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Chafin v. Chafin: Protecting a U.S. Parent's Power to Litigate International Abductions

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Chafin v. Chafin: Protecting a U.S. Parent’s Power to Litigate International Abductions

Monique Vieites¹

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I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter “Hague Convention”) was created to provide a structural regime for the return of children who have been wrongfully abducted to another country.² It has found a niche in divorce and custody disputes, here in the United States and abroad. Under the Hague Convention, a petitioning parent

1. J.D. Candidate 2014, University of Miami School of Law; B.S., 2010, Rice University. I would like to thank Professor Bernard Perlmutter of the University of Miami School of Law for his insight and guidance. A special thanks also to my family for their continued support and encouragement.

2. Hague Convention on the Civil Aspects of International Child Abduction art. 1, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 111670 (entered into force Dec. 1, 1983) [hereinafter Hague Convention on Child Abduction].

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may ask the court in a signatory state to grant the return of the child to his rightful habitual residence with the purpose of deterring the other parent from crossing international boundaries to retain sole custody of the child, or to seek custody from a more sympathetic court.³ The Hague Convention does not, however, provide for a resolution on the merits of the custody dispute; it only affords for the return of a child.⁴ The divorce and custody proceedings must be conducted in the courts of the child's habitual residence.⁵

In an age where affordable transnational travel has made international abductions a tempting option, the Hague Convention has become a powerful legal resource for those left-behind parents who claim that their child has been wrongfully removed to another nation.⁶ In 2009 alone, 478 children were returned to their habitual countries under Hague Convention protocols.⁷ The Hague Convention makes returns possible by providing a concrete method for the expeditious return of abducted children.⁸ Specifically, its text delineates the proper practice for member state compliance with the Convention's purposes and objectives.⁹

Despite its overwhelming comprehensiveness, the Hague Convention has one specific shortcoming—it fails to assert whether courts retain jurisdiction over an appeal after a child has returned to his habitual country pursuant to a Hague Convention return order.¹⁰ The U.S. courts were, therefore, left to rely on their judicial discretion when making a jurisdictional determination in those circumstances. The result was a severe split amongst the federal appellate courts on whether the U.S. courts retained the authority to review a district court's return order after the child's departure from the United States.

The conflict stemmed from varying applications of the moot-

3. *Outline-Hague Child Abduction Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 1 (July 2012), <http://www.hcch.net/upload/outline28e.pdf>.

4. Hague Convention on Child Abduction, *supra* note 2, at art. 19.

5. See *Outline-Hague Child Abduction Convention*, *supra* note 3, at 1.

6. Emily Lynch, Note, *Villegas Duran v. Arribada Beaumont: The Second Circuit Court's Interpretation of Custody Rights Undermines the Purpose of the Hague Convention on the Civil Aspects of International Child Abduction*, 41 U. MIAMI INTER-AM. L. REV. 221, 225 (2010).

7. *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction*, U.S. DEPT OF STATE 6 (April 2010), <http://travel.state.gov/pdf/2010ComplianceReport.pdf> [hereinafter *Report on Compliance with the Hague Convention*].

8. See generally Hague Convention on Child Abduction, *supra* note 2, at art. 1.

9. *Id.*

10. *Id.*

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ness doctrine, which provides that a case is moot if there no longer exists a case or controversy to be resolved. If a case is deemed moot, appellate courts do not have authority to give an opinion and therefore have no grounds to hear such case on appeal. The Fifth and Eleventh Circuits shared the minority view that removal of the child from the country moots a pending appeal and that all further remedies must be sought in the foreign court where the child now resides. Other circuits, in contrast, strongly rejected such a narrow interpretation of the mootness doctrine and argued for permitting appellate review in such instances. In light of these disagreements, the Supreme Court decided to review the issue in *Chafin v. Chafin*,¹¹ ultimately ruling that the return of the child to a foreign country pursuant to an order under the Hague Convention does not render an appeal of that order moot.¹²

While the issues in the case derived from a primarily procedural issue, particularly the appellate court's degree of review authority, the intrinsic implications of the decision make it one of monumental importance in the field of family law. This Casenote argues that the Supreme Court's decision in *Chafin v. Chafin* was correct in light of the existing applicable mootness law, and its effects on future international child abduction cases. Part II of this Note discusses the Hague Convention and the purpose for its inception. Part II also provides background on the United States' adoption and interpretation of the treaty through the ratification of the International Child Abduction Remedies Act. Part III examines the conflicting case law from the various U.S. federal circuit courts that led to the Supreme Court's grant of certiorari to review the issue at hand. Part III further presents the relevant facts pertaining to *Chafin v. Chafin*, and outlines the lower court's decisions as well as the issues presented to the Supreme Court. Part IV of this Note begins with a cursory summary of the Supreme Court's decision in *Chafin v. Chafin*, and then provides an in-depth analysis of the Court's reasoning. Specifically, this section explains why the Court's decision was correct by exploring the merits of the case, and highlighting the legal and substantive factors that provided support for a favorable outcome. Part V investigates the possible implicit social and policy reasons behind the Court's ruling. The Court's decision is based on considerations of the potential consequences its judgment would have on future international child custody disputes, particularly with regards to

11. 133 S.Ct. 1017 (2013).

12. *Id.* at 1023-27.

the child's psychological and physical well-being and the hurdles that arise from litigation abroad. Part VI considers what effects appellate review would have on the general disputes in *Chafin*.

This Note argues that the Court was not confined to a legalistic interpretation of the mootness doctrine and instead embraced a more liberal approach that acknowledged the severe effects an adverse finding would have had on future child custody disputes.

II. HISTORICAL BACKGROUND: THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral treaty, developed by the Hague Convention on Private International Law on October 25, 1980, that provides a procedure for the prompt return of children who have been victims of cross-border abductions and wrongful retentions from the state of their habitual residence.¹³ The treaty provides for the return of children only between contracting states.¹⁴ Currently, the treaty has eighty-nine contracting states.¹⁵ The objectives of the treaty are premised on the protection and promotion of the child's best interest in matters relating to his custody,¹⁶ and the preclusion of the wrongful parent from gaining an advantage from the abduction.¹⁷

By becoming signatories to the Hague Convention, states express their intentions to become parties to the treaty; signature alone, however, does not legally oblige a state to abide by the treaty guidelines.¹⁸ The Hague Convention legally binds only those states that ratify the treaty.¹⁹ A state may alternatively choose to accede to the Hague Convention, instead of ratifying it, as a way of affirming its commitment to the treaty, but without

13. Hague Convention on Child Abduction, *supra* note 2, at art. 1.

14. *Id.*

15. *Members of the Organisation*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24 (last visited May 27, 2013).

16. Hague Convention on Child Abduction, *supra* note 2, at prologue.

17. *Outline-Hague Child Abduction Convention*, *supra* note 3, at 1 (explaining that the purpose of the principle of prompt return is to deter abductions and is designed to restore the "the status quo which existed before the wrongful removal" so as to deprive the wrongful parent of any advantage that might be gained from fleeing).

18. Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 568-69 (2005).

19. *Id.* at 569.

actually becoming bound by its terms.²⁰

In 1998, the United States ratified the treaty and implemented its provisions through a federal statute,²¹ known as the International Child Abduction Remedies Act (ICARA).²² The purpose of ICARA is to “establish procedures for the implementation of the Convention in the United States.”²³ ICARA grants federal and state courts concurrent jurisdiction over cases arising under the Convention,²⁴ and specifically directs them to determine cases in strict accordance with the Convention guidelines.²⁵

Members to the Convention are directed to “designate a Central Authority to discharge the duties which are imposed by the Convention.”²⁶ The Central Authority in each state is responsible for promoting cooperation from the state’s authorities to secure the prompt return of abducted children and achieve the general objectives of the Convention.²⁷ Parents seeking the return of an abducted child are directed to apply with the Central Authority of the child’s habitual residence or that of any other contracting state for assistance in securing the return of the child.²⁸

To establish a *prima facie* case of wrongful removal or retention, the parent must establish “that the child was habitually residing in the other State; that the removal or retention of the child constituted a breach of custody rights attributed by the law of that State; and that the applicant was actually exercising those rights at the time of the wrongful removal or retention.”²⁹ *Rights of custody* include “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”³⁰ Custody rights are established “by operation of law or by reason of a judicial or administrative decision, or by reason of

20. *Id.*

21. *Chafin*, 133 S. Ct. at 1021.

22. 42 U.S.C. § 11601 (West).

23. § 11601(b)(1).

24. 42 U.S.C. § 11603(a).

25. § 11603(d).

26. Hague Convention on Child Abduction, *supra* note 2, at art. 6.

27. *Id.* at art. 7 (responsibilities include locating the whereabouts of a child who has been wrongfully removed or retained; preventing further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; securing the voluntary return of the child or to bring about an amicable resolution of the issues; and providing such administrative arrangements as may be necessary and appropriate to secure the safe return of the child).

28. *Id.* at art. 8.

29. *Id.* at art. 3.

30. *Id.* at art. 5.

an agreement having legal effect under the law of that State.”³¹ The Hague Convention similarly protects parental *rights of access*,³² which is the “right to take a child for a limited period of time to a place other than the child’s habitual residence.”³³ However, in the case of access rights violations, the parent may only request that the contracting state “make arrangements for organizing or securing the effective exercise of rights of access,”³⁴ not for the absolute return of the child.

Once the *prima facie* case has been established, the court may reject the parent’s return request if: the parent was not actually exercising custody rights at the time of removal or retention;³⁵ the parent had consented to or subsequently acquiesced to the removal or retention;³⁶ there is a grave risk that return would expose the child to physical or psychological harm;³⁷ the child objects to being returned and is of age and maturity to make such decisions;³⁸ or return would not be permitted “by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”³⁹ Additionally, the courts are given discretion to refuse a request for the return of a child if the application was made a year after the removal or retention occurred and the child is now settled in the new environment.⁴⁰

If the country in which the child has been taken determines that the child has been wrongfully removed from his habitual residence, the court has the authority to order that the child be returned to his home country.⁴¹ If the court issues a return order, the child must be returned to his habitual residence. The treaty, however, does not define habitual residence and has left its interpretation to the courts. This method of interpretation has proved to be problematic as increasingly diverse interpretations emerge in different jurisdictions. In the United States for instance, the courts are split as to whether habitual residence should be determined exclusively based on the child’s interests or the intentions

31. Hague Convention on Child Abduction, *supra* note 2, at art. 3.

32. *Id.* at prologue.

33. *Id.* at art. 5.

34. *Id.* at art. 7.

35. Hague Convention on Child Abduction, *supra* note 2, at art. 13.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at art. 20.

40. *Id.* at art. 12.

41. Lynch, *supra* note 6, at 227.

of the parents.⁴²

Return of the child to his habitual residence relies exclusively on the cooperation of the member states to the treaty. Once the habitual residence has been determined and a return order has been granted, the contracting state where the child has been sequestered has the role of administering the safe return of the child.⁴³ Central authorities in the contracting state are responsible for providing assistance in locating the child and ensuring his or her return, either by the parent's cooperation or through necessary administrative arrangements and proceedings.⁴⁴ In essence, the smooth return of the child is predicated on compliance between member states. The reality, however, is often not so easy. Non-compliance by contracting states has become increasingly problematic.⁴⁵ The U.S. Department of State's most recent annual compliance report indicates that a significant number of member states voluntarily choose to not comply with the Convention, either by denying Convention return applications, holding that domestic laws relating to child custody disputes supersede the Convention, or by judicial non-compliance.⁴⁶

Furthermore, a return order, although a giant step towards safeguarding the well-being of a child, does not determine custody or guarantee that the child will remain in his habitual residence indefinitely. A return order simply returns the child to the juris-

42. Compare *Friedrich v. Friedrich*, 983 F.2d 1396, 1400-03 (6th Cir. 1993) (This case demonstrates the child-centered approach in the determination of habitual residence. In *Friedrich*, the father petitioned the US courts for the return of the child to Germany pursuant to the Hague Convention. The court held that in deciding the child's habitual residence, the court "must focus on the child, not the parents, and examine past experience, not future intentions." The simple fact that the child was born in Germany and had resided there exclusively until his mother removed him to the United States was sufficient to establish that Germany was his habitual residence. Any changes that occurred after the removal, including obtaining U.S. citizenship, were future events created by the parents' actions that established legal residence and are irrelevant to the inquiry. Legal residence is not synonymous with habitual residence, and "habitual residence cannot be so easily altered."), with *Mozes v. Mozes*, 239 F.3d 1067, 1081-85 (9th Cir. 2001) (Here the court focuses on parental intention when deciding habitual residence. In this case the father petitioned for the return of his children to Israel pursuant to the Hague Convention. The court held that habitual residence is that which has supplanted the previous residence as the "locus of the children's family and social development." This is determined from the circumstances which must "enable the court to infer a shared intent to abandon the previous habitual residence," such as by mutual agreement between the parents.).

43. *Outline-Hague Child Abduction Convention*, *supra* note 3, at 2.

44. *Id.*

45. See generally *Report on Compliance with the Hague Convention*, *supra* note 7.

46. *Id.*

diction that is most appropriate to determine the child's custody.⁴⁷ Thus, although the child may be returned to his habitual residence, it is only the beginning of the long process to determine the child's future.

III. THE ROAD TO *CHAFIN*

Although the Hague Convention provides a comprehensive guideline on the proper implementation of the aims of the treaty, it fails to assert whether courts retain jurisdiction over an appeal after a child has returned to his habitual country pursuant to a Hague Convention return order. This gap, in turn, gives the member states autonomy to use judicial discretion when making a jurisdictional determination in those instances. In the United States, however, this led to inconsistent results.

