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In re: International Child Abduction v. Best Interests of the Child: Comity Should Control

Esther Levy Blynn

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COMMENTS

IN RE: INTERNATIONAL CHILD ABDUCTION V. BEST INTERESTS OF THE CHILD: COMITY SHOULD CONTROL

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I. INTRODUCTION

The United Nations Declaration of the Rights of the Child was adopted by the United Nations General Assembly at its 841st Plenary Meeting on November 20, 1959.¹ While the Declaration is not legally binding on member states of the United Nations, it does set out general principles or standards for the special protection and treatment of children throughout the world.² The Declaration explicitly sets forth the "best interests of the child" as the paramount purpose for the enactment of laws designed to promote the health, welfare and security of children.³

International child abduction, even if by a parent or other relative, is a violation of the rights of children and abhorrent to the tenets of the Declaration.⁴ It is disturbing to a child's need for security and stability, and seriously disruptive of a child's personal relationships.⁵ In addition, the parent from whom the child is "snatched" endures emotional and financial hardship during the search for the child.⁶

There is evidence that the increased mobility of the population and the rising rate of separation and divorce in the United States and other Western countries have contributed to the increased incidence of international child abductions.⁷ Children ab-

1. G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

2. Principle two of the Declaration states:

Principle 2. The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be paramount.

Id.

3. *Id.*

4. *Id.* Principle 9.

5. See Leo, *Kidnapped by Mom or Dad*, TIME, July 14, 1980, at 40; S. KATZ, CHILD SNATCHING (1981).

6. See Noble & Palmer, *The Painful Phenomenon of Child Snatching*, 65 Soc. CASEWORK 330 (1984).

7. Note, *American and International Responses to International Child Abductions*, 16 N.Y.U.J. INT'L L. & POL. 415, 416 nn.4-6 (1984)[hereinafter *Responses to International Child Abductions*].

According to Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. State Department, Washington, D.C., there were 677 known cases of child abduction from the United States as of May 1983. From May 1, 1983 to December 1, 1985, the Department of State documented 1,936 cases of children abducted from the United States, or approximately forty children per month.

According to Pfund, it is difficult to get statistics on the number of children abducted into the United States from other countries. The estimate from the State Department of

ducted into this country are difficult to locate because there are no mandatory national or state registration requirements for children entering the United States from a foreign country.

Even if the child is located, no assurance exists that the child will be returned to the parent from whom it was snatched. Many courts fail to recognize or modify foreign custody decrees in the name of "best [serving] the interests of the child."⁸

Ironically, courts which relitigate custody cases "in the best interests of the child" have created an atmosphere of instability which encourages child-snatching. In child custody determinations, the usual rule of respect for judgments of other courts gives way to broad judicial discretion to exercise continuing oversight of the welfare of the child.⁹

This comment begins with a discussion of the U.S. case law prior to the enactment of federal legislation to deter parental child abduction. This discussion is followed by an examination of the federal statutes,¹⁰ and how, in applying this legislation, the U.S. judicial system operates to encourage international child abduction by failing to recognize and enforce foreign custody decrees. An analysis of the case of Cynthia Johns underscores the inadequacies of existing federal legislation. Cynthia, a Mexican child, was taken illegally from Mexico by an American couple when she was one day old. Six years later she was abducted and taken back to Mexico by her biological mother. Next, the comment looks at the advantages of the Hague Convention on the Civil Aspects of Child Abduction. To deter international child abduction, the provisions of the Hague Convention mandate that the authorities in the abducting country promptly return the abducted child to the custodial parent or child care institution.¹¹ The comment concludes by showing how the Hague Convention, which limits judicial discretion in these cases,

children abducted into the United States is highly speculative but suggests that there are at least 15 to 40 per year. Telephone interview with Peter H. Pfund, Esq., Assistant Legal Advisor for Private International Law, U.S. State Department (Apr. 18, 1986) [hereinafter Pfund Interview].

8. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 242 (1972).

9. Note, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L L. 669, 670 (1980).

10. Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111 (1979); 28 U.S.C. § 1738A (1982) (Full faith and credit given to child custody determination); 18 U.S.C. § 1073, as amended by Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3573.

11. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 [hereinafter Hague Convention]; 51 Fed. Reg. 10,498 (Mar. 26, 1986).

is a more effective deterrent to child snatching than the federal legislation now in force.

