

FAMILY LAW FRUSTRATIONS: ADDRESSING HAGUE CONVENTION ISSUES IN FEDERAL COURTS

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I. INTRODUCTION

Modern technologies have made family relationships across international borders increasingly common.¹ With the existence of these “transnational families,” however, come transnational child custody battles, during which parents must contend with the different legal systems governing these disputes in each country.² To simplify this legal complexity, ninety-eight countries have adopted versions of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), an international treaty that provides a unified approach to resolving custody disputes across international borders.³

The legislation implementing the Hague Convention in the United States, the International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001-9011, grants federal and state courts concurrent jurisdiction over these international custody battles.⁴ While family law inquiries are familiar territory for state courts, federal courts face a number of

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¹ See Carmen Gonzalez & Vikki S. Katz, *Transnational Family Communication as a Driver of Technology Adoption*, 10 INT’L J. COMM. 2863, 2863 (2016), <http://ijoc.org/index.php/ijoc/article/view/5321/1673>; Valentina Mazzucato & Djamila Schans, *Transnational Families and the Well-Being of Children: Conceptual and Methodological Challenges*, 73 J. MARRIAGE FAM. 704, 704 (2011).

² Mazzucato & Schans, *supra* note 1, at 704; *About HCCH*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/about> (last visited Sept. 1, 2017).

³ *Status Table*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last updated July 27, 2016); *About HCCH*, *supra* note 2.

⁴ 22 U.S.C. § 9003(a) (Supp. III 2016); *see also* Chafin v. Chafin, 133 S. Ct. 1017, 1022 (2013).

substantive issues when handling Hague Convention cases.⁵ This comment explores those substantive issues and their underlying cause, ultimately proposing a solution to aid federal courts in accomplishing the goals of the Hague Convention.

Part II of this article provides an overview of the Hague Convention, its policy objectives, and its implementation in the United States. Part III details the various substantive issues that arise when federal courts handle Hague Convention return petitions, tracing their cause to federal courts' lack of experience with family law. Part IV sets out a proposed solution to these issues: referring certain fact-intensive, family-law-oriented determinations in federal Hague Convention cases to a state court judge. Finally, Part V explains this solution in further detail and illustrates its impact on Hague Convention litigation in federal courts.

II. HAGUE CONVENTION OVERVIEW

International custody disputes often occur when one parent moves a child out of the child's home country in hopes of obtaining a favorable judgment under another nation's custody laws.⁶ In 2015 alone, "more than 600 children were reportedly abducted by a parent from the United States to another country."⁷ The increasing frequency of these custody-driven kidnappings—referred to in the United States as "international parental child abductions"—prompted the drafting of the Hague Convention.⁸

⁵ See, e.g., *Berezowsky v. Ojeda*, 652 F. App'x 249, 255 (5th Cir. 2016) (Elrod, J., concurring); *Redmond v. Redmond*, 724 F.3d 729, 748–49 (7th Cir. 2013); Eric Lesh, Note, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 175 (2011); Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 234–35 (2008); Ion Hazzikostas, Note, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421, 425 (2004).

⁶ Elisa Perez-Vera, *Rapport Explicative [Explanatory Report]*, 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 426, 428 (1982), available at <https://assets.hech.net/upload/exp128.pdf>.

⁷ Bureau of Consular Affairs, *Annual Report on International Parental Child Abduction*, U.S. DEP'T OF STATE, at 5 (2016), [https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20\(July%2011\).pdf](https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20(July%2011).pdf).

⁸ Bureau of Consular Affairs, *International Parental Child Abduction*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/childabduction/en.html> (last visited Sept. 1, 2017); Perez-Vera,

Adopted by the Hague Conference on Private International Law⁹ in 1980, the Hague Convention provides for the expeditious return of victims of international parental child abduction.¹⁰ The Convention applies to children who were “habitually resident in a Contracting State¹¹ immediately before any breach of custody or access rights” by the abducting parent.¹² However, the Convention does not apply to children age sixteen or older.¹³

Under the provisions of the Hague Convention, a person claiming that a child has been wrongfully removed from the child’s country of habitual residence or wrongfully retained in a country that is not the child’s habitual residence may seek help from the judicial system of any Contracting State to have the child returned.¹⁴ Article 3 of the Convention provides that a removal or retention is wrongful when:

“[1] it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention” and “[2] at the time of removal or retention those

supra note 6, at 428; *see also* 22 U.S.C. § 9001(a)(3) (West, Supp. 2017) (“International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.”).

⁹The Hague Conference is a “global inter-governmental organization” that works toward “progressive unification” of international laws. *About HCCH*, *supra* note 2; *see also* Hague Conference on Private Int’l Law, Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11 [hereinafter “Hague Convention”]. Based in The Hague, Netherlands, the Conference meets every four years to address prevalent issues in international law. *About HCCH*, *supra* note 2. The Conference has adopted thirty-eight international Conventions, with the Hague Convention on the Civil Aspects of International Child Abduction among the most widely ratified. *Id.* The Conference consists of the European Union and eighty-three member nations, including the United States. *HCCH Members*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/e-n/states/hcch-members> (last visited Sept. 1, 2017).

¹⁰*About HCCH*, *supra* note 2; *Child Abduction Section*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> (last visited Sept. 1, 2017).

¹¹The term “Contracting State” in the text of the Hague Convention refers to nations who have adopted the treaty’s provisions. *See* Hague Convention, *supra* note 9, preamble, art. 1.

¹²Hague Convention, *supra* note 9, art. 4.

¹³*Id.*

¹⁴*Id.* art. 8.

rights were actually exercised . . . or would have been so exercised but for the removal or retention.”¹⁵

If these two elements are satisfied and less than a year has passed since the removal or retention, the nation where the child is currently located must order the immediate return of the child.¹⁶ When more than a year has passed since the wrongful removal or retention, the Hague Convention also requires an order for the child’s return, “unless it is demonstrated that the child is now settled in [his or her] new environment.”¹⁷ Courts have referred to this limitation as the Convention’s “well-settled defense” or “well-settled exception.”¹⁸ In addition to this defense, the Convention contemplates several other exceptions to the return order requirement: (1) where the parent seeking the return “had consented to removal”; (2) where “there is a ‘grave risk’ that return will result in harm”; (3) where “the child is mature and objects to return”; or (4) where “return would conflict with fundamental principles of freedom and human rights in the state from which return is requested.”¹⁹

A. *The Goals of the Hague Convention*

According to its preamble, the Hague Convention aims to create a procedural mechanism for the return of a parentally abducted child, prioritizing the interest of the child and protecting the child from being

¹⁵ *Chafin v. Chafin*, 133 S. Ct. 1017, 1021 (2013) (quoting Hague Convention, *supra* note 9, art. 3).