Prior to the Supreme Court's decision in *Chafin*, which provided a uniform standard for interpretation of the treaty, the federal appellate courts were deeply divided on whether U.S. courts retained the authority to review a district court's return order after the child's departure from the United States. The conflict stemmed from varying applications of the mootness doctrine.

A. *Mootness Explained*

Article III of the U.S. Constitution limits a federal court's jurisdiction to live "cases and controversies."⁴⁸ No case or controversy exists when the issues presented are no longer alive or the parties lack a cognizable interest in the outcome.⁴⁹ When no case or controversy exists, the case is said to be moot.⁵⁰ However, a case becomes moot "only when it is impossible for a court to grant any effectual relief" to the parties."⁵¹ So long as the parties have a "concrete interest, however small, in the outcome of the litigation, the case is not moot."⁵² Thus, in instances where the controversy in question has already been resolved and the court's decision in a civil action or appeal will not affect the rights of the parties or affect the matter in issue in the case, the case is considered moot.⁵³

47. *Outline-Hague Child Abduction Convention*, *supra* note 3, at 1; *see also* Hague Convention on Child Abduction, *supra* note 2, at art. 16, 19.

48. U.S. CONST. art. III, § 2.

49. *Chafin*, 133 S. Ct. at 1023.

50. *Id.*

51. *Id.* (citing *Knox v. Service Employees International Union*, 132 S. Ct. 2277, 2287 (2012)).

52. *Id.*

53. *Mills v. Green*, 159 U.S. 651, 653 (1895) (Our duty "[i]s to decide actual

B. *The Divide Explained: An Analysis of the Differing Applications of the Mootness Doctrine*

Until *Chafin* was decided, the Eleventh and Sixth Circuits shared the minority view that removal of the child from the United States moots a pending appeal and that all further remedies must be sought in the foreign court where the child currently resides. In *Bekier v. Bekier*, the Eleventh Circuit found that an appeal of a district court's return order pursuant to the Hague Convention and the International Child Abduction Remedies Act (ICARA) is rendered moot when the child returns to his country of habitual residence because there is no longer a live case or controversy.⁵⁴ The court opined that a case becomes moot when a child returns to his habitual country because the U.S. courts become powerless to grant any effectual relief to the appellant⁵⁵ and any decisions made by the U.S. courts in an appellate action are not binding or influential on any foreign court's decision for the return of the child. Essentially, the court reasoned that any decisions by the U.S. courts would be merely advisory.⁵⁶ Potential remedies that the petitioning party seeks lie in the foreign courts where the child now resides.⁵⁷ Similarly, the Sixth Circuit in *March v. Levine* granted stay of an order to return a child recognizing that the immediate return of the child abroad would effectively moot an appeal.⁵⁸

In contrast, courts in other federal circuits rejected this narrow interpretation of the mootness doctrine and argued for appellate review in spite of a child's departure from the United States.⁵⁹ For instance, the Fourth Circuit in *Fawcett v. McRoberts* found that an appeal of a return order was not moot even if the child had

controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions."); *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009) ("Our job is to decide cases that matter in the real world, not those that don't." (quoting *Leser v. Berridge*, 668 F.3d 1202, 1207 (10th Cir. 2011))).

54. *Bekier v. Bekier*, 248 F.3d 1051, 1052 (11th Cir. 2001).

55. *Id.* at 1055.

56. *Id.* at 1054.

57. *Id.*

58. *March v. Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000), *aff'd* 249 F.3d 462 (6th Cir. 2001).

59. *See generally* *Whiting v. Krassner*, 391 F.3d 540, 545 (3rd Cir. 2004) (finding that an appeal of a return order pursuant to the Hague Convention is not moot even after the child's return to her country of habitual residence. The court reasoned that because relief may still be granted in response to the continuing appeal for the return of the child, a live issue remains for the court to decide.).

returned to his country of habitual residence.⁶⁰ The court explained that compliance with the trial court's order does not moot an appeal if it "remains possible to undo the effects of compliance or if the order will have a continuing impact on future action."⁶¹ The court noted that there was "no law of physics" which would render it impossible for the parent living abroad to comply with a judgment by the appellate court or by the district court on remand.⁶² Furthermore, the petitioning parent could rely on mechanisms available for enforcing a judgment by the U.S. courts abroad.⁶³ In this case, the petitioning parent could resort to the United Kingdom's Child Abduction and Custody Act 1985, which codified the Hague Convention there.⁶⁴ The Act mandates that a "decision to which [Articles 7 and 12 of the Hague Convention] appl[y] which was made in a Contracting State other than the United Kingdom shall be recognized in each part of the United Kingdom as if made by a court having jurisdiction" in the United Kingdom.⁶⁵

In light of these disagreements among the courts, the Supreme Court agreed to review this issue in the case *Chafin v. Chafin*.

C. *Chafin v. Chafin: Factual Background and Procedural History*

In *Chafin*, the dispute arose from a custody battle between a U.S. Army sergeant and his former Scottish wife over their daughter.⁶⁶ The two married in Germany in 2006, and their daughter was born the following year.⁶⁷ When Mr. Chafin was deployed to Afghanistan, Ms. Chafin moved to Scotland with their daughter.⁶⁸ After his deployment, however, the two decided to remain separated.⁶⁹ In 2009, Mr. Chafin was transferred to Huntsville, Alabama.⁷⁰

Despite their separation, Ms. Chafin moved to Alabama with

60. *Fawcett v. McRoberts*, 326 F.3d 491, 497 (4th Cir. 2003).

61. *Id.* at 494.

62. *Id.* at 496.

63. *Id.* at 496-97.

64. *Id.* at 497.

65. *Id.*

66. Petition for Writ of Certiorari at 3, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 4.

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their daughter to reside with Mr. Chafin.⁷¹ Ms. Chafin traveled back and forth between Scotland and the U.S., but their daughter remained in Alabama the entire time.⁷² In mid-2010, the parties divorced and the court granted them full and complete joint legal and physical custody of the child.⁷³ Meanwhile, the daughter remained in an American school and acclimatized to her life in Alabama.⁷⁴

On December 24, 2010, Ms. Chafin was arrested for domestic violence.⁷⁵ The incident alerted the U.S. Immigration and Customs Enforcement (ICE) officials that she had overstayed her visa.⁷⁶ She was consequently deported in February 2011, during which time the child remained under the care of Mr. Chafin.⁷⁷

On May 2, 2011, Ms. Chafin filed an action in the U.S. District Court for the Northern District of Alabama for the return of the child to Scotland, which she contended was the child's habitual residence.⁷⁸ She filed the petition under the Hague Convention and ICARA.⁷⁹ The court determined that Scotland was in fact the child's habitual residence and ordered the return of the child pursuant to the Hague Convention.⁸⁰ In response, Mr. Chafin filed a motion to stay the district court's order, but the court denied his request.⁸¹ Within hours of the district court's order, Ms. Chafin went to Scotland with the child.⁸²

Mr. Chafin subsequently appealed the district court's order to the U.S. Court of Appeals for the Eleventh Circuit.⁸³ In February 2012, the Eleventh Circuit dismissed Mr. Chafin's appeal as moot, citing *Bekier v. Bekier*⁸⁴ as precedent.⁸⁵ The court remanded the case to the District Court with the instructions to dismiss the case

71. *Id.*

72. Petition for Writ of Certiorari at 4, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

73. *Id.*

74. *Id.* at 5.

