

Child Relocation 2026

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USA

Law and Practice

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Trends and Developments

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Law and Practice

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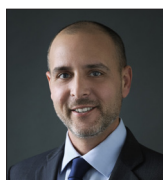
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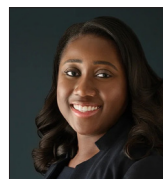
matrimonial matters (both domestic and international) involving equitable distribution and custody disputes, child and spousal support, and prenuptial and postnuptial agreements – with a special focus on international child abduction and custody disputes, including proceedings arising under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. She is an active certified divorce mediator and a certified parent coordinator. Valentina is consistently ranked by Chambers and Partners' High Net Worth Guide as a top family/matrimonial lawyer.



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

1.1 Parental Responsibility

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

Although the terminology may vary across the 50 states of the USA, a parent's decision-making power with regard to a child is most often referred to as "legal custody". A parent can have "sole legal custody" under which a parent is individually empowered – or "joint legal custody", which requires parents to co-operate with one another – to make important decisions affecting a child's life, including (but not limited to) a child's education, healthcare, religious upbringing, and extracurricular activities.

1.2 Requirements for Birth Mothers

A birth mother would automatically acquire parental rights or legal custody of the child. A birth mother can lose custody of her child to the authority of the state if a court determines that such relief is in the child's

best interests and the court terminates or suspends the mother's parental rights as a result. By way of example, a state can take protective custody of a child and commit guardianship to an authorised social services agency if parental rights are terminated owing to a finding of neglect or abuse, a newborn testing positive for drugs, etc.

1.3 Requirements for Fathers

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

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

- being registered as the child's father on the birth certificate;

- obtaining a parentage/paternity order from a court (eg, an “Order of Filiation” in New York);
- entering into a custody agreement with the child’s mother;
- obtaining a court order granting joint or sole legal custody; and
- entering into a marriage with the mother.

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

1.4 Requirements for Non-Genetic Parents

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

Adoption

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

Step-Parents

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

Same-Sex Relationships

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

Surrogacy

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

The USA does not have federal laws regarding gestational surrogacy. Instead, each state has its own laws on the subject, which vary from state to state. In New York, surrogacy agreements were unenforceable until the Child Parent Security Act became law in 2021, which allows for compensated gestational surrogacy pursuant to surrogacy agreements and for parentage orders to be granted prior to the birth of a child. New York law only applies to gestational surrogacy, whereby the surrogate’s own egg is not used to conceive the child. Arrangements whereby the surrogate is biologically related to the child remain unenforceable in New York and they are prohibited if the surrogate is being compensated.

1.5 Relevance of Marriage at Point of Conception or Birth

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

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

1.6 Same-Sex Relationships

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

1.7 Adoption

See 1.4 Requirements for Non-Genetic Parents.

2. Relocation

2.1 Whose Consent Is Required for Relocation?

When one parent wishes to relocate a child permanently to another country, the relocating parent generally needs the consent of the other parent and/or any other individual who is a legal guardian of the child.

2.2 Relocation Without Full Consent

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

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

2.3.1 Factors Determining an Application for Relocation

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

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

- the relocating parent's stated reasons for wanting to relocate;
- whether the move would significantly enhance the child's educational or financial circumstances to the extent that it outweighs the potential disruption

to the child's relationship with the non-relocating parent or guardian;

- the child's age, relationships with any siblings who are not relocating, and overall family structure and support in both locations; and
- each parent's capability to meet the child's overall needs, including the ability to foster and facilitate the child's relationship with the other parent or legal guardian.

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

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

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

Key precedents on relocation from other states include:

- *Altomare v Altomare*, 77 Mass App Ct 601, 933 NE 2d 170 (2010) – Massachusetts; and
- *In re Marriage of Burgess*, 13 Cal 4th 25, 913 P 2d 473 (1996) – California.