¹⁶ *Id.*

¹⁷ Hague Convention, *supra* note 9, art. 12. Consequently, the Supreme Court has clarified that the Convention’s one-year rule does not operate as a statute of limitations. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014).

¹⁸ *See, e.g., Hernandez v. Pena*, 820 F.3d 782, 785 (5th Cir. 2016); *Miller v. Miller*, 240 F.3d 392, 402 n.14 (4th Cir. 2001); *Blondin v. Dubois*, 238 F.3d 153, 165 (2d Cir. 2001); *Lops v. Lops*, 140 F.3d 927, 945 (11th Cir. 1998).

¹⁹ *Chafin*, 133 S. Ct. at 1021 (citing Hague Convention, *supra* note 9, arts. 13, 20). The International Child Abduction Remedies Act (ICARA) sets out two different burdens of proof for respondents raising these Convention exceptions, which function procedurally as affirmative defenses. *See* 22 U.S.C. § 9003(e) (West Supp. 2017). For the grave risk and human rights exceptions, ICARA requires clear and convincing evidence. *Id.* § 9003(e)(2)(A). In contrast, the well-settled, consent, and age and maturity exceptions must only be proved by a preponderance of the evidence. *Id.* § 9003(e)(2)(B).

harmful by a removal or retention.²⁰ Other goals listed in Article 1 of the Convention include “secur[ing] the prompt return of children wrongfully removed . . . or retained” and “ensur[ing] that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”²¹ In the Supreme Court’s view, the overall objective of the Convention is to “facilitate custody adjudications, promptly and exclusively, in the place where the child habitually resides.”²²

In addition to these stated objectives, the Convention expressly stipulates that a decision regarding a child’s return to the child’s habitual residence is not intended to operate as a substantive decision on the merits of the ongoing custody dispute.²³ Thus, the Convention does not attempt to resolve transnational families’ custody battles, but to “restore the status quo prior to any wrongful removal or retention” and discourage parents from internationally forum shopping to obtain more favorable custody rulings.²⁴ As to the ultimate custody determinations, the Convention provides that the merits should be litigated in the judicial system of the nation where the child habitually resides.²⁵

B. *Implementing the Hague Convention in the United States*

The United States ratified the Hague Convention in 1988, implementing it through the International Child Abduction Remedies Act (ICARA).²⁶ ICARA grants concurrent jurisdiction over Hague Convention cases to state and federal courts,²⁷ directing them to decide these cases “in accordance with the Convention.”²⁸ The procedural device under ICARA is a petition for relief, which the so-called “left-behind parent” files to secure the prompt return of an abducted child.²⁹ In 2015, this legislative solution facilitated the

²⁰ Hague Convention, *supra* note 9, preamble.

²¹ *Id.* art. 1.

²² *Chafin*, 133 S. Ct. at 1028 (Ginsburg, J., concurring) (citing Hague Convention, *supra* note 9, arts. 1, 3).

²³ Hague Convention, *supra* note 9, art. 19.

²⁴ *Redmond v. Redmond*, 724 F.3d 729, 739 (7th Cir. 2013).

²⁵ *Perez-Vera*, *supra* note 6, at 430.

²⁶ 22 U.S.C. §§ 9001-9011 (Supp. III 2016); *Chafin*, 133 S. Ct. at 1021.

²⁷ 22 U.S.C. § 9003(a) (“The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.”).

²⁸ *Id.* § 9003(d).

²⁹ *Redmond*, 724 F.3d at 731; 22 U.S.C. § 9003(b).

return of 299 wrongfully removed or retained children to their habitual residences in the United States.³⁰

Consistent with the Convention's objectives, ICARA includes a provision prohibiting courts from reaching "the merits of any underlying child custody claims."³¹ The Seventh Circuit explained the role of the Convention in this respect as follows:

A Hague Convention case is not a child custody case. Rather, a Hague Convention case is more akin to a provisional remedy—to determine if the child was wrongfully removed or kept away from his or her habitual residence, and if so, then to order the child returned to that nation. The merits of the child custody case—what a parent's custody and visitation rights should be—are questions that are reserved for the courts of the habitual residence.³²

Thus, ICARA—and the Convention itself—requires courts to toe an often unclear line between procedural questions of international law and the substantive issues involved in a custody battle. In effect, federal courts are faced with the difficult task of applying the fact-intensive, child-focused analyses characteristic of family law in the context of an international treaty.

III. SUBSTANTIVE HAGUE CONVENTION ISSUES IN FEDERAL COURTS

In her concurring opinion in *Berezowsky v. Ojeda*, Judge Jennifer Elrod commented on the substantive issues that arise when federal courts decide Hague Convention cases:

This case provides yet another example of the problems that can occur when federal courts address Hague Convention return petitions. The Hague Convention's role within the broader context of cross-border custody disputes is to undo an abduction so as to "facilitate custody

³⁰ *Annual Report*, *supra* note 7, at 13.

³¹ 22 U.S.C. § 9001(b)(4).

³² *Redmond*, 724 F.3d at 737 (citing HON. JAMES D. GARBOLINO, FED. JUDICIAL CTR., *THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES* ix (2012)).

adjudications, promptly and exclusively, in the place where the child habitually resides.” But time and again federal courts have struggled in that task, likely because of . . . the substantive law involved

For example, we have struggled to heed our own admonition that . . . courts “must not cross the line into a consideration of the underlying custody dispute.” In spite of that straightforward directive, we recently gave one of the Hague Convention exceptions an interpretation that we acknowledged could “embroil the state of refuge in the underlying custody dispute.” We likewise recently joined the Second and Ninth Circuits in adopting a multi-factor test for the Convention’s “well-settled” defense that requires courts to weigh custody-type considerations These are complicated and wrenching areas of substantive law with which we have little expertise.³³

Berezowsky involved two Mexican nationals who had been fighting for custody of their son in various state, federal, and foreign courts throughout the first six years of his life.³⁴ While the majority opinion focused on a procedural issue,³⁵ Judge Elrod’s commentary discussed substantive issues as well, illustrating that in both areas ICARA’s prohibition on reaching the merits of the custody dispute is not as simple as it sounds.³⁶

³³ 652 F. App’x 249, 255 (5th Cir. 2016) (Elrod, J., concurring) (citations omitted).