75. *Id.*

76. *Id.* at 6.

77. *Chafin*, 133 S. Ct. at 1022.

78. Petition for Writ of Certiorari at 7, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 8.

84. 248 F.3d 1051, 1055 (2001) (holding that an appeal of a Hague Convention order is rendered moot when the child has been returned to his habitual residence because the court becomes powerless to grant relief.)

85. *Chafin*, 133 S. Ct. at 1022.

as moot and to vacate the order.⁸⁶ On remand, the District Court vacated the order.⁸⁷ The court further ordered Mr. Chafin to pay Ms. Chafin's court costs, attorney's fees, and travel expenses, totaling over \$94,000.⁸⁸

IV. *CHAFIN V. CHAFIN*: THE SUPREME COURT'S DECISION

In light of the divided circuit courts, the Supreme Court granted certiorari to review the judgment of the Eleventh Circuit Court of Appeals, and settle the issue once and for all.⁸⁹ The result was a 9-0 decision. In the unanimous opinion, delivered by Chief Justice Roberts, the Court held that a child's return to his habitual residence pursuant to an order under the Hague Convention does not render an appeal of that order moot.⁹⁰ The Court reasoned that this is not a case concerning "hypothetical state of facts"; instead, it involves concrete issues that continue to be under dispute, in which the parties continue to hold a cognizable interest.⁹¹

In forming its opinion, the Court primarily relied on a legalistic interpretation of the mootness doctrine. Specifically, the central question was whether the U.S. courts could grant relief to the parties.⁹² The Court ultimately applied a less restrictive approach to appellate review, reasoning that the mootness doctrine bars appellate review only in those instances where relief is *impossible*.⁹³ But, the Court's decision was not confined to a legalistic interpretation of the mootness doctrine alone. Instead, it also embraced a more liberal approach that acknowledged the purpose of the Hague Convention and the severe effects an adverse finding would have on future child international child abduction disputes.⁹⁴

A. *An In-Depth Analysis of the Opinion*

The Court's holding rested on the conclusion that U.S. courts could grant Mr. Chafin effectual relief despite the child's return to

86. *Id.* at 1023.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1028.

91. *Chafin*, 133 S. Ct. at 1023-24.

92. *Id.* at 1029.

93. *Id.* at 1020.

94. *Id.* at 1026.

Scotland.⁹⁵ Specifically, the courts could grant reversal of the District Court's return order and the expense order against Mr. Chafin.⁹⁶

The Court first analyzed whether the type of appellate relief Mr. Chafin sought with regard to the child would be effectual.⁹⁷ Specifically, the Court analyzed Mr. Chafin's petition for a reversal of the District Court's determination that the child's habitual residence was Scotland, and if that was successful, his petition for an issuance of a re-return order.⁹⁸ In conducting its analysis, the Court applied a strict legalistic interpretation of the mootness doctrine and withheld from an exhaustive assessment of the merits of the arguments.

For instance, Ms. Chafin argued that the case was moot because the District Court lacked the authority to "issue a re-return order either under the Convention or pursuant to its equitable powers."⁹⁹ Instead of exploring the more complex and arguably the more difficult question on the limits of the District Court's authority, the Court adopted a more simplified, fundamental application of the mootness doctrine. The Court dismissed Ms. Chafin's argument as confusing the issue of mootness with the merits of the case,¹⁰⁰ reasoning that Mr. Chafin's claims for a re-return order, whether pursuant to the Convention itself or according to general equitable principles, "cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction."¹⁰¹ The Court relied on *Powell v. McCormack*,¹⁰² where it held that a claim

95. *Id.* at 1024-27.

96. *See generally id.* at 1024-27.

97. *Chafin*, 133 S. Ct. at 1024.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 395 U.S. 486 (1969) (in *McCormack v. Powell*, petitioner Adam Clayton Powell, Jr. was elected from the 18th Congressional District of New York to serve in the United States House of Representatives for the 90th Congress. Pursuant to a House resolution, however, he was not permitted to take his seat. Powell subsequently filed suit in Federal District Court, claiming that the House could exclude him only if he failed to meet the standing requirements contained in Art. I of the Constitution. Powell met these requirements, thus he claimed excluding him was unconstitutional. The District Court dismissed the complaint "for want of jurisdiction of the subject matter," and the Court of Appeals affirmed the dismissal. The Supreme Court granted certiorari. Respondents argued that the case must be dismissed because the House of Representatives of the 90th Congress had officially terminated him on January 3, 1969, and Powell was seated as member of the 91st Congress. As such, because petitioner's complaint was based on the refusal to let him take his seat in the 90th Congress, and that because the House of Representatives is not a continuing

for backpay saved the case from mootness despite the fact that the case had been brought in the wrong court where the relief sought was unattainable.¹⁰³ Similarly here, even if the District Court lacks the authority to issue a re-return order, this would not render Mr. Chafin's case moot, as his right to recover is not a question to be answered during a mootness inquiry.¹⁰⁴ The Court ultimately affirmed that an appellant's chance of success on the merits is not relevant in determining whether a case is moot.

Similarly, the Court rejected Ms. Chafin's second argument that even if Mr. Chafin obtained a reversal on the District Court's order establishing the child's habitual residence, and the District Court issued a re-return order, any relief would be ineffectual because Scotland would not comply.¹⁰⁵ Rather than delving into various mechanisms through which judgments passed by the U.S. courts may be enforced abroad, especially in the Hague Convention context, the Court reasoned that the case would not be moot by virtue of the U.S. courts' continued personal jurisdiction over Ms. Chafin.¹⁰⁶ In the case that Scotland chose to ignore a U.S. return order or decline in assisting in its enforcement, the U.S. courts could still command compliance by forcing Ms. Chafin to comply under the threat of sanctions.¹⁰⁷ In the alternative, Ms. Chafin could choose to voluntarily comply with the re-return order.¹⁰⁸ Uncertainty regarding the enforcement of compliance would not alone render the case moot.¹⁰⁹ The unanimous opinion explained that U.S. courts often decide cases against foreign nationals, deportees, and insolvent defendants, despite the uncertainty for compliance.¹¹⁰

The Court then analyzed Mr. Chafin's petition to vacate the District Court's award of \$94,000 to Ms. Chafin, for court costs, attorney's fees, and travel expenses.¹¹¹ The Court again relied on a

body and Powell has now been seated, his claims are moot. The Court, reasoning that a case is moot only when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," concluded that the case was not moot because "Powell's claim for back salary remains viable even though he has been seated in the 91st Congress.").