II. THE UNITED STATES RESPONSE TO CHILD ABDUCTION

A. *Pre-Uniform Child Custody Jurisdiction Act Law*

Prior to adoption of the Uniform Child Custody Jurisdiction Act (UCCJA), state courts, in the absence of any national standard, had virtually unlimited discretion in refusing to recognize or enforce custody decrees of sister states and foreign nations.¹² State courts assumed jurisdiction on a number of grounds, "including physical presence of the child, personal jurisdiction over both parents, and domicile of the child."¹³ Consequently, two state courts could simultaneously assert jurisdiction over the parties to a custody dispute and render inconsistent decrees. The parent who snatched the child, having physical custody of the child, had the advantage of being able to "forum shop" by taking the child to a favorable jurisdiction and then relitigating the custody issue. This forum shopping was popular because courts tended to give great weight to the presence of the child in the state when making custody determinations.¹⁴ Furthermore, if the child snatcher was able to retain the child for a considerable length of time, the wrongdoer could argue on the merits that for the child's stability and security, *i.e.*, the best interests of the child, the child should remain in the new jurisdiction. As a result, the wrong-doer would be rewarded in "the best interests of the child."¹⁵

Before the widespread adoption of the UCCJA state courts rarely recognized or enforced the custody decrees of sister states, and even less frequently recognized foreign-nation custody decrees. In *May v. Anderson*¹⁶ the Supreme Court held that under the U.S. Constitution,¹⁷ a Wisconsin custody decree obtained by the father in an *ex parte* divorce action was not entitled to full faith and credit by an Ohio court. In another pre-UCCJA case, *Kovacs v.*

12. Note, *supra* note 9, at 677.

13. *Responses to International Child Abductions*, *supra* note 7, at 419 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971)).

14. See Hoff, *Child Snatching: Interstate and International Child Custody Litigation*, in INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES 10 (ABA Monograph, 4th ed. Mar. 1984).

15. *Responses to International Child Abductions*, *supra* note 7, at 419.

16. 345 U.S. 528 (1953).

17. U.S. CONST. art IV, § 1.

Brewer,¹⁸ the Court stated that, "the forum state has at least as much right to disregard, qualify or depart from custody judgment as does the state where originally rendered."¹⁹ Furthermore, in *Ford v. Ford*,²⁰ the Court held that in making a custody determination, South Carolina was not barred from making its own determination with respect to the best interests of the child even though Virginia had already awarded custody on the same basis.²¹ Thus, prior to the widespread adoption of the UCCJA within the United States, custody decrees of sister states, considered non-final judgments, were not accorded full faith and credit.

Foreign judgments, while never accorded full faith and credit, have been recognized and enforced on the basis of the principle of comity. The Supreme Court articulated the principle of comity in *Hilton v. Guyot*.²²

Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment or any other special reason why comity of this nation should not allow it full effect, the merits of this case should not . . . be tried afresh . . . upon the mere assertion of the party that the judgment was erroneous in law or in fact.²³

Comity refers to the willingness to give recognition to the judicial acts of another sovereign not as a matter of right or obligation, but as a matter of deference, international courtesy, mutual respect, and good will.²⁴ While the Restatement (Second) of Conflicts of Laws incorporates the *Hilton* comity principle,²⁵ the exception to comity with respect to a child custody decree as a non-final judgment has been noted,²⁶ thus leaving states "free to shape their own

18. 356 U.S. 604 (1958).

19. *Id.* at 616.

20. 371 U.S. 187 (1962).

21. *Id.* at 194.

22. 159 U.S. 113 (1895).

23. *Id.* at 202.

24. *Id.* at 163-65.

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment c (1971).

26. Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83, 86 (1977).

judicial policies in this area of the law."²⁷ Prior to the adoption of the UCCJA in some form by all states, even if a court recognized a foreign custody decree, it was free not to enforce it. With few notable exceptions, state courts have chosen to litigate child custody cases rather than enforce the decrees of foreign nations.²⁸

There are several reasons for not giving full faith and credit to a sister state's custody decree, as well as for disregarding the comity principle in international child custody disputes. First, the full faith and credit doctrine may not be applied because custody decrees are not final judgments and may be modified at any time based on changed circumstances which require a *de novo* custody determination in the best interests of the child. A second reason, particularly relevant to state courts' reluctance to enforce foreign nation courts' custody decrees, is that the judge in the later action may disagree with or mistrust the prior award. Judges in the United States have been particularly unwilling to enforce foreign custody awards when they suspect the awards are not in accord with their own notion of what constitutes the best interests of the child.²⁹ Third, some judges are "loathe to defer to courts of other states."³⁰ Judges may also tend to be more receptive to the parent who is a local resident and is present with the child.³¹ Finally, judges and attorneys become emotionally involved in the custody dilemma and irrationally cling to a belief that "if we cannot divide the child by sword [as King Solomon proposed] we can divide him by periods of time through the free and easy modifiability of the custody decree of the original court."³²

The modern American trend toward joint custody awards may well be unrealistic in the judicial resolution of international child custody disputes. The child needs, and in fact deserves, a judicial determination securing for him the stability of a single home with at least one parent. This can best be effected by custody arrangements which are subject to modification only by the court making the original custody determination, and then only when necessary to accommodate a substantial change of circumstances.³³ Such ju-

27. Note, *supra* note 9, at 674.

28. See *id.* at 673.

29. Bodenheimer, *supra* note 27, at 83.

30. *Id.* at 84 & n.3 (citing Address by Justice Fairchild of the Supreme Court of Wisconsin, Conference of Chief Justices at 8 (St. Louis, Aug. 1961)).

31. Bodenheimer, *supra* note 27, at 84.

32. *Id.* at 84-85.

33. See J. GOLDSTEIN, A. FREUD & A.J. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD*

dicial determinations should not preclude the non-custodial parent from having frequent access to the child and as much sharing as is geographically feasible.³⁴

Prior to a state's adoption of the UCCJA, international child abduction case determinations were unpredictable. Even where the clean hands rule should have been applied to prevent a child snatcher from benefiting from his wrong-doing, it was not consistently used. In *State v. ex rel. Domico v. Domico*,³⁵ the West Virginia Supreme Court of Appeal, on the mother's habeas petition, refused to honor a German custody decree, awarding custody to the mother even though there was evidence the father had forcibly removed the children from her custody. The court decided to relitigate the case on the merits. Courts have traditionally required the parent seeking to modify a custody decree to show change of circumstances; the court in this instance, however, required the mother, who was seeking to enforce the West German decree unchanged, to show "changed circumstances" in order to regain custody.³⁶ The court denied the mother's petition to regain custody, holding that:

[Because the mother] was not as well off financially as the respondent, since his income is four or five times more than her income . . . [t]o remove the children from one country to another . . . to subject them to different customs in this formative period of their lives would appear, from the evidence in this case against their welfare and best interest.³⁷

The court, by awarding custody to the father, in effect rewarded him for child-snatching.³⁸

Contrary to the holding in *Domico*, the Connecticut Supreme

(1973).

34. Bodenheimer, *supra* note 27, at 85.

35. 153 W. Va. 695, 172 S.E.2d 805 (1970).

36. *Id.* at 704, 172 S.E.2d at 810.

37. *Id.*

38. In an impassioned dissent, J. Calhoun pointed out that the court had "misconstrued the . . . question of comity . . . and . . . has misconceived pertinent legal principles which should be applied in this case. . . [and] has done great violence to basic equitable considerations." *Id.* at 811 (Calhoun, J., dissenting).

Judge Calhoun went on to emphatically state that, "[I]f ever a litigant came into court with unclean hands to seek equitable relief, it was this respondent." *Id.* "The ingenious, reprehensible [child snatching] scheme conceived and commenced in West Germany has, by this Court's decision culminated in full fruition and success." *Id.* at 707, 172 S.E.2d at 811-12.

Court of Errors in *Adamsen v. Adamsen*,³⁹ upheld a Norwegian court's grant of custody to the father. In this case, the court concluded that, unlike the situation in *Domico*, the change in circumstances following the abduction had been to the child's detriment. The *Adamsen* trial court decision, like that in *Domico*, was not based on an application of the comity principle: "It was an independent adjudication after a full hearing rather than the enforcement of the foreign judgment."⁴⁰ As in *Adamsen* and *Domico* the majority of U.S. state courts, especially in pre-UCCJA cases, did not apply comity principles, but made de novo custody determinations based on their view of what was in the "best interest of the child," even where a foreign court already had made such a determination.⁴¹ The victimized parent was thus forced to relitigate the entire custody matter on the merits.