³⁴ *Id.* at 249–50 (majority opinion).

³⁵ The majority opinion responded to the father’s second appeal to the Fifth Circuit in this case. *Id.* at 250. In a previous decision, the Fifth Circuit vacated and remanded the district court’s decision to grant the mother’s Hague Convention return petition. *Id.* On remand, the district court vacated its previous return order and dismissed the case. *Id.* at 250. The father then moved to amend the judgment to include an order that the mother return the child to him, but the district court denied the motion. *Id.* On the second appeal, the Fifth Circuit affirmed the district court’s decision, holding that its own order to dismiss permitted the trial court to use its discretion to determine whether an order to “re-return” the child was appropriate. *Id.* at 253. In other words, while a “re-return” order may have accomplished the practical effect of the district court’s judgment, the trial court did not abuse its discretion in choosing not to issue such an order. *Id.* at 253–54.

³⁶ *Id.* at 255–56 (Elrod, J., concurring).

A. *A Lack of Family Law Expertise*

Other federal courts have made similar observations about the complexities of handling Hague Convention return petitions. For example, in *Redmond v. Redmond*, the Seventh Circuit reversed the trial court's order that a child be returned to Ireland despite the fact that the courts in the two jurisdictions involved—Ireland and Illinois—*agreed* that the child should reside in Ireland.³⁷ In his *dubitante* opinion, Judge Easterbrook recognized the absurdity of ruling on a Hague Convention return petition when the underlying custody dispute had already been resolved in an Illinois state court.³⁸ In his view, this demonstrated that the case never should have been in federal court at all.³⁹

Additionally, while not addressing the difficulties in federal courts specifically, several courts have acknowledged the fact-intensive nature of Hague Convention cases or the careful dance associated with avoiding the underlying custody dispute.⁴⁰ One such case, *Sealed Appellant v. Sealed Appellee*, discussed this fine line:

The determination whether a party is exercising custody rights closely parallels the determination of the nature and dimension of those rights. Courts charged with deciding “exercise” under the Convention must not cross the line into a consideration of the underlying custody dispute. . . . Once it determines that the parent exercised custody rights

³⁷ 724 F.3d at 731–32.

³⁸ *Id.* at 748–49 (Easterbrook, J., *dubitante*).

³⁹ *Id.* at 749 (“It is time for this federal overlay to end and the subject be returned to the domestic-relations apparatus of Illinois and Ireland, where it should have been all along.”).

⁴⁰ *Barzilay v. Barzilay*, 600 F.3d 912, 920 (8th Cir. 2010) (“[D]etermination of habitual residence under the Hague Convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child.”); *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996) (defining “exercise” of custody rights as occurring “whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child” because a narrower definition would require courts to make determinations that come “dangerously close to forbidden territory: the merits of the custody dispute”); *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001) (assigning a narrow definition to the “grave risk” exception because “[t]he Hague Convention is not designed to resolve underlying custody disputes[,]” but “this fact . . . does not render irrelevant any countervailing interests the child might have”); *Hernandez v. Pena*, 820 F.3d 782, 787–88 (5th Cir. 2016) (listing factors for the well-settled defense that are fact-intensive inquiries related to the child’s best interest).

in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly.⁴¹

Hague Convention cases often require courts to make these kinds of meticulous distinctions to preserve the Convention's goals.

Like Judge Elrod, commentators have found that these difficulties are rooted in federal courts' lack of family law expertise. Due to the large number of potential courts where a parent can file a Hague Convention return petition and the small number of Hague Convention cases relative to other types of litigation, it is difficult for judges and lawyers at all levels to develop any kind of expertise in deciding these cases.⁴² In fact, in an ABA study on Hague Convention cases, more than sixty percent of lawyers reported that the judges they appeared before were not familiar with the Convention's provisions.⁴³ Consequently, when filing Hague Convention cases, "[s]tate courts are [often] considered superior for their expertise in domestic family law."⁴⁴

As a result, rather than attempting to make family-law-intensive determinations themselves, federal courts have suggested that they should defer to state courts and their decades of family law experience.⁴⁵ Referencing the constitutional mandate that federal courts should not hear family law cases based on diversity of citizenship jurisdiction,⁴⁶ some commentators have suggested that this dichotomy should extend to Hague Convention cases as well—after all, "family law is a traditional area of state regulation."⁴⁷

Deferring to state courts is also consistent with the Hague Convention's objectives and the standards set forth in ICARA. The Convention's preamble provides that "the interests of children are of paramount

⁴¹ 394 F.3d 338, 344–45 (5th Cir. 2004) (citation omitted).

⁴² Lesh, *supra* note 5, at 175.

⁴³ *Id.* (citing LINDA GIRDNER & PATRICIA HOFF, U.S. DEP'T OF JUST., FINAL REPORT OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN (Linda Girdner and Patricia Hoff eds., 1993)).

⁴⁴ *Id.* at 176.

⁴⁵ Naomi Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1091 (1994) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703–04 (1992)).

⁴⁶ This doctrine has been termed the "domestic relations exception." *Id.* at 1073.