103. *Chafin*, 133 S. Ct. at 1024.

104. *Id.*

105. *Id.*

106. *See id.* at 1025.

107. *Id.* at 1025.

108. *Id.*

109. *Chafin*, 133 S. Ct. at 1025.

110. *See id.* at 1025.

111. *Id.* at 1026.

restricted analysis on the effectiveness of the relief sought based on the mootness principles.¹¹² The Court dismissed Ms. Chafin's contention that the case was moot because Mr. Chafin was not entitled to relief vacating the expense order on account of his failure to pursue an appeal of the order, which was entered as a separate judgment.¹¹³ Again, the Court found that Ms. Chafin's argument went to the merits of the case, rather than addressing the mootness question.¹¹⁴ Although Mr. Chafin's chances of success were uncertain, they were not so implausible so as to render the case moot.¹¹⁵ In fact, there exists "authority for the proposition that failure to appeal such judgments separately does not preclude relief."¹¹⁶ Even a partial remedy, while not fully satisfactory, would be sufficient to prevent a case from being moot.¹¹⁷ Inquiry into, and the eventual determination on the merits of Mr. Chafin's requests, is left to the lower courts and is not relevant in the mootness question.¹¹⁸

Ms. Chafin further argued for the necessity of rendering these cases moot in order to further the purpose of the Hague Convention and ICARA. The justices disagreed. The Court explained that the goals of the Hague Convention and ICARA (to secure the prompt return of wrongfully removed children) will be best served through the full judicial process, not through the manipulation of constitutional doctrines to hold these cases out as moot.¹¹⁹ In fact, doing so could undermine the goals of the treaty and harm the children it is meant to protect,¹²⁰ as it would entice parents to flee the jurisdiction to moot the case¹²¹ and encourage the courts to "grant stays as a matter of course, to prevent the loss of any right to appeal."¹²² These routine stays would conflict with the treaty's purpose in multiple ways. First, where one parent is pursuing a meritless appeal, it would cause the child to lose "precious months when she could have been readjusting to life in her country of habitual residence."¹²³ Routine stays would also increase the num-

112. *See id.* at 1026.

113. *Id.* at 1026.

114. *Id.*

115. *Chafin*, 133 S. Ct. at 1026.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1026-27.

120. *Id.* at 1027.

121. *Chafin*, 133 S. Ct. at 1027.

122. *Id.*

123. *Id.*

ber of appeals, as losing parents are more likely to appeal when granted an automatic stay.¹²⁴

To prevent the negative consequences of a blanket application of routine stays, and to ensure that each case receives the individualized treatment necessary to ensure the best interests of the child, the Court provided guidance for the lower courts to follow in future cases.¹²⁵ Justice Roberts' opinion suggested that the lower courts apply the four traditional stay factors when determining whether to stay a return order: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."¹²⁶

B. *The Concurrence*

Justice Ginsburg delivered the concurring opinion, joined by Justices Scalia and Breyer.¹²⁷ While the concurring justices agreed with the Court that the case is not moot because the courts may provide Mr. Chafin with effectual relief,¹²⁸ their concurring opinion went far beyond a strictly legal construction of the mootness doctrine. Instead, it focused heavily on the importance of furthering the objectives of the Hague Convention, and on the social implications its decision would have on future custodial disputes.¹²⁹

The concurring justices stated that this case highlights "the need for both speed and certainty" in Hague cases,¹³⁰ so as to ensure that the main objective of the treaty—to secure the prompt return of wrongfully removed children.¹³¹ They further noted that both the treaty and ICARA are silent on the appropriate time frame for appellate review; thus it rests on each contracting state to ensure that appeals proceed without delay.¹³² The broad issue in this case, therefore, is to identify a standardized appellate process that would avoid the shuttling of children back and forth across

124. *Id.*

125. *Id.*

126. *Id.* at 1027.

127. *Chafin*, 133 S. Ct. at 1028.

128. *Id.* at 1029.

129. *See generally id.* at 1028-31.

130. *Id.* at 1029.

131. *Id.* at 1028.

132. *Id.*

international borders.¹³³

The concurrence opinion agreed with the majority that stays should not be granted as a “matter of course” because in instances where appeals are not successful, they result in a loss of time where the child could have been readjusting to life in his habitual country.¹³⁴ In order to devise a viable appellate process, the concurrence looked for guidance from the appellate procedures employed by England and Wales for Hague Convention cases.¹³⁵ In England and Wales, to pursue an appeal from a return order, leave must be obtained from the first instance judge or the Court of Appeals.¹³⁶ Leave is granted only where the appeal has a real chance of success or where there is a compelling reason as to why the appeal should not be denied.¹³⁷ The appeal does not trigger an automatic stay.¹³⁸ If an appeal is granted, the court that granted leave ordinarily will order a stay.¹³⁹ The appeal then goes on a fast track, where disposition is expected within six weeks.¹⁴⁰ The English appellate process for Hague Convention cases essentially provides for speedy determinations “without turning away appellants whose pleas may have merit,” and reduces the “risk of rival custody proceedings.”¹⁴¹ The concurrence suggested that a similar process could be effectual if implemented in the United States.¹⁴²

C. The Court’s Decision Correctly Applied its Legal and Substantive Approach

The Court’s decision involved a multi-step analysis, which started with a strict application of the law and ended with a more expansive approach, taking into consideration the purpose of the Hague Convention and the possible consequences its ruling would have on future child custody disputes.¹⁴³ The Court’s approach was deliberate. In making determinations, the Court is confined to an application of national and international law, as these laws serve as guidance and boundaries of the power of the courts. This does

133. *See generally Chafin*, 133 S.Ct. at 1029.

134. *Id.*

135. *Id.* at 1030.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Chafin*, 133 S. Ct. at 1030.

140. *Id.*

141. *Id.*

142. *See id.* at 1030-31.

143. *See generally id.* at 1026-28.

not mean, however, that the Court is precluded from incorporating social and policy considerations into its decisions. Doing so, in fact, makes its decisions more complete as it takes into account its real life implications. The Court's methodology, therefore, allowed it to incorporate a more liberal approach while still remaining within the boundaries of the law.

With regards to the legal principles, the unanimous decision was correct in light of the mootness doctrine and the possibilities of relief available to the left-behind party. Article III of the U.S. Constitution restricts the federal court's jurisdiction to live cases and controversies.¹⁴⁴ That is, a case is moot where a court's decision in a civil action or appeal will not affect the rights of the parties or affect the matter in issue in the case.¹⁴⁵ Under this strict reading, the Court was correct to find that the courts below continue to have jurisdiction to adjudicate the merits of the parties' claims.¹⁴⁶

Although the Court based its analysis on only a cursory application of the mootness doctrine, and on the potential forms of relief available nationally, the Court's decision is also heavily supported by a number of concrete international mechanisms through which judgments passed by U.S. courts may be enforced. For instance, U.S. tribunals may rely on foreign courts to award relief. Many of the signatory states have adopted laws that codify the Hague Convention in their states. One such law is the Child Abduction and Custody Act 1985, the United Kingdom's analogue to the United States' International Child Abduction Remedies Act (ICARA), which codified the Hague Convention. The Act provides that "a decision to which [Articles 7 and 12 of the Hague Convention]¹⁴⁷ appl[y] which was made in a Contracting State other than

144. See U.S. CONST. art. III, § 2, cl. 1.

145. *Mills v. Green*, 159 U.S. 651, 653 (1895) (Our duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions."); *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009) ("Our job is to decide cases that matter in the real world, not those that don't.").