The New York Supreme Court followed the minority view of U.S. state courts, applying principles of comity in *Lang v. Lang*.⁴² *Lang* held that New York courts should recognize and enforce foreign custody awards absent a showing of extraordinary circumstances proving that otherwise the child would suffer.⁴³ In this case, a Swiss court had awarded custody of two children to the father. The mother fled with the children to New York for the purpose of frustrating the Swiss decree. The father filed a writ of habeas corpus petition in New York for the return of custody of the children.⁴⁴ The New York court granted the father's petition, basing its decision on principles of comity. The court stated:

Adherence to the principle of comity provides the key to rational disposition for the welfare of the children . . . in many, if not most, custody cases involving self-help Not only does self-help make the eventual placement of the children an arbitrary consequence but it breeds reprisal in kind.⁴⁵

B. *The Uniform Child Custody Jurisdiction Act*

The purpose of the Uniform Child Custody Jurisdiction Act

39. 151 Conn. 172, 195 A.2d 418 (1963).

40. *Id.* at 180, 195 A.2d at 422.

41. See, e.g., *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431 (D.C. 1972); see also *Baranshamaje v. Baranshamaje*, 7 Fam. L. Rep. (BNA) 2134 (D.C. Super. Ct. Nov. 26, 1980).

42. 9 A.D.2d 401, 193 N.Y.S.2d 763 (N.Y. App. Div. 1959).

43. *Id.* at 406, 193 N.Y.S.2d at 768.

44. *Id.* at 404, 193 N.Y.S.2d at 766.

45. *Id.* at 408, 193 N.Y.S.2d at 770.

(UCCJA) is to deter parental child abduction by limiting jurisdiction of custody matters to courts of one state thereby preventing multiple custody litigation.⁴⁶ As of this writing, all of the states in the U.S. have adopted the UCCJA in some form.⁴⁷ Under the Act, a court is permitted to assert jurisdiction over a custody matter only if (1) the state is the "home state" of the child at the time the proceeding commences; (2) there is a significant connection between the child and at least one custodian of the state; (3) the child is physically present in the state and has been abandoned, or is in immediate need of protection from abuse or neglect; or (4) no other state would be able to assert jurisdiction under (1), (2), or (3).⁴⁸ The UCCJA sets out uniform criteria for the selection of the appropriate forum for recognition and enforcement of out-of-state custody decrees.⁴⁹ Sections of the Act prohibit a second court from assuming jurisdiction once litigation has commenced in another state and require the state to which the abducting parent flees to decline jurisdiction based on the clean hands principle.⁵⁰ Thus, as was the case in most of the pre-UCCJA custody determinations discussed previously, the UCCJA codified the "clean hands" principle in an attempt to prevent the child snatcher from benefiting

46. Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111 (1979).

Section 1 provides that the general purposes of the Act are to (1) avoid jurisdictional competition between state courts; (2) promote cooperation between courts so that the state that can best decide the case in the interests of the child has jurisdiction; (3) deter abductions undertaken to obtain custody awards; and (4) facilitate enforcement of out-of-state custody decrees. *Id.* § 1.

47. See Hoff, *supra* note 14.

48. Uniform Child Custody Jurisdiction Act § 3a.

49. Uniform Child Custody Jurisdiction Act §§ 7, 8. Sections 7 and 8 of the UCCJA address the question of jurisdiction. Section 7 allows a court to decline jurisdiction upon a finding of "forum non conveniens." Section 8 permits the court to decline jurisdiction if the petitioner comes to the court with "unclean hands," i.e. has abducted, or otherwise improperly retained the child from the custodial parent.

Section 8 [Jurisdiction Declined by Reason of Conduct] states:

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court may decline to exercise its jurisdiction if this is just and proper under the circumstances. . . .

Id. § 8(a), (b).

50. *Id.*

from his wrong-doing.

The general provisions of the UCCJA apply with equal force to international child custody disputes by virtue of Section 23 of the Act.⁵¹ Comity is granted, provided all parties to the action are afforded reasonable notice and an opportunity to be heard. Under Section 23, foreign courts have jurisdiction under their own laws which may or may not comport with the jurisdictional requirements of