⁴⁷ *Id.*

importance in matters relating to their custody.”⁴⁸ Similarly, the legislative findings supporting ICARA note that “the international abduction or wrongful retention of children is harmful to their well-being.”⁴⁹ Further, in addition to ruling on a Hague Convention return petition, ICARA authorizes courts to take any appropriate measure under federal or state law “to protect the well-being of the child involved.”⁵⁰ This focus on protecting the child parallels the guiding principle in state court family law determinations: acting in the “best interests of the child.”⁵¹

B. Implications on Hague Convention Cases

Federal courts’ lack of family law expertise often results in inconsistent resolution of Hague Convention cases: “Despite a deceptively simple appearance, a Hague Convention proceeding can raise interpretive questions over what constitutes ‘custody rights,’ ‘grave harm,’ and even how to determine ‘habitual residence.’ This has led to a divergence in outcomes particularly when applying the exceptions and affirmative defenses of the Hague Convention.”⁵² Because these cases deal with the interests of children, expertise and uniform decision-making are particularly paramount, as non-custodial parents may exploit inconsistencies or loopholes arising out of divergent judicial pronouncements.⁵³

In several instances, these inconsistent outcomes have produced circuit splits among the federal courts of appeals. In *Abbott v. Abbott*, the Supreme Court resolved a circuit split regarding what constitutes a “right of custody” under the Convention’s provisions.⁵⁴ However, while the Supreme Court has addressed this narrow issue, a number of Hague Convention circuit

⁴⁸Hague Convention, *supra* note 9, preamble.

⁴⁹22 U.S.C. § 9001(a)(1) (Supp. III 2016).

⁵⁰*Id.* § 9004(a).

⁵¹*See, e.g.*, TEX. FAM. CODE ANN. § 153.002 (West 2014); *see also* Merle H. Weiner, “*We Are Family*”: *Valuing Associationalism in Disputes Over Children’s Surnames*, 75 N.C. L. REV. 1625, 1709 & n.363 (1997) (noting that “the best interest of the child standard has become ubiquitous in family law” and is used “to resolve disputes in numerous areas, including adoption, neglect proceedings, and modification of custody orders”); *Troxel v. Granville*, 530 U.S. 57, 84 n.5 (2000) (“[A] search of current state custody and visitation laws reveals fully 698 separate references to the ‘best interest of the child’ standard . . .”).

⁵²Lesh, *supra* note 5, at 175.

⁵³Weiner, *supra* note 5, at 234.

⁵⁴560 U.S. 1, 15 (2010); *see also* Lesh, *supra* note 5, at 176.

splits remain unresolved. For example, “[t]here is a current split between the circuits as to whether . . . [ICARA] provides for a federal remedy for visitation violations” in addition to international parental child abductions.⁵⁵ Additionally, a split exists regarding the weight assigned to the parents’ intentions in determining a child’s habitual residence.⁵⁶ Finally, the Fifth Circuit recently joined the Second and Ninth Circuits in finding that immigration status is merely one relevant factor in the multifactor test for the Convention’s “well-settled” exception.⁵⁷ While these are the only three federal circuit courts to address this issue, lower courts have differed on the weight given to immigration status, with some finding it dispositive and others finding that it weighs more heavily than other factors.⁵⁸

Coupled with ICARA’s grant of concurrent jurisdiction, these inconsistent standards in Hague Convention cases increase the likelihood that both parents will forum shop among federal courts: “[W]hen a party waits until a late stage of the custody proceedings to file an ICARA claim in federal court, this inevitably entails . . . a heightened risk of forum shopping.”⁵⁹ Not only does this kind of gamesmanship abuse judicial resources, but it subverts the best interest of the child in favor of the parent’s desire to win custody.⁶⁰

Ultimately, filing Hague Convention cases in federal court creates substantive issues rooted in the unfamiliar nature of family law issues in the federal system. Federal Hague Convention cases generate inconsistencies and circuit splits, which reduce certainty both for parents seeking enforcement of their custody rights and for children hoping for a prompt return home. While courts and commentators have suggested an array of

⁵⁵Robert G. Spector, *International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy than the Abduction Convention*, 49 FAM. L.Q. 385, 396 n.30 (2015).

⁵⁶*Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012). Minority positions occupy both ends of the spectrum, with some courts requiring express consent by the non-custodial parent to change the child’s habitual residence and some instead finding that the child’s experience is the most important consideration. *Id.* However, the majority of the circuits take a middle-ground approach, gradually decreasing the weight assigned to parental intent in proportion with the child’s age and maturity level. *Id.*

⁵⁷*Hernandez v. Pena*, 820 F.3d 782, 788 (5th Cir. 2016).

⁵⁸*Id.*

⁵⁹Hazzikostas, *supra* note 5, at 434.

⁶⁰*Id.* at 425; *see also* *Berezowsky v. Ojeda*, 765 F.3d 456, 473 (5th Cir. 2014) (“Allowing either party to impact the habitual residence determination through judicial gamesmanship . . . would be at odds with the stated goals of the Hague Convention.”).

solutions,⁶¹ the dilemma remains: the Hague Convention's warning against addressing the underlying custody dispute is much more difficult to heed in federal court.

IV. THE SOLUTION: REFERRING FAMILY LAW DETERMINATIONS TO A STATE JUDGE

These substantive issues call for a solution that addresses the lack of family law expertise in the federal court system. Because federal courts do not routinely resolve family law matters, it is difficult for these courts to determine when they are becoming embroiled in the types of custody inquiries that ICARA expressly prohibits. As a result, federal courts are left with the impossible task of avoiding a boundary line they cannot see.

In contrast, the substantive difference between a Hague Convention return petition and the underlying custody dispute is likely to be much clearer to state courts. Consequently, in areas of Hague Convention law that require fact-intensive inquiries akin to deciding the merits of a custody dispute, state courts are a more apt forum to navigate this boundary. An effective solution to the substantive issues in federal Hague Convention cases would enable federal courts to "borrow" state court expertise to bring consistency and certainty to particularly difficult return petition determinations.

A. *The Potential for State and Federal Court Collaboration*

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) instructs courts to communicate and collaborate to resolve custody disputes.⁶² By way of illustration, this instruction to collaborate appears in several provisions of the Texas version of the UCCJEA. First, the Act permits different states' court systems to communicate throughout custody proceedings.⁶³ Additionally, a court in one state may instruct a court in another state to take certain actions necessary to resolve a case, such as conducting an evidentiary hearing, which results in the instructing

⁶¹E.g., Linda J. 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, 60 (2003); Hazzikostas, *supra* note 5, at 426.

⁶²UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT § 110 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1997).