146. *Chafin*, 133 S. Ct. at 1028.

147. See Hague Convention on Child Abduction, *supra* note 2, at art. 7 (Article 7 mandates that the Central Authorities of the signatory states shall cooperate with each other to secure the prompt return of children and to achieve the other objects of this Convention. Article 7 further details appropriate measure which may be taken by the central authorities of the signatory states to ensure the prompt return of child victims.); see also *id.* at art. 12 (Article 12 states that where a child has been wrongfully removed or retained, and a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child. Where the proceedings have been commenced after the one-year

the United Kingdom shall be recognized in each part of the United Kingdom as if made by a court having jurisdiction to make it in that part.”¹⁴⁸ This statute serves as an avenue to enforce a U.S. judgment in the United Kingdom, so long as the conditions specified in the Act are met.¹⁴⁹ Applied to the instant case, the Child Abduction and Custody Act 1985 specifically provides for enforcement of U.S. court decisions in the United Kingdom.¹⁵⁰ This means that despite the child’s return to Scotland, there remains a live case or controversy that may be addressed by the federal appellate courts and it is therefore not moot.

Alternatively, the appellate courts could influence future litigation in this case by relying on Scotland’s Family Law Act of 1986.¹⁵¹ The Family Law Act of 1986 served to amend the Child Abduction and Custody Act 1985 and to further clarify the powers of the courts in the recognition and enforcement of orders relating to the custody of children.¹⁵² The act states that “an order relating to parental responsibilities or parental rights in relation to a child which is made outside the United Kingdom shall be recognised in Scotland if the order was made in the country where the child was habitually resident.”¹⁵³ Thus, by statute, the courts in Scotland would be enjoined to recognize any judgment relating to parental rights awarded by the U.S. courts, including a reversal of the district court’s order for the return of the child to the United States.

Within its opinion, the Court also explored beyond the four corners of the mootness doctrine, incorporating into its reasoning a more liberal approach that acknowledged the purpose of the Hague Convention, social concerns, and the possible consequences its ruling would have on future child custody disputes.¹⁵⁴ This was appropriate because it had already provided substantial doctrinal support for its decision.

The Court’s supplementary approach was correct in view of the Hague Convention’s purpose and principles. Although the

period has passed, must also order the return of the child unless the child is now settled in its new environment. Furthermore, “where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.”)

148. Child Abduction and Custody Act, 1985, c. 60, § 15 (U.K.).

149. *See id.*

150. *See id.*

151. Family Law Act, 1986, c. 55, § 26 (U.K.).

152. *See generally id.*

153. *Id.* at § 26.

154. *See generally* Chafin v. Chafin, 133 S. Ct. 1017, 1026-28 (2013).

treaty does not provide definitive guidelines for appeals of Hague cases, it nevertheless requires its signatory states to ensure a speedy judicial process that secures the prompt return of the child.¹⁵⁵ In its decision, the Court aimed to promote the treaty's purpose of securing the timely return of children by defining a framework that could be uniformly applied by the courts to ensure expedited management of Hague cases.¹⁵⁶ Had the Court failed to address this issue, the lower courts would have continued to lack definitive guidance on how to approach Hague appeals. The result would have been overwhelming confusion and disorder, with many courts granting automatic stays as a precautionary measure to prevent the loss of any right to appeal.¹⁵⁷ This blanket application of automatic stays would serve to unduly delay the appellate process, particularly when the appeals had little chances of success. Because delays in the resolution of Hague convention cases would have run counter to the intent of the treaty, the Court was correct to go beyond a strict legal construction of the mootness doctrine in its decision.

V. THE POSSIBLE IMPLICIT POLICY REASONS BEHIND THE COURT'S DECISION

The Supreme Court is forthright on its goal of furthering the treaty's intent.¹⁵⁸ This is evident from the manner in which both the majority and concurring opinions discuss the very purpose of the Hague Convention, as well as the potential social consequences the Court's ruling would have on future child custody disputes.¹⁵⁹ But, generally, the Court fails to delve deeper into its logic. Between the lines of the majority and concurrent opinions, however, there are implicit reasons driving the Court.

The Court identifies the child's well-being as a primary concern in its decision, reasoning that the purpose of the Hague Convention is to ensure the safety and welfare of abducted children.¹⁶⁰ The Hague Convention was designed to protect children through procedural safeguards that deter abduction or permit for the swift return of the child so as to prevent any unnecessary trauma or

155. See generally Hague Convention on Child Abduction, *supra* note 2.

156. See *Chafin*, 133 S. Ct. at 1027-28.

157. See *id.* at 1027.

158. See generally *id.* at 1026-30.

159. See generally *id.* at 1026-28.

160. See *id.* at 1026-27.

frustration.¹⁶¹ The Court explicitly acknowledges that applying the mootness doctrine to Hague Convention cases runs counter to this very goal, as it would foreclose any possibility for a swift resolution on the issues, consequently exposing the abducted child to unnecessary hardships.¹⁶² Implicit in the Court's reasoning are the psychological, physical, and emotional difficulties the children would be exposed to if these cases were deemed moot.

The effects an international abduction may have on a child range from the minimal to the more severe. These effects may be short-lived, or extend into long-term or chronic symptoms resulting from their childhood trauma, including depression or anxiety.¹⁶³ According to one report, "between 10% and 40% of all snatched American children become severely disturbed."¹⁶⁴ One adverse effect is the "deprivation of stable relationships and the sense of loss from being suddenly uprooted."¹⁶⁵ If appeals are prohibited after the child is removed from the United States, there is a great incentive for parents to flee the country immediately after a favorable decision from a lower court, and before the possibility of appellate review. Because of the short timeframe, the removal is usually conducted abruptly, with severe consequences. When a child is suddenly uprooted from his home he is forced to leave behind his family, friends, and familiar surroundings without being afforded the time to reflect on the ongoing changes. Many times the child is unable to say his good-byes or collect his belongings,¹⁶⁶ thereby aggravating the situation. The unfortunate result is a sense of helplessness, of not belonging, and a loss of identity. Moreover, when the child is uprooted he is often forced to live in unfamiliar settings, in countries whose environment, language,

161. See Hague Convention on Child Abduction, *supra* note 2, at prologue.

162. *Chafin*, 133 S. Ct. at 1027.