2.3.2 Wishes and Feelings of the Child

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

2.3.3 Age/Maturity of the Child

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

2.3.4 Importance of Keeping Children Together

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

2.3.5 Loss of Contact

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

2.3.6 Which Reasons for Relocation Are Viewed Most Favourably?

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

- support the child financially;
- improve the child's educational opportunities – for example, where the child has special educational needs that are not adequately addressed by the child's current school district; and

- increase the parent's and child's access to emotional and physical support systems – for example, by moving closer to family members.

2.3.7 Grounds for Opposition to Relocation

There are no specific grounds for opposing relocation. If a parent's custodial rights would be adversely affected by relocation, they can set forth various reasons for opposition, with a focus on the child's best interests. Generally, courts are most sympathetic to opposition based on a reduction in frequent and meaningful access between the non-applicant and the child as a result of relocation, and will consider the degree to which such a decrease would negatively impact the child and/or whether suitable alternative arrangements could be made to reduce the negative impact. The more significant access that the non-applicant has, or parenting time that they spend with the child, and the more involved the non-applicant is in the child's life, the more likely a court would find that relocation is not in the child's best interests – although no factor alone is dispositive.

2.3.8 Costs of an Application for Relocation

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

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

A worthwhile consideration in many jurisdictions is that an application for relocation is considered a custody modification proceeding. In New York, for example, a court has the discretion to award the less-

monied party counsel and expert fees to be paid by the more-monied party pursuant to Section 237 (b) of the Domestic Relations Law and/or Section 651 of the Family Court Act. Indeed, in New York there is a rebuttable statutory presumption that fees be awarded to the less-monied party, subject to the discretion of the court based on consideration of the facts and circumstances.

2.3.9 Time Taken by an Application for Relocation

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

2.3.10 Primary Caregivers Versus Left-Behind Parents

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

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

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

2.4 Relocation Within a Jurisdiction

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

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

3. Child Abduction

3.1 Legality

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

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

Similarly, in California, any “person” who takes a child and “maliciously deprives a lawful custodia[n] of a right to custody... or visitation” may be prosecuted for “deprivation of custody of a child or right to visitation” (Section 278.5 of the California Penal Code). Depending on the degree, deprivation of custody is

punishable by up to three years in prison and a fine of up to USD10,000.

3.2 Steps Taken to Return Abducted Children

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

Each of the signatory member states to the 1980 Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in what are known as both “incoming” and “outgoing” cases. A proceeding pursuant to the 1980 Hague Convention may be brought directly before the courts of a signatory state or through the Central Authority of the state of habitual residence, which co-ordinates with the Central Authority of the country the child was taken to. Cases pursuant to the 1980 Hague Convention are brought in the country in which the children are located, seeking return to the state of habitual residence.

In the USA, the 1980 Hague Convention is implemented through the International Child Abduction Remedies Act (ICARA), a federal law enacted by the US Congress in 1988. Section 9001 (a)(4) of ICARA mandates the prompt return of children “wrongfully removed or retained” within the definition of the 1980 Hague Convention, unless one of the narrow exceptions to the return applies. ICARA further establishes a uniform process for “prompt return” and directs that

states must act “expeditiously” to return children to their “state of habitual residence”. The Office of Children’s Issues within the Department of State serves as the Central Authority for the US government.

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

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

3.3 Hague Convention on the Civil Aspects of International Child Abduction

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

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

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addition, the Office of Children's Issues will provide a list of full-fee attorneys upon request. These attorneys can work on incoming 1980 Hague Convention cases and some may work on non-Hague cases as well.

Ultimately, a petition for the return of the child under the 1980 Hague Convention must be filed with the court. In the USA, state and federal courts have concurrent jurisdiction to hear such cases and make a determination. The courts in the USA take these proceedings very seriously and will order the return of the child unless the parent opposing such return can establish one of the narrow defences. The 1980 Hague Convention provides five narrow exceptions to return:

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

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

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

For further information, see the [2026 Annual Report to Congress on International Child Abduction](#) published by the US Department of State, and the [HCCH Global Report – Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction Convention](#).