⁶³TEX. FAM. CODE ANN. § 152.110(b) (West 2014).

court in effect “borrowing” another court’s findings.⁶⁴ Finally, in addressing *forum non conveniens* challenges, a Texas court may assess the jurisdiction of a court in another state, considering, among other factors, “the familiarity of the court of each state with the facts and issues in the pending litigation.”⁶⁵ This provision acknowledges that some courts may be better suited to handle particular family law issues based on their familiarity with the facts of the case and the governing law.

While the UCCJEA focuses on collaboration among state courts, the same kind of cooperation among state and federal courts has proved to be beneficial in other areas of substantive law. Judges who have collaborated in this way have noted that advantages to this practice include conserving judicial resources, avoiding scheduling conflicts or other issues between court systems, creating consistency in state and federal resolution of cases to make outcomes more predictable, and developing more effective case management strategies.⁶⁶ While much of the current collaboration is administrative, polling results have suggested that individuals working in the court system—including judges and law clerks—would be open to increased substantive collaboration as well.⁶⁷ For example, these individuals suggested “the use of state judges as federal magistrates in an emergency.”⁶⁸

The area of mass tort litigation presents a number of examples of successful federal-state collaboration. In fact, “[m]ost related multiforum litigation results from mass torts: situations in which numerous injuries and, therefore, numerous lawsuits result from the same event or set of circumstances.”⁶⁹ Collaboration in this area occurs with respect to pretrial issues, including case management, discovery, and settlement, as well as

⁶⁴ *Id.* § 152.112(a) (listing permissible collaboration).

⁶⁵ *Id.* § 152.207(b)(8).

⁶⁶ Catherine R. Borden & Emery G. Lee III, *Beyond Transfer: Coordination of Complex Litigation in State and Federal Courts in the Twenty-First Century*, 31 REV. LITIG. 997, 1001–02 (2012).

⁶⁷ See Victor E. Flango & Maria Gibson, *Administrative Cooperation Between State and Federal Courts* 11 (1992), available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/federal/id/24>.

⁶⁸ *Id.*

⁶⁹ William W. Schwarzer, et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1691 (1992).

substantive issues such as class certification and summary judgment.⁷⁰ Often, state and federal courts combine proceedings in these matters, allowing judges from both court systems to preside over a joint hearing.⁷¹

The existence of successful federal-state collaboration sheds light on a potential solution to the substantive issues in federal Hague Convention cases. If these courts were to cooperate in deciding the family-law-intensive issues in return petition cases—with state courts lending their expertise where federal courts are lacking—many of the substantive issues could be resolved. Interestingly, the language of ICARA begins to contemplate this kind of collaboration. The Act’s full faith and credit provision invites federal courts to defer to state courts’ Hague Convention judgments where the return petition originated in state court.⁷² Additionally, the statute expressly authorizes communication between court systems.⁷³ Thus, implementing a more formal system of collaboration between federal and state courts would not be a significant departure from the procedural mechanisms envisioned by the drafters of ICARA.

B. A Referral System for Family Law Determinations

Given the advantages of federal-state collaboration in other areas, the following solution emerges: The legislature should amend ICARA to incorporate a system where federal courts refer family-law-intensive determinations in Hague Convention cases to a state court judge. A number of issues in Hague Convention cases—discussed at *infra* Part VA—require fact-based inquiries that mirror the “best interest of the child” standard state courts apply with regularity to family law disputes.⁷⁴ Using state court judges’ family law expertise to help address these Hague Convention

⁷⁰JAMES G. APPLE ET AL., FED. JUDICIAL CTR., MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS 23 (1997), available at <https://cdm16501.contentdm.oclc.org/digital/collection/federal/id/16>.

⁷¹*Id.*

⁷²22 U.S.C. § 9003(g) (Supp. III 2016) (“Full faith and credit shall be accorded by the courts of the States and the court of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.”).

⁷³*Id.* § 9008(a).

⁷⁴See *Barzilay v. Barzilay*, 600 F.3d 912, 920 (8th Cir. 2010); *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996); *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001); *Hernandez v. Pena*, 820 F.3d 782, 787–88 (5th Cir. 2016).

inquiries will decrease the frequency of inconsistent outcomes and reduce the risk of forum shopping across federal courts.

In effect, this solution would resemble the magistrate system. Under the magistrate statute, a federal trial judge may designate a magistrate judge to “hear and determine any pretrial matter pending before the court,” “conduct hearings, including evidentiary hearings,” and “submit . . . proposed findings of fact and recommendations for the disposition . . . of any motion.”⁷⁵ The trial judge then relies on those determinations in entering final judgment.⁷⁶

In the same way, under this proposed solution, a federal judge handling a Hague Convention case would, at the judge’s discretion, delegate any determinations that require family law expertise to a state judge. The state judge would then conduct hearings as needed on those determinations and submit findings of fact, conclusions of law, and a recommended resolution. The federal judge would incorporate those findings and recommendations into the judge’s overall analysis of the case. As a result, the federal court would retain its independent legal authority in choosing whether to adopt the state court’s recommended resolution or to reach its own distinct holding. However, the federal court would benefit substantively from the state court’s analysis on the proper application of family law principles.

V. STRUCTURING THE SOLUTION

While this solution may sound effective in theory, questions remain as to how it would operate within the nation’s two distinct court systems. First, the legislature may need to clarify which specific Hague Convention determinations are subject to referral. Additionally, from a procedural perspective, the state court would need to ensure that it may properly exercise jurisdiction over the referred determinations. Further, this referral solution implicates both the court systems’ and the parties’ interests in litigating in a proper and convenient venue.

A. *Applicable Determinations*

The boundary line between the Hague Convention and the underlying custody dispute is most unclear where return petition determinations require

⁷⁵28 U.S.C. § 636(b)(1) (2012).

⁷⁶*See id.* § 636(b)(1)(B).

the federal court to make in-depth, fact-intensive inquiries. As a result, these inquiries—those that implicate the same kind of factual analyses present in custody cases—should be made with the assistance of a court system familiar with their intricacies. A survey of federal Hague Convention cases reveals at least three⁷⁷ determinations that should be referable to state court judges: (1) habitual residence; (2) the “well-settled” defense; and (3) the “age and maturity” exception.