163. Eric Lesh, *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, 171 (2011).

164. Caroline LeGette, *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L L.J. 287, 290 (1990) (citing Robin Jo Frank, Note, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. INT'L L. & POL. 415, 416 (1984)).

165. Melissa S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 429 (2006).

166. *Litigating International Child Abduction Cases Under the Hague Convention*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, 116 (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf.

customs, and beliefs are completely foreign to him.¹⁶⁷ These linguistic and social disconnects may also serve to make the child feel alienated and alone in the foreign country where he now resides.

The child's state of mind and perception of the world and the people around him are also affected in these types of situations. The changes may be the result of influence, intentionally or otherwise, on the child by the abducting parent.¹⁶⁸ In many instances the relationship between the fleeing parent and the U.S. parent is contentious as a result of custody and divorce disputes. In those situations it is not unheard of for the fleeing parent to speak negatively about the other parent.¹⁶⁹ And even if that is not the case, the fact that these disputes are ongoing tends to be influential in formulating the child's perceptions, and may cause psychological problems and behavioral maladjustments in children.¹⁷⁰ The child may come to resent the parents,¹⁷¹ or believe that the U.S. parent abandoned or does not love him.¹⁷² With time, the child's connection to his home and U.S. parent may suffer, as time creates a distance that slowly breaks those bonds apart.¹⁷³ This means that if too much time lapses between removal and justice in foreign courts the child may never return to normalcy. Overall, the catastrophic effects sudden removal from the United States may have on the child's social, psychological, and emotional development support the Court's decision to allow appellate review where the child's habitual residence is in dispute.

Also implicit in the Court's opinion are the social and policy concerns that would arise from giving the fleeing parent unilateral power to control future resolution of the case. The Court comments that "a mootness holding here might . . . encourage flight in future Hague Convention cases, as prevailing parents try to flee the jurisdiction to moot the case."¹⁷⁴ The ability to moot an appeal by departure from the United States grants the fleeing parent the

167. Wills, *supra* note 165, at 429.

168. *Litigating International Child Abduction Cases Under the Hague Convention*, *supra* note 166, at 116.

169. Wills, *supra* note 165, at 429.

170. *Id.*

171. *Id.*

172. *Litigating International Child Abduction Cases Under the Hague Convention*, *supra* note 166, at 116.

173. Brief for the National Center for Missing Children and Exploited Children as Amicus Curiae in Support of Reversal at 22, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

174. *Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013).

power to curtail review of the lower court's decision and the possibility of reversal of the judgment. The U.S. parent, however, is given no such strategic power over the course of the case and any and all future litigation is left to the foreign courts, which is problematic.

First, relocation of the case to a foreign court may be significantly, and unjustly, advantageous for the fleeing parent. Once the parent has fled the United States with the child following a district court's return order, any petition for the return of the child to the United States would need to be conducted in the foreign court where the child now resides. Unfortunately, the U.S. parent often times experiences problems obtaining return remedies abroad.¹⁷⁵

Difficulty with enforcement abroad arises in many different forms,¹⁷⁶ but in all instances the U.S. parent will feel lost and helpless in a labyrinth of legal battles where he will be unlikely be able to prevail. Most importantly, deference to foreign courts unfairly inhibits U.S. parents who are financially unable to pursue legal remedies abroad. The costs of litigating abroad can be very high on account of the complexity and time that is necessary for the resolution of abduction cases.¹⁷⁷ These high costs inhibit U.S. parents who do not have the economic means to pursue complex litigation in defending their parental rights.

The cost of foreign litigation goes far beyond travel expenses.¹⁷⁸ The first part of foreign litigation is locating the child.¹⁷⁹ The State Department collaborates with various agencies, including Non-governmental organizations (NGOs) and the International Criminal Police Organization (INTERPOL) to locate the abducted child.¹⁸⁰ Nevertheless, strict reliance on this information can stall the investigation and be damaging to the U.S. parent's case. The Hague Commission has identified two problems in the location of abducted children: the inability of state authorities to locate the missing children and a lack of adequate legal aid for the U.S. parents once the child has been located.¹⁸¹ Even if the child is located, information regarding the potential whereabouts of the

175. See generally *Report on Compliance with the Hague Convention*, *supra* note 7.

176. See generally *id.*

177. See generally *Litigating International Child Abduction Cases Under the Hague Convention*, *supra* note 166, at 91-105.

178. *Id.* at 101-103.

179. *Id.* at 92-93.

180. *Id.* at 92.

181. LeGette, *supra* note 164, at 288.

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child may become stale between the time location occurs and the time information is communicated to the U.S. parent.¹⁸² For these reasons, the U.S. parent will need to rely on private investigators to locate the child quickly. In addition, the U.S. parent will need to incur expenses related to attorney representation in the foreign country, any translator costs if the U.S. parent is not fluent in the language of the foreign country, and court fees.¹⁸³

Even if the U.S. parent is able to proceed with this costly litigation, he might find himself trapped in a legal battle with a foreign court that is sympathetic to its nationals.¹⁸⁴ In these instances legal remedies available to the U.S. parent will be scarce or nonexistent.¹⁸⁵ Often times the foreign court will support the fleeing parent by deference to cultural values. In the Middle East, for example, a father may obtain custody more readily over a U.S. mother on account of religious and cultural beliefs in the superiority of men.¹⁸⁶

Even if the U.S. parent does succeed in obtaining a return order for the child to the United States, the road for actual return may be long and ultimately disappointing. The return of the child is predicated on compliance between member states and while some signatory states, such as England, Australia, and New Zealand, maintain a good reputation for enforcement and return of children under the Hague Convention,¹⁸⁷ a significant number of states, such as Brazil, Chile, Mexico, and Venezuela,¹⁸⁸ “either ignore the procedures or demonstrate patterns of non-compliance with the procedures.”¹⁸⁹ In fact, non-compliance by contracting states has become increasingly problematic.¹⁹⁰ The U.S. Department of State’s most recent annual compliance report indicates that a significant number of member states voluntarily choose not to comply with the Convention, either by denying Convention

182. See generally *Litigating International Child Abduction Cases Under the Hague Convention*, *supra* note 166, at 92.

183. See generally *id.* at 93-96.

184. Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief-Can Something More Be Done?*, 8 N.Y. INT’L L. REV. 95, 113 (1995).

185. *Id.* at 97.

186. *Id.*

187. Rita Wasserstein Warner, *International Child Custody and Abduction Under the Hague Convention*, 23 INT’L L. PRACTICUM 50, 53 (2010).

188. *Id.*

189. Amanda Michelle Waide, *To Comply or Not to Comply? Brazil’s Relationship with the Hague Convention on the Civil Aspects of International Child Abduction*, 39 GA. J. INT’L & COMP. L. 271, 279 (2010).