3.4 Non-Hague Convention Countries

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

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The Second Forum on Domestic Violence and the Hague Convention: One Step Forward, Two Steps Back

In June 2024, the Permanent Bureau of the Hague Conference on Private International Law (*Hague Conference – Conférence de La Haye*, or HCCH) convened the first-ever Forum on Domestic Violence and the Related Operation of Article 13 (1)(b) of the Hague Convention on the Civil Aspects of International Child Abduction (the “1980 Convention”). That gathering, held in Sandton, South Africa, was a historic moment. For the first time, the HCCH brought judges, “Central Authorities”, advocates, psychologists and, most importantly, survivors of domestic violence into the same room to discuss whether the 1980 Convention was serving the children it was designed to protect. This author covered that Forum in the [Child Relocation 2024 Global Practice Guide](#), noting the cautious optimism it generated:

- a recognition of the different forms domestic violence can take; the harm it causes to children; and
- a growing judicial willingness, as reflected in the US Supreme Court’s 2022 decision in *Golan v Saada*, to reduce the reliance on protective measures as a condition of return.

The optimism was reinforced by the Secretary General Christophe Bernasconi’s closing observation that success under the Convention “is not about the sheer number of returns but really about the correct application of the Convention”. The First Forum did not resolve the complexities at the intersection of domestic violence and the Convention. What it did, however, was acknowledge the problem and open the door to a productive dialogue.

That dialogue continued approximately sixteen months later, this time in Fortaleza, Brazil. From 27 to 30 October 2025, the HCCH and the Government of Brazil co-hosted the Second Forum on Domestic Violence and the Operation of Article 13 (1)(b). Nearly 500 participants registered, more than 150 of them in person. The Second Forum should have advanced the work begun in Sandton and moved toward resolving the practicalities of how to best protect victims within the framework of the Convention. Unfortunately, the opposite happened. While the evidence assembled at

Fortaleza was even more detailed and compelling than what had persuaded Sandton’s participants of the need for a serious conversation, the institutional posture with which that evidence was received appeared noticeably narrower than the one Mr Bernasconi had articulated sixteen months earlier.

This article examines that reversal. It is offered from the perspective of a practitioner who views the 1980 Convention as essential, but believes that a course correction in the way it is implemented has become necessary. The Convention’s original purpose was to protect children from the harmful effects of international abductions by promptly returning them to their home country. With 46 years of evidence, we now understand that not every “abduction” is harmful and not every return is protective. A more nuanced implementation of the Convention is needed to accomplish its true goal of protecting children.

The data presented in Fortaleza fleshed out the problems identified in Sandton

The data and other evidence presented in Fortaleza was clear, specific and detailed, albeit bleak. It filled in the gaps left open in Sandton.

Professor Merle Weiner (University of Oregon) presented research, drawing on journalist Olivia Gentile’s analysis of United States cases between July 2022 and June 2024, showing that 77% of return petitions in that period were filed by fathers against mothers, consistent with international data compiled separately by Professor Nigel Lowe and Victoria Stephens. Among respondent mothers, 79% alleged domestic violence or child abuse in defending against return; only 17% of those who raised the Article 13 (1)(b) defence at trial succeeded in proving it. Meanwhile, 55% of fathers accused of abuse obtained their children’s return. Of the mothers Professor Weiner’s research team interviewed whose children were returned, 59% reported severely adverse custody outcomes, including losing their relationship with their children entirely, whether through inability to safely return themselves, deportation, minimal or supervised visitation, or the other parent’s non-compliance with the terms of return.

The picture was similar outside the return context. Dr Nishat Hyder-Rahman presented findings from a

GlobalARRK survey of 165 respondents on the lived experience of relocation proceedings: of those who answered the survey's question on domestic violence, 93.2% reported having experienced it. Yet, those who disclosed the abuse in their proceedings mostly reported that it was given limited weight, or ignored outright, by the court. Some had been advised by their own lawyers not to disclose the abuse at all, for fear of appearing uncooperative with contact arrangements.