1. Habitual Residence

Perhaps the most significant of these referable determinations is that of habitual residence, as the ultimate disposition of a Hague Convention return petition hinges on this finding.⁷⁸ Despite its importance, however, the Convention’s text does not define the term “habitual residence.”⁷⁹ Instead, as several circuit courts have noted, the inquiry is fluid and fact-intensive,⁸⁰ requiring federal courts to weigh a broad array of relevant evidence and surrounding circumstances.⁸¹ For example, the *Redmond* court’s habitual residence analysis was based on the following considerations:

⁷⁷There may well be other Hague Convention determinations that would be appropriate to refer to a state judge. This discussion does not attempt to provide an exhaustive list of all the referable determinations, but rather sets out three that have been particularly difficult for federal courts to navigate.

⁷⁸*Redmond v. Redmond*, 724 F.3d 729, 742 (7th Cir. 2013) (“[E]very Hague Convention petition turns on the threshold determination of the child’s habitual residence; all other Hague determinations flow from that decision.”)

⁷⁹*Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012) (citation omitted).

⁸⁰*See Redmond*, 724 F.3d at 732 (“The determination of habitual residence under the Hague Convention is a practical, flexible, factual inquiry that accounts for all available relevant evidence and considers the individual circumstances of each case.”); *Barzilay v. Barzilay*, 600 F.3d 912, 920 (8th Cir. 2010) (“[D]etermination of habitual residence under the Hague Convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child.”); *Larbie*, 690 F.3d at 310 (5th Cir. 2012) (“The inquiry into a child’s habitual residence is not formulaic; rather it is a fact-intensive determination that necessarily varies with the circumstances of each case.”).

⁸¹Courts have noted that the habitual residence inquiry should remain a flexible standard to be consistent with the Convention’s objectives and prevent forum shopping. *See, e.g., Redmond*, 724 F.3d at 742 (“It is greatly to be hoped that courts will resist the temptation to develop detailed and restrictive rules as to habitual residence The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.” (quoting *Re Bates* (1989), No. CA 122/89 (High Ct. of Justice, Fam Div., Eng.), 1989 WL 1683783)); *Kijowska v. Haines*, 463 F.3d 583, 586 (7th Cir. 2006) (“The determination of ‘habitual residence’ is to be

Under this commonsense and fact-based approach, we think it clear that . . . JMR habitually resided in Illinois He was born in Illinois, and except for seven and a half months of his infancy, he lived continuously in Illinois with only periodic, brief visits to Ireland. . . . [H]e had spent more than three of his four years in Illinois—approximately 80% of his young life. . . .

In addition to the length of time JMR had spent in the United States . . . the everyday details of his life confirm that Illinois was home. JMR had frequent contact with his extended family in Illinois; he received regular care from an Illinois pediatrician and an Illinois dentist; he went to daycare, preschool, and church in Orland Park; he had neighborhood friends and played on a children’s baseball team in the area. . . .

In contrast . . . JMR’s ties to Ireland were tenuous. As of that date, he had spent only a small fraction of his life in Ireland—not more than 20%—and much of that time was prior to his initial move to Illinois when he was an infant. After the move, which occurred when he was not yet eight months old, JMR spent only about ten and a half separated weeks in Ireland and then primarily for the purpose of attending court proceedings. Although [the child’s father] and his extended family live in Ireland, these ties, without more, do not translate to habitual residence. . . . [A]ny objective observer of the facts of JMR’s everyday life would not call Ireland the child’s home.⁸²

made on the basis of the everyday meaning of these words rather than the legal meaning that a particular jurisdiction attaches to them, as otherwise forum shopping would come in by the back door—each contestant would seek a forum that would define ‘habitual residence’ in the contestant’s favor.” (quoting *Koch v. Koch* 450 F.3d 703, 712 (7th Cir. 2006))). The state court referral system will allow federal courts to preserve the benefits of conducting a fact-intensive habitual residence inquiry without having to contend with the “underlying custody dispute” boundary line.

⁸²724 F.3d at 743–44.

Given the in-depth factual analysis required and the fact that “[c]ourts use varying approaches to determine a child’s habitual residence,”⁸³ the habitual residence determination is the type of inquiry made difficult by federal courts’ lack of family law expertise. Courts making this crucial finding in Hague Convention cases would benefit from a state judge’s assessment of facts and circumstances that resemble the custody disputes these judges resolve regularly.

2. “Well-Settled” Defense

The “well-settled” defense, while a less central piece of the Hague Convention analysis, presents a second determination that should be referable to a state court judge. Similar to habitual residence, neither the Hague Convention nor ICARA defines the term “settled.”⁸⁴ Instead, application of this Convention exception requires “substantial evidence of the child’s significant connections to the new country” compared to “the child’s contacts with and ties to his or her State of habitual residence.”⁸⁵ Federal courts conducting the “well-settled” analysis apply a seven-factor test that the Fifth Circuit recently adopted in *Hernandez*:

We join the circuits that have addressed this issue and hold that the following factors should be considered: (1) the child’s age; (2) the stability and duration of the child’s residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child’s participation in community or extracurricular activities; (6) the respondent’s employment and financial stability; and (7) the immigration status of the respondent and child.⁸⁶

⁸³ *Larbie*, 690 F.3d at 310.

⁸⁴ *Hernandez v. Pena*, 820 F.3d 782, 787 (5th Cir. 2016) (citation omitted).

⁸⁵ *Id.* (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (March 26, 1986)).

⁸⁶ *Id.* at 787–88.

Courts weighing these factors have engaged in the same kind of fact-intensive analysis involved in the habitual residence determination.⁸⁷ Thus, because the “well-settled” defense requires federal courts to consider facts relevant to custody disputes, this Hague Convention determination is likely more suited for evaluation by a state court judge with family law expertise.⁸⁸

3. Age and Maturity Exception

A third referable determination is what courts have termed the “age and maturity” exception—the Hague Convention provision stipulating that “the judicial . . . authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [the child’s] views.”⁸⁹ The maturity determination is a discretionary, fact-intensive inquiry in the same vein as the habitual residence and “well-settled” analyses.⁹⁰ One commentator summarized the difficulties involved in this inquiry:

The [age and maturity] exception requires judges, often federal judges unused to children’s issues, to resolve complex cases involving children. . . .

. . .