190. See generally *Report on Compliance with the Hague Convention*, *supra* note 7.

return applications, holding that domestic laws relating to child custody disputes supersede the Convention, or by judicial non-compliance.¹⁹¹

Several factors contribute to a state's non-compliance.¹⁹² In some states, policy and political reasons inhibit return enforcement, while other countries will refuse to extradite its own citizens.¹⁹³ In other states—such as Brazil, Chile, Venezuela, and Ecuador—non-compliance is a result of incorrectly treating Hague Convention cases as custody determinations.¹⁹⁴ In Brazil, for example, the courts tend to reason that abducted children “have become ‘adapted to the Brazilian culture’ and should remain in the country.”¹⁹⁵ This line of reasoning is incorrect because it goes to the merits of the custody dispute, not the true purpose of the Convention, which mandates that custody determinations must not be determined during Hague Convention proceedings.¹⁹⁶

VI. WHAT PURPOSE WILL APPELLATE REVIEW HAVE IN *CHAFIN*?

The question that remains is, even if the court permits appellate review pursuant to a child's departure from the United States, what effects would it have on the general disputes of *Chafin*? Mr. Chafin sought reversal of the District Court's ruling that the child's habitual residence is Scotland.¹⁹⁷ Thus, on review, the federal appellate court would be deciding whether the child's habitual residence is Alabama or Scotland. The problem is that although the Hague Convention demands the return of children to their habitual residence, it fails to define the term and instead leaves such determination strictly to the discretion of the court.¹⁹⁸ As a consequence, the federal circuit courts are divided on what

191. See generally *id.*

192. See generally *id.* at 3-6.

193. Jeanine Lewis, *Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 *TRANSNAT'L LAW*. 391, 422 (2000).

194. Timothy L. Arcaro, *Creating A Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction*, 40 *U. MIAMI INTER-AM. L. REV.* 109, 122-24 (2008); see also Waide, *supra* note 189, at 279.

195. Waide, *supra* note 189, at 279.

196. *Id.*

197. *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013).

198. Tai Vivatvaraphol, *Back to Basics: Determining A Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3325 (2009).

characterizes a country as a habitual residence, with some emphasizing “the parents’ last shared subjective intentions” and others focusing “on objective indicators of a child’s acclimatization.”¹⁹⁹

The Eleventh Circuit, the federal appellate court that would hear *Chafin* on review, adheres to consideration of shared parental intent.²⁰⁰ In *Ruiz v. Tenoria*,²⁰¹ the Eleventh Circuit determined habitual residence based on the parents shared intentions and the objective facts of the case.²⁰² In *Ruiz*, the parents of the children had birthed and raised the children in Minnesota, but subsequently moved to Mexico so the father could work for his family’s business.²⁰³ Three years after their move, marital problems developed and the mother moved to Florida with the children, without any intention to move back to Mexico.²⁰⁴ The father filed a petition for the return of the children to Mexico pursuant to the Hague Convention.²⁰⁵ The Eleventh Circuit found that the parents had failed to show a shared intention to abandon the United States as the children’s habitual residence.²⁰⁶ The court additionally considered the objective facts of the case reasoning that a shared intention to abandon the previous habitual residence was not dispositive.²⁰⁷ Although the court found that the children had become acclimatized to the Mexican culture during their three-year stay, the court found that the move to Mexico was conditional and the children’s habitual residence never ceased being the United States.²⁰⁸

Taking *Ruiz* as precedent, the court in *Chafin* would determine the child’s habitual residence to be the United States. The facts demonstrate that the parents had a shared intention to make Alabama the child’s habitual residence. Mr. and Ms. Chafin had their child in Germany in 2007, one year after they were married.²⁰⁹ Later that year, Ms. Chafin moved to Scotland, her home country, with the child while Mr. Chafin was deployed to Afghani-

199. *Id.*

200. *Id.* at 3328.

201. 392 F.3d 1247 (11th Cir. 2004).

202. Vivatvaraphol, *supra* note 198, at 3351.

203. *Id.* at 3350.

204. *Id.*

205. *Id.*

206. *Id.* at 3351.

207. *Id.*

208. Vivatvaraphol, *supra* note 198, at 3351.

209. Petition for Writ of Certiorari at 3, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

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stan for fifteen months.²¹⁰ When Mr. Chafin returned to Germany in 2008, the parties decided to remain separated, with Ms. Chafin and the child continuing to reside in Scotland.²¹¹ Mr. Chafin was subsequently transferred to Alabama in 2009.²¹² That is when Ms. Chafin relocated with the child to Alabama, where she and Mr. Chafin decided to resume cohabitation.²¹³

While in Alabama the parties lived together as husband and wife, despite having filed for divorce in May 2010.²¹⁴ Mr. and Ms. Chafin attended parties, went on vacation, and raised their child together.²¹⁵ During this time in Alabama, Ms. Chafin retained her own passport, and had access to the child's, and was free to leave to Scotland at any time,²¹⁶ although that was not the intention. Despite the ongoing divorce proceedings, Ms. Chafin made the United States her and the child's home.²¹⁷ Ms. Chafin remodeled the family home, and the child was enrolled in school.²¹⁸ In fact, Ms. Chafin had previously admitted in a divorce proceeding that she never mentioned to anyone that her intention was to live in the United States conditionally; instead, anyone who testified claimed she expressed her intentions to make the United States her permanent residence.²¹⁹ Ms. Chafin even began her application with the U.S. government to obtain her permanent residency.²²⁰ It was not until Ms. Chafin faced deportation that she claimed Scotland was the child's habitual residence.²²¹

The facts of this case demonstrate that both parties intended for the United States to be the child's habitual residence. In the approximately two years that the child lived in the United States, there was never any indication that the child was to return to Scotland or that living in Alabama would be conditional. Both parties took steps to make Alabama the child's home and to permit her to acclimatize to living in the United States. In light of the

210. *Id.*

211. *Id.*

212. *Id.* at 4.

213. *Id.*

214. *Id.*

215. Petition for Writ of Certiorari at 4, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

216. *Id.* at 5.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Petition for Writ of Certiorari at 6, *Chafin v. Chafin*, 133 S. Ct. 638 (2012) (No. 11-1347).

parent's shared intentions, the Eleventh Circuit is likely to find that the child's habitual residence is the United States, and will thus reverse the district court's ruling.

VII. CONCLUSION

In essence, the Court in *Chafin v. Chafin* was correct in going beyond merely a legalistic interpretation of the mootness doctrine in formulating its decision. In order to adhere to the principles of the Hague Convention, the Court needed to embrace a more expansive approach that took into consideration the treaty's purpose and the possible consequences its ruling would have on future child abduction cases. A holding that removal of the child pursuant to a return order under the Hague Convention does not moot the case; instead it promotes judicial uniformity while serving the best interests of the child. Furthermore, by establishing a standardized test for granting stays, the Court ensures that the very purpose of the treaty is met—"to secure the prompt return of children wrongfully removed to or retained in any Contracting State."²²²

222. Hague Convention on Child Abduction, *supra* note 1, at art. 1 (a).