Dr Braden Clark cited a 2020 inquiry by the government of New South Wales, Australia, finding that coercive control was present in 99% of intimate partner homicides in that jurisdiction, with no physical violence previously reported in approximately 25% of those cases. As is now well-understood, separation is statistically the most dangerous moment for a victim: 77% of Australian women killed by their partners had separated or were in the process of separating.

And on the issue of protective measures, the data, assembled at scale, was consistent across jurisdictions. Ruth Dineen and Roz Osborne, presenting joint research from FiLiA Hague Mothers and GlobalARRK, reported that 71.4% of mothers who returned under protective measures faced further abuse despite these measures, a figure consistent with a 2003 Reunite International study finding two thirds of undertakings in the United Kingdom cases were never implemented, and that even mirror orders were honoured in only one out of five cases.

The protective measures problem – revisited

A full session during the Second Forum was devoted entirely to protective measures. Speaker after speaker – Ms Osborne, Ms Dineen, Judge Myriam de Hemptinne and Justice Steven Arnold Majiedt – walked through the same conclusion from different jurisdictions: undertakings are rarely enforced, mirror orders are rarely honoured, and the practical safety net that return orders assume is often not there in any meaningful sense. Dr Adrienne Barnett (Brunel University of London), presenting on behalf of Hague Mothers, situated the protective measures problem within a broader institutional pattern, observing that the assumption that protective measures can mitigate risk “is underpinned by [a] physical incident model of domestic violence” and “fails to acknowledge high

level of recidivism and breaches, and broader risk and harm”. She pointed to the recent English decision in *J. v. K.* [2025] EWHC 2125 (Fam), which had quoted with approval Cobb J.’s direct formulation in *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415 that “Protective Measures need to be what they say they are – protective. To be protective, they need to be effective”. Ms Dineen summed up the implication for cross-border cases: “if protective orders fail domestically, they cannot be expected to work across borders”.

The institutional response, articulated by Christian Höhn on behalf of Germany’s Central Authority, was to double down. Return is the rule, non-return is the exception, and protective measures are the tool ensuring “safe” returns despite the risk of grave harm. That this remains the mainstream approach across the majority of the contracting states in the face of the mountain of evidence that shows protective measures do not work is truly baffling. Even more concerning, it is also the approach the HCCH continues to endorse in its Guide to Good Practice.

The reform that is not coming

Similarly, a full session was dedicated to reviewing the HCCH’s Guide to Good Practice on Article 13 (1) (b). Such a review was timely, if not overdue, given the five years that have passed since its publication. Boni de Moraes Soares, an attorney at Brazil’s Attorney General’s Office, presenting on behalf of Brazil, questioned whether three of the Guide’s central features reflect either the current understanding of domestic violence or the text of the Convention itself. The Guide’s own language is instructive. It provides that “harm to a parent, whether physical or psychological, could, in some *exceptional circumstances*, create a grave risk” to the child (emphasis added). It directs that the grave risk analysis turn on “such considerations as the nature, frequency and intensity of the violence”, and states that “evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child”. Mr Soares questioned why sexual abuse, for instance, should require any assessment of frequency or intensity to qualify as grave risk, an obviously fair question, given that the Guide itself elsewhere states there is no separate, lower test for

any particular category of harm: “the Convention does not provide for different tests to assess a grave risk on the basis of the type of risk”.

It would be inaccurate to suggest that the Guide ignores domestic violence. Its companion volume on mediation devotes an entire chapter to screening for domestic violence and safeguarding victims who go through mediation, and the Special Commission has separately confirmed that a child need not be the direct target of violence for the exception to apply. The concern Mr Soares and others have identified is deeper. The burden to avoid return – ie, the “exceptional circumstances”, assessed by “nature, frequency and intensity” – demonstrates a fundamental lack of understanding of the pervasiveness of domestic violence and the frequency of institutional failures when responding to it.