The Hague Abduction Convention makes no specific reference as to how the judge should determine if an individual child is of sufficient age and maturity. . . . While one federal court made a blanket statement that children under nine were not of sufficient age and maturity, most

⁸⁷ See *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998); *Taveras v. Morales*, 22 F. Supp. 3d 219, 236–39 (S.D.N.Y. 2014), *aff’d sub nom. Taveras ex rel. L.A.H. v. Morales*, 604 F. App’x 55 (2d Cir. 2015); *In re R.V.B.*, 29 F. Supp. 3d 243, 257 (E.D.N.Y. 2014).

⁸⁸ See *Berezowsky v. Ojeda*, 652 F. App’x 249, 255 (5th Cir. 2016) (Elrod, J., concurring) (citing *Hernandez*, 820 F.3d at 787–88).

⁸⁹ Hague Convention, *supra* note 9, art. 13; *see, e.g., De Silva v. Pitts*, 481 F.3d 1279, 1287 (10th Cir. 2007).

⁹⁰ See *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007) (“Whether a child is mature enough to have its views considered is a factual finding.”); *Rodriguez v. Yanez*, 817 F.3d 466, 475 (5th Cir. 2016); *In re R.V.B.*, 29 F. Supp. 3d at 259.

courts have not established a minimum age below which they will not interview a child. The lack of objective criteria or tests to determine maturity can result in subjective and inconsistent decisions.

Whether a child is of sufficient age and maturity to have his or her views considered is a factual finding that a district court must make in light of the specific circumstances of each case. . . .⁹¹

Thus, because the age and maturity exception is nuanced and fact-intensive, decisions applying this exception are often disparate and contradictory.⁹² For example, as Judge Elrod noted in her *Berezowsky* concurrence, the Fifth Circuit “recently gave [this exception] an interpretation that [it] acknowledged could ‘embroil the state of refuge in the underlying custody dispute.’”⁹³ Consequently, the age and maturity exception is also an apt determination for referral to a state court judge.

B. Jurisdiction and Venue: A Twofold Referral Method

The referral system would be consistent with the fundamental jurisdiction and venue requirements for federal and state courts. Beginning with jurisdiction, ICARA’s grant of concurrent jurisdiction over Hague Convention cases provides an independent basis for the exercise of federal court authority.⁹⁴ This ICARA provision expressly creates state jurisdiction over these matters as well.⁹⁵ Thus, because both court systems have received jurisdictional authority by statute, this solution does not create jurisdictional issues inconsistent with either ICARA or constitutional mandates.

With regard to venue, the solution would rely on a twofold system of referral created by statute. To determine which state court a federal court should collaborate with, this legislative system would take into account any pre-existing custody proceedings in which the parties are involved.

⁹¹Linda D. Elrod, “*Please Let Me Stay*”: *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663, 677–78 (2011).

⁹²*De Silva*, 481 F.3d at 1287 (collecting cases).

⁹³*Berezowsky*, 652 F. App’x at 255 (quoting *Rodriguez*, 817 F.3d at 475 & n.33).

⁹⁴22 U.S.C. § 9003(a) (Supp. III 2016).

⁹⁵*Id.*

First, if the petitioning family has custody proceedings pending in a state court in the United States, the federal court would refer determinations to that state court judge. If the family has multiple pending custody proceedings in the United States, the federal court would refer determinations to the state court with the most recently filed proceeding. This would streamline the decision-making process for the state court because the court would already be familiar with the particular facts of the case as well as any unique circumstances that could trigger Hague Convention exceptions. Additionally, any venue challenges related to that state court would likely have already been raised and resolved.

Second, if the family does not have custody proceedings pending in the United States, the federal judge would refer determinations to the “designated” state court judge for that federal court. The statutory scheme for this solution would designate one state court judge for each division of each United States judicial district whose court is centrally located within that geographic region. This would increase administrative efficiency and ensure that the state court venue is still geographically convenient for the parties, avoiding challenges under the doctrine of *forum non conveniens*.⁹⁶

C. *The Effect of a Referral System*

Ultimately, this referral system would remedy the core substantive concern Judge Elrod and others have expressed with federal court Hague Convention cases: a lack of family law expertise. Where courts have collaborated under the UCCJEA, “state courts [have] accomplished what federal courts could not,” resolving cases efficiently and accurately.⁹⁷ The same would be true in Hague Convention cases if the legislature implemented this proposed solution. The inconsistencies and loopholes would be greatly reduced, providing similarly-situated families with more predictable outcomes. Further, abducting parents would no longer be able to forum shop across federal courts. Thus, the decisions in these cases would turn on an objective assessment of the child’s habitual residence, not disparate definitions of Convention provisions that result from federal courts’ efforts to avoid addressing the “underlying custody dispute.”

In addition to solving the substantive issues, the referral system may also alleviate a procedural issue in Hague Convention cases: the federal

⁹⁶ See 28 U.S.C. § 1404 (2012).

⁹⁷ Spector, *supra* note 55, at 406.

court system's difficulty in affording cases the "expeditious" resolution the Convention contemplates.⁹⁸ Judge Elrod also discussed these procedural issues in her *Berezowsky* concurrence:

Nor are we well-suited to the prompt resolution that the Hague Convention envisions we will achieve. The Convention sets six weeks as the target time for judicial disposition of a petition, but in 2008 . . . "the average time taken to reach a first instance decision was 209 days compared with 441 days to finalise [sic] a case that was appealed."⁹⁹

Where cases are referred to a state court familiar with the facts, the family-law-intensive determinations can be made more efficiently at the state level. Additionally, even where cases are referred to the designated state court judge, because state and federal courts can work on the case simultaneously—with the federal court addressing issues not involving difficult questions of family law while it waits on the state court's findings—these cases will be resolved much more quickly.

VI. OTHER PROPOSED SOLUTIONS AND THEIR WEAKNESSES

A major aim of the referral system is to avoid the difficulties presented by other possible fixes for these substantive Hague Convention issues. Scholarship on this topic has produced four major alternatives to the solution proposed in this article: (1) vesting jurisdiction exclusively in state courts; (2) vesting jurisdiction exclusively in federal courts; (3) vesting jurisdiction in a limited number of state and federal courts or one state or federal court; and (4) utilizing federal court abstention doctrines to decline to exercise federal court jurisdiction. While these suggestions may seem workable, each presents underlying weaknesses not present in the referral system.

⁹⁸Hague Convention, *supra* note 9, art. 2; *see also* *Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013) ("[C]ourts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation.")

⁹⁹*Berezowsky v. Ojeda*, 652 F. App'x 249, 255 (5th Cir. 2016) (Elrod, J., concurring) (quoting Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—Part III*, National Reports 207 (2011)).

A. *Exclusive State Court Jurisdiction*

Considering that the substantive issues discussed are rooted in federal courts' inexperience with family law, perhaps the most obvious solution is vesting exclusive jurisdiction over Hague Convention cases in the state court system.¹⁰⁰ Despite its face-value appeal, this solution suffers from a fundamental flaw: denying federal courts their constitutional and statutory power to hear cases arising under international treaties.

Article III, § 2 of the U.S. Constitution and the federal question statute both authorize federal courts to exercise jurisdiction over cases arising under federal law, including international treaties.¹⁰¹ Courts and commentators have relied upon two major policy justifications for ensuring that a federal forum exists to adjudicate federal issues: guarding against state hostility to federal law and promoting uniformity in its interpretation.¹⁰² First articulated by Alexander Hamilton, these policies predate the federal court system itself—jurisdiction over federal issues, including international treaties, is of foundational importance to the federal courts.¹⁰³ Divesting federal courts of this jurisdiction is not a decision to be made lightly, especially given the similar policies identified by Congress as supporting the passage of ICARA.¹⁰⁴ Ultimately, making state courts the exclusive Hague Convention forum would disrupt a centuries-old jurisdictional balance and remove federal courts' ability to uniformly interpret a treaty enacted as federal law. Because there are alternatives to this drastic approach, such an anomalous shift in jurisdictional power is unwarranted.

¹⁰⁰ See Lesh, *supra* note 5, at 180.

¹⁰¹ U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2012).

¹⁰² See, e.g., Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 647 (1987); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CAL. L. REV. 95, 97 (2009).

¹⁰³ Doernberg, *supra* note 102, at 647 (citing THE FEDERALIST NO. 80 (Alexander Hamilton)).

¹⁰⁴ 22 U.S.C. § 9001(b)(3)(B) (Supp. III 2016) (recognizing "the need for uniform international interpretation of the Convention"); see also 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, 281–93 (2002).

B. Exclusive Federal Court Jurisdiction

The opposite arrangement has also been suggested as a Hague Convention fix—vesting jurisdiction over Hague Convention cases exclusively in the federal courts.¹⁰⁵ In addition to the substantive issues in federal Hague Convention cases, another concern indicates that state courts should not be deprived of Hague Convention jurisdiction altogether: the availability of state court adjudication protects the compelling state interest in family law matters.

The Supreme Court has noted on several occasions that “child custody questions implicate a strong state interest.”¹⁰⁶ Reflected in the development of the domestic relations exception and as discussed above, the tendency of federal courts to leave family law matters to the states is rooted in state courts’ increased suitability and proficiency to handle these issues.¹⁰⁷ As a result, similar to exclusive state jurisdiction, exclusive federal jurisdiction over Hague Convention cases would be contrary to a long-established jurisdictional balance between federal and state courts.

Because federal and state courts both have compelling interests in Hague Convention cases, an appropriate solution would allow each court system to protect its interests and apply its separate area of expertise. The referral system accomplishes this, balancing the federal and state interests by facilitating collaboration.

C. Jurisdiction in Designated Courts

A third solution offered to resolve Hague Convention issues is vesting jurisdiction over these cases in one or a limited number of state and federal courts.¹⁰⁸ Specifically, commentators have suggested a system similar to the Federal Circuit’s exclusive jurisdiction over patent appeals—funneling all Hague Convention cases to one federal court.¹⁰⁹ Another possible iteration of this solution would not go quite as far, limiting jurisdiction to a small

¹⁰⁵ Lesh, *supra* note 5, at 177.

¹⁰⁶ Hazzikostas, *supra* note 5, at 444 (citing *Moore v. Sims*, 442 U.S. 415, 435 (1979)); *see also* *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (“[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890))).

¹⁰⁷ *Ankenbrandt*, 504 U.S. at 703–04.

¹⁰⁸ Lesh, *supra* note 5, at 181.

¹⁰⁹ *Id.*

number of state and federal courts, perhaps one state and one federal court in the geographic area assigned to each of the federal regional circuits.

While the single federal court proposal can be set aside under the same rationale discussed in the previous section, even the broader small-number-of-courts alternative presents a due process problem that renders it unusable.¹¹⁰ In particular, requiring a parent who is already shouldering the expense of separate Hague Convention and custody cases to also travel to a distant forum to litigate the Hague Convention matter impedes that parent's access to the court system.¹¹¹ For some, the inconvenience of pursuing a Hague Convention return petition in a court that is hundreds of miles away may foreclose such an action altogether, denying parents a chance to see their children safely returned to their habitual residence.

D. Federal Court Abstention

Finally, commentators have suggested the use of federal abstention doctrines—in particular, *Colorado River* abstention—to avoid the federal court issues in Hague Convention cases altogether.¹¹² Under this approach, a federal court would apply the six-factor *Colorado River* test to each Hague Convention case, and the “default position [would] be to exercise jurisdiction.”¹¹³ In other words, only some cases would present appropriate circumstances for *Colorado River* abstention, and federal courts would have to conduct yet another complex, multi-factor analysis to determine whether to apply the doctrine.¹¹⁴ In cases where the court could not justify abstention, the substantive Hague Convention issues would still be alive and well. Thus, while the abstention solution may eliminate a small number of Hague Convention cases in federal court, it would not remedy the issues in every case. The referral system, in contrast, would address the federal courts' Hague Convention issues comprehensively and completely.

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² Hazzikostas, *supra* note 5, at 426.

¹¹³ *Id.* at 451.

¹¹⁴ *See id.*

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VII. CONCLUSION

Ultimately, a statutory referral system will allow federal courts to more effectively accomplish the Hague Convention's goal of returning parentally abducted children to their habitual residences. When a court experienced in handling family law cases is involved, the boundaries of the "underlying custody dispute" become clearer, so cases will be decided more predictably and efficiently. Consequently, the Hague Convention will operate as it should: as a procedural mechanism for returning a child home as soon as possible.