⁰ The *MacKinnon* approach places this important interest on the same level as other statutory factors, some of which may represent little more than attempts to tip an otherwise deadlocked scale in one direction or another.²⁵¹ This approach may therefore be in opposition to the intent of Congress and to the constitutionally-based principle that the parent-child relationship should be preserved when possible.²⁵²

3. The Condon Approach

The third approach to the problem of enforceability is to take steps intended to ensure that the court's order will be honored in the destination country.²⁵³ This approach is represented by *Condon v. Cooper*.²⁵⁴ While the protections granted in the *Condon* case may reduce the risk of parental abduction, they may still be insufficient to protect the parental rights of the left-behind parent.²⁵⁵

249. See *infra* notes 250–53 and accompanying text (explaining why *MacKinnon* does not address the enforceability problem adequately).

250. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("[T]he interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme] Court.").

251. See *MacKinnon*, 922 A.2d at 1258 (listing enumerated factors courts consider in a relocation dispute).

252. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("When an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause."); *supra* Part II.A.2 (discussing the IPKCA).

253. See *supra* notes 120–32 and accompanying text (explaining the facts and decision of *Condon*).

254. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 33 (Cal. Ct. App. 1998) (upholding an order permitting the relocation of two children to Australia with their mother over their father's objections but remanding the case to the trial court to obtain concessions ensuring continued jurisdiction and enforceability of the court's order).

255. See *infra* notes 256–70 and accompanying text (explaining why the *Condon* approach is insufficient).

The principal protection offered by the *Condon* court took the form of a substantial financial bond.²⁵⁶ If the children's mother did not comply with the court order, she would forfeit the bond.²⁵⁷ The most obvious problem with using a bond to ensure compliance is the relative value of children and money.²⁵⁸ Many parents would give up large sums of money to gain complete control of their children.²⁵⁹

In addition to failing to ensure enforceability, requiring a parent to post a sizable bond may not be in the child's best interests.²⁶⁰ The deterrence value of a bond is closely connected to the parent's need to regain the money.²⁶¹ A parent who can barely afford to live without the money he or she has surrendered will be more motivated to comply with the court order; however, the child's standard of living is likely to suffer as well.²⁶²

Conditioning relocation on the ability to post a bond may also deprive lower income parents of much-needed opportunities.²⁶³ Prohibiting parties of meager financial means from relocating is contrary to logic; a party who is struggling financially may be particularly justified in moving to pursue a more lucrative career or to seek the assistance of family members.²⁶⁴ While a bond may be an appropriate tool in certain cases, it is not always a feasible solution to the enforceability problem.²⁶⁵

In addition to a bond, the court in *Condon* also required the mother to submit to the continuing jurisdiction of the California court.²⁶⁶ As the court

256. See *Condon*, 73 Cal. Rptr. 2d at 52 (requiring the moving party to post a bond).

257. See *id.* (explaining the terms of the required bond).

258. See *May v. Anderson*, 345 U.S. 528, 533 (1953) (describing a parent's interest in the custody of her child as "far more precious . . . than property rights").

259. See *Lah et al.*, *supra* note 7 (explaining that Mrs. Savoie absconded with her children notwithstanding the large amount of money she stood to lose by doing so).

260. See *infra* notes 261–65 and accompanying text (explaining why a bond requirement may place an undesirable burden on the moving party).

261. See *Hoff*, *supra* note 99, at 20 ("A court may order a parent to obtain a bond in an amount that would be a financial deterrent to abduction, taking into account that parent's financial circumstances.").

262. See *id.* (describing the use of financial bonds to ensure enforceability).

263. See *Burgess v. Burgess (In re Marriage of Burgess)*, 913 P.2d 473, 480–81 (Cal. 1996) (explaining the needs of both parents "to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends").

264. See *id.* (describing legitimate reasons a parent may desire to relocate).

265. See *supra* notes 258–65 and accompanying text (explaining why a bond requirement will not always solve the enforceability problem).

266. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 52 (1998) (requiring the mother to "concede the continuing jurisdiction of the California court").

itself admitted, the value of such a concession depends entirely on whether it will be honored by the destination country.²⁶⁷ While such a concession may be necessary to the future jurisdiction of the state court, it is not by itself sufficient to prevent a foreign court from entering a separate order depriving the left-behind parent of contact with the child.²⁶⁸ The financial and jurisdictional concessions required by the *Condon* court are certainly a step in the right direction. However, the court's attempts fall short of ensuring enforceability.²⁶⁹

C. Why a Legislative-Judicial Response is Necessary

Currently, many courts are setting the stage for parental abduction by permitting children to be taken to a jurisdiction where there is little or no risk that the abductor will be prosecuted or the child returned.²⁷⁰ This judicial response is not only bad policy, it contradicts the efforts of Congress to protect families from international child abduction.²⁷¹

Because parties in custody cases most often settle by bargaining "in the shadow of the law,"²⁷² the loophole created by the current state of international relocation law may also give an unfair bargaining advantage to the party with overseas contacts. For example, Christopher Savoie had previously paid an \$800,000 settlement and substantial alimony in exchange for his former wife's agreement to remain in the United States with the children.²⁷³

267. See *id.* ("The issue remains, however, whether the Australian court will enforce a concession of jurisdiction.").

268. See *id.* (explaining that the foreign court is not bound to honor the mother's concession of jurisdiction to the California court).

269. See *supra* notes 255–69 and accompanying text (explaining why *Condon*'s attempt at protecting the left-behind parent's rights fall short).

270. See *supra* Part II.B.4 (describing three judicial approaches to international relocation disputes).

271. See *supra* Part II.A.2 (discussing the IPKCA).

272. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 390 (2008) (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956 (1979)).

273. See *Friend: Mom Who Fled To Japan Felt Trapped*, MSNBC.COM, Oct. 1, 2009, http://today.msnbc.msn.com/id/33130396/ns/today-parenting_and_family (last visited Nov. 16, 2010) (explaining the facts of the Savoie matter) (on file with the Washington and Lee Law Review).

IV. Proposed Solution

A. Potential Solutions

There are three potential solutions to the enforceability problem in international relocation disputes. One solution is to adopt a per se ban on all contested international relocations of a child for whom custody is shared. While this option certainly would be the most effective method for addressing concerns of enforceability, it is not desirable because it does not permit courts the flexibility that may be necessary to reach a just result in an individual case.²⁷⁴ Although there are substantial reasons to be concerned about the level of judicial discretion in the current child custody judicial system, a system without any room for case-by-case consideration is equally undesirable.²⁷⁵

In addition, there are compelling arguments in favor of a permissive relocation standard. There are strong policy and constitutional concerns that weigh against limiting a parent's mobility unless absolutely necessary.²⁷⁶ In most cases, a permissive relocation standard is desirable and likely to benefit the child by increasing the happiness, autonomy, and stability of the custodial parent while nonetheless permitting the child to retain a close and substantial relationship with both parents.²⁷⁷ While this Note takes the position that these benefits are undercut by the risks in cases where continuing contact cannot be assured, they are nonetheless important and should not be ignored in cases where it is possible to accommodate the moving parent without a real risk of abduction.²⁷⁸ An overly-inclusive prohibition on international relocations ignores these realities.

A second option is to adopt a per se ban on all contested international relocations to non-Hague Convention countries. One beneficial aspect of this option is that it provides a rule that is clear and easy to apply, while accommodating both sides of the controversy. However, the limits of the Hague Convention and the need for at least limited case-by-case consideration ultimately counsel against adopting this approach. As

274. See Richards, *supra* note 20, at 245 (explaining the importance of an approach that "provid[es] courts with discretion when it is needed").

275. *Id.*

276. See LaFrance, *supra* note 160, at 3 (arguing that relocation cases "implicate constitutional interests of travel, autonomy, privacy, home, family, and, oftentimes, marriage").

277. See *id.* at 9 (arguing that a permissive relocation standard benefits children).

278. *Id.*

previously explained, it is questionable whether the Hague Convention will offer protection for some parents.²⁷⁹ A bright-line rule does not allow the court to consider whether the Convention provides adequate protection in a particular destination country. Moreover, a parent seeking to move to a non-Hague country should not be prohibited from doing so if he or she can establish that the custody arrangement is enforceable in the destination country.²⁸⁰

The third approach is to adopt a presumption against a contested international relocation unless it can be shown that the parental rights of both parents will be protected following the move.

B. Recommended Solution

This Note proposes that states adopt a presumption against contested international relocation, unless the moving parent can show that the rights of both parents will be protected following the move. A country's status as a signatory of the Convention should serve as presumptive evidence that a custody order will be enforceable in that country. A parent seeking to move to a member country need only point to that country's member status. Once he or she has done so, the burden should shift to the nonmoving parent to establish that the Convention, as interpreted by the destination country, would not adequately protect the parental rights at stake. This shifting burden would avoid forcing the moving parent to prove enforceability in cases where case law interpreting the Convention demonstrates that the parental rights of both parties will be protected.

In cases where the Convention does not apply or is inadequate, the party requesting the move should be permitted to present alternatives to ensure enforceability. The available methods will depend on the law of the destination country.²⁸¹

In some countries, the moving parent has the option of seeking a preliminary declaration of custody rights in the destination country.²⁸² This option permits the parent to demonstrate to the American court that the destination country will protect the nonmoving parent's rights. Often, the foreign country will allow a "mirror order" to be entered declaring the

279. See *supra* Part III.A (explaining why the Convention may be an inadequate remedy in some cases).

280. See LaFrance, *supra* note 160, at 3 (arguing for a permissive relocation standard).

281. See Katz, *supra* note 86, at 47 (discussing possible enforcement provisions).

282. *Id.*

same division of parenting time that the U.S. court had ordered.²⁸³ A similar option is for the moving parent to seek to have the American court order registered in the destination country.²⁸⁴ This option, when it is available, ensures that the order of the court in the United States granting access to the left-behind parent will be followed.²⁸⁵

In some cases, it may be possible to determine that the rights of the left-behind parent will be protected even if the state court's exact order is not adopted. For example, the foreign court may have entered a preliminary determination of custody rights that is similar but not identical to the order of the American court. This is a desirable compromise. The exact terms of the existing court order are less important than the protection that will be given to the left-behind parent's rights. A move to a country that recognizes and consistently protects parental rights should not be prohibited simply because there is a possibility that the court will order a visitation schedule that varies from the one selected by the American court. The moving parent should be permitted to discharge his or her burden by submitting statutory and case law of the destination country. In analyzing the country's precedent, the American court should specifically consider past treatment of foreign parents.

If it cannot be shown that the parental rights of the left-behind parent will be protected following the move, the court should not condone the move unless it explicitly finds that the child's best interests would be served by severing contact with the left-behind parent.²⁸⁶ This somewhat harsh standard is necessary to ensure that the risks to the left-behind parent and the child are fully considered.²⁸⁷

283. See *Tischendorf v. Tischendorf*, 321 N.W. 2d 405, 412 (Minn. 1982) (permitting a father to take his son to Germany for three weeks on the condition that he first obtain an order from the German court recognizing "the exclusive jurisdiction of American courts for determining" custody and acknowledging a duty to enforce the mother's custody rights); Hoff, *supra* note 99, at 26 (explaining that a court may require a parent "to obtain an order from a court in the country where visits are to occur with terms identical to the U.S. custody order").

284. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 50 (Cal. Ct. App. 1998) (discussing the possibility of registering a California custody order in an Australian court); Katz, *supra* note 86, at 47 (discussing the possibility of "an advance ruling by the foreign court and entry of a mirror order").

285. See Katz, *supra* note 86, at 47 (discussing possible enforcement provisions).

286. See *supra* Part II.B.6.a (discussing the importance of enforceability of parents' rights).

287. See Inbar, *supra* note 2 (explaining that the court in the Savoie matter permitted the move to Japan because it presumed the mother would comply with the American court

This proposal will not end the problem of international parental abduction. The principal barrier to the success of this recommendation is that a parent who fears he or she will be unable to relocate with the court's permission will abscond with the child illegally.

However, it is not clear that every party who would ignore an American court order while in another country would be equally willing to abduct a child from the United States in violation of federal law.²⁸⁸ Even otherwise law-abiding citizens may be willing to ignore a foreign court decision, particularly if it is contrary to the rule of law in the nation where they currently reside.²⁸⁹ Moreover, legislatures have not ignored the risk of "race-to-the-airport" international kidnappings.²⁹⁰ Both state and federal law may be available to help prevent this type of kidnapping²⁹¹ before it happens,²⁹² or end it while it is in progress.²⁹³ Such alternatives are not available when a court has

order even while she was out of the country).

288. See International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2003) (making it a federal crime to remove a child from the United States in violation of a custody order).

289. U.S. Dep't of State, *Enforcement of Judgments*, U.S. DEP'T OF STATE, http://travel.state.gov/law/judicial/judicial_691.html (last visited Nov. 16, 2010) ("There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.") (on file with the Washington and Lee Law Review).

290. See *supra* Part II.A.2 (discussing the IPKCA).

291. See International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2003) (criminalizing international parental abduction); TEX. FAM. CODE ANN. § 153.503 (Vernon 2005) (mandating measures to prevent international parental abduction); CAL. FAM. CODE § 3048 (West 2003) (same); see also Hoff, *supra* note 99, at 9–27 (describing various ways to prevent international parental abduction).

292. See U.S. Dep't of State, *Prevention: Guarding Against International Parental Child Abduction*, U.S. DEP'T OF STATE, http://travel.state.gov/abduction/prevention/prevention_560.html (last visited Nov. 16, 2010) (explaining techniques for preventing international parental abduction) (on file with the Washington and Lee Law Review). U.S. passport requirements are the first barrier to international parental abduction. *Id.* A child under age sixteen will be issued a U.S. passport only with the personal appearance or notarized written consent of both legal parents. *Id.* Of course, these restrictions will not protect a child who already has a passport. See *id.* (explaining that although the U.S. government will not revoke a child's passport once it has been issued, the passport can be held by the court). U.S. passport restrictions will also not necessarily prevent a parent from obtaining a foreign passport for a child who is a dual citizen. See *id.* (advising parents that a child "may be able to travel on [another] country's passport" if the child is of "dual nationality"). For example, the mother in the Savoie matter had been threatening for some time to cut the children off from their father by taking them to Japan. See *supra* notes 9–14 and accompanying text (discussing the Savoie matter). She acted on these threats only after the court turned over the children's passports to her for the summer move. See *supra* notes 9–14 and accompanying text (discussing the Savoie matter).

293. See U.S. Dep't of State, *Emergencies: Abduction in Progress*, U.S. DEP'T OF

approved of the move. Therefore, the chances that an abduction will be successful are lessened when the court has not granted permission for relocation. Even if the abductor is successful in reaching the destination country, the chances of return are greater if the parent took the child from the United States in violation of federal law than if he or she is simply not in compliance with a court order from a state where he or she no longer resides.²⁹⁴

While the recommended approach will not end the problem of international parental abduction, it will close the current loophole in relocation law that permits parents to cut off their former partners by moving the child out of the country.

V. Conclusion

After seventeen days in Japanese prison, Christopher Savoie was released and returned to the United States.²⁹⁵ His children, however, remain in Japan. It is questionable whether they will ever see their father again.

The current state of relocation law fails to provide adequate protection to the parent-child relationship, and leaves parents like Christopher Savoie

STATE, http://travel.state.gov/abduction/emergencies/emergencies_3845.html (last visited Nov. 16, 2010) (explaining that the Department can "work with law enforcement to try to stop the departure of children being abducted from the United States") (on file with the Washington and Lee Law Review). Even after the child has left the United States, it may be possible to stop the abduction. *See id.* ("If the abductor is transiting a country that is a party to the Hague Abduction Convention, [the Department] will contact authorities of that country who can attempt to stop the abduction as it is in progress."); U.S. DEP'T OF JUSTICE, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 23 (2007) (explaining the process for stopping an international parental abduction while it is in progress) (on file with the Washington and Lee Law Review).

294. U.S. DEP'T OF JUSTICE, *supra* note 293, at 23. As previously discussed, the fact that a parent has lost a contested relocation battle may undercut his or her ability to utilize the Hague Convention to effectuate return of the child. *See supra* Part III.A (explaining why the Convention may not provide an adequate remedy to parents left behind in parental abductions stemming from an international relocation). For example, in *Condon*, Ms. Cooper had already kidnapped the children once and taken them out of the country. *See Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1998) (explaining the facts of the case). Because her actions were clearly illegal, Mr. Condon was able to have the children returned under the Hague Convention. *Id.* As the court acknowledged, it is questionable whether such relief would be available to him if the mother retained the children in violation of a custody order following a legal relocation. *Id.*

295. *See* Nashville News Channel Five, *Christopher Savoie Released from Japanese Jail*, NEWSCHANNEL5.COM, Oct. 15, 2009, <http://www.newschannel5.com/Global/story.asp?S=11318092> (last visited Nov. 16, 2010) (explaining the facts of the Savoie matter) (on file with the Washington and Lee Law Review).

without legal recourse to enforce their parental rights. To address this problem, states should adopt the test proposed in this Note. Under the proposed test, the parent proposing the move bears the burden of proving enforceability. The destination country's status as a Convention signatory serves as presumptive evidence of enforceability, causing the burden to shift to the nonmoving parent to demonstrate that, notwithstanding the country's signatory status, his or her parental rights will not be protected following the move. The proposed framework would prevent parents from using courts to effectuate a "de facto termination"²⁹⁶ of the other parent's rights, and would align relocation law with the intentions of Congress and the interests protected by the Constitution.

296. See *Condon v. Cooper (In re Marriage of Condon)*, 73 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1998) (explaining that an international move could serve as a "de facto termination of the non-moving parent's rights to visitation").