The Guide’s treatment of protective measures compounds this concern. Even when a court finds that returning a child would create a grave risk of harm, the Guide recommends considering whether “adequate arrangements”, most commonly undertakings from the taking parent or mirror orders in the requesting state, can be put in place to ameliorate that risk and allow the return to proceed. As set out above, the empirical record on the effectiveness of such measures is appalling: the 71.4% figure from FiLiA Hague Mothers and GlobalARRK, the 2003 Reunite findings on undertakings and mirror orders, and the consistent testimony of practitioners across jurisdictions all point in the same direction. See [The Guide to Good Practice on Article 13 \(1\)\(b\): Domestic Abuse Perspective](#).

In his closing remarks, Mr Bernasconi was candid about the institutional runway: any revision to the Guide will depend on a decision by CGAP (the HCCH’s Council on General Affairs and Policy), which in turn will want to be informed by a future meeting of the Special Commission, a body that meets every six years. On that basis, the Secretary General noted that work on revising the Guide, or on drafting a separate instrument specific to domestic violence, “cannot realistically begin within the next five years”.

That timeline had already been set. At its March 2025 meeting, seven months before the Second Forum,

CGAP had resolved that “the second Forum, like the first, will not result in any HCCH Conclusions and Recommendations”, and that “any proposal for an additional Forum involving the HCCH... shall be presented to CGAP for consideration”. Before a single participant travelled to Brazil, the question of what would be done with the evidence they would assemble had been answered: nothing binding, and nothing further, without another round of approval from the same body that had just foreclosed the current round. This was perhaps the precise moment at which the door opened in Sandton began to close.

The label problem

A recurring theme through the Second Forum’s discussion, surfacing across multiple sessions, in different formulations and from different speakers, was whether the Convention’s labelling of “wrongfulness” in cases of domestic violence accurately describes the problem for the population of cases to which the term is most frequently applied.

Under the Convention, a child’s removal in breach of the left-behind parent’s custody rights is deemed “wrongful”. The label itself presents certain difficulties. Several speakers questioned whether the treatment of a removal by a primary-caregiver parent fleeing documented domestic violence should be conceptually and evidentially identical to the treatment of a removal calculated to defeat the other parent’s lawful custody rights in the absence of any such factor. The two removals plainly have different purposes, raise different concerns and reflect different motivations, but the Convention does not allow for this nuance.

This is not a new question and it did not originate at Fortaleza. But the empirical evidence reaffirmed at the Forum – that 77% of respondents were mothers, 79% raised domestic violence allegations and 71.4% of returned mothers faced continued abuse despite protective measures – makes the definitional question harder to defer.

This question surfaced during the Secretary General’s opening remarks, and it is here that the distance between the two Forums is perhaps the most visible. At Sandton, in his closing remarks, Mr Bernasconi had offered what many participants took as the ani-

mating principle of the Forum's project: that success under the Convention "is not about the sheer number of returns but really about the correct application of the Convention". That formulation did not prejudge outcomes. It made the analysis, rather than the disposition, the measure. It was the sentence that most obviously kept the door open – a door through which the empirical evidence, the reform proposals and the definitional questions raised at Fortaleza were meant to walk.

Yet, in his opening at the Second Forum, the same Secretary General took a noticeably narrower stance. Responding to what he described as a recent line of argument suggesting the Convention should distinguish between "harmful abductions" and "protective abductions", Mr Bernasconi said: "I respectfully disagree with this distinction. Let us be clear: when custody rights are violated, the removal or retention is wrongful. An abduction inflicts harm. Domestic violence inflicts harm. Both are wrong. Both cause trauma". The Convention, he emphasised, "does not begin with labelling some abductions as "protective" – it begins with the rule that abductions are wrongful, followed by the question of whether an exception to the principle of a return applies".

The two statements of the Secretary General are not immediately or obviously compatible. If it is the correct application rather than the number of returns that is the true measure of the Convention's success, then the language used to describe the removals that trigger it is not incidental to the analysis. It is an essential part of what makes the analysis correct or incorrect. A category that treats fleeing domestic violence as identical, at the threshold, to retaliatory removal is not a neutral doctrinal starting point; it is a choice that shapes how correct application is defined and by whom. Labels, in other words, matter, and terminology is not the opposite of substance. It is one of the tools through which substance is either honoured or eroded.

This point has been developed recently in scholarly terms as well. Jeffrey Edleson and Emma Katz, in a forthcoming article in the *Journal of Gender-Based Violence*, argue that Article 13 (1)(b)'s explicit references to "exposure" to grave psychological harm and

to "intolerable situations" on their face already provide the textual foundation for denying return in cases of documented coercive control. All that is needed is to give these terms their due.

The institutional defensiveness is particularly striking considering that it stands apart even from the position now advanced by the Convention's own rapporteur. In a February 2024 interview published in the Uruguayan newspaper *La Diaria*, Elisa Pérez-Vera, author of the 1981 Explanatory Report whose interpretation of the exceptions has for decades guided the Convention's application, acknowledged that "gender-based violence was not taken into account... we had not become aware that it was a phenomenon" when the Convention was drafted. Pérez-Vera went further, offering a contemporary reinterpretation: "I believe that, almost 50 years later, we need to reinterpret the letter of the Convention in light of the new social realities in which it has to be applied", and insisting that "from the point of view of interpreting Article 13, domestic violence and gender-based violence should be a factor to be taken into consideration both by the judges in the requested state, who have to decide whether or not to return the child, and by the judge who naturally, according to the Convention, would have to decide on the custody relationship".

Mr Bernasconi's own post-Forum footnote, appended to the published text of his opening address after "valuable discussions during the Forum", acknowledged that some removals "may indeed be prompted by a genuine and instinctive – often motherly – desire to protect the child", while maintaining that "the Convention does not distinguish between types or motives of abduction". That the footnote was added at all suggests the Forum moved something. That it maintained the definitional rule intact suggests how much of the Sandton framing – and how much of the interpretive space Pérez-Vera herself is now inviting – is yet to be recovered.

Where this leaves the Convention

None of this is intended as criticism of the Hague Convention itself, much less as an argument for weakening it. The 1980 Convention remains an essential and effective tool for protecting children from the harmful effects of international abduction, and its goals are as

important today as they were 46 years ago. Victims of domestic violence also depend on the Convention's correct application, including when they seek the return of children wrongfully removed by abusive partners. The evidence presented in Fortaleza does not call for changes to the Convention's structure, but for changes in how it is interpreted and applied:

- careful, fact-sensitive attention to the dynamics of domestic violence, including coercive control;
- consistent trauma-informed training for judges who apply the Convention; and
- a willingness to let definitions and interpretive frameworks evolve in light of 46 years of practice and research, as the Convention's own rapporteur now suggests they must.

As Dr Barnett put it, what is needed is a “systemic and fundamental change in the understandings, perceptions, attitudes and approaches of all those working to apply and implement the law”. That is a cultural shift in service of the Convention's purpose.

The Convention touches thousands of children and families each year. Implementing these changes would directly recognise and honour its protective purpose. The distance between Sandton and Fortaleza has become its own data point: evidence of how difficult this cultural and institutional shift remains. The next Forum, whenever it is held, will inherit both the evidence presented at Fortaleza and the unresolved question of which framework will guide the response – the openness of Sandton or the retrenchment of Fortaleza.

Mr Bernasconi's Sandton observation – that correct application, not the number of returns, is the true measure of the Convention's success – remains the most useful sentence the HCCH has produced on this subject. Whether the institution is prepared to be held to that standard is the question this Forum left for the next.

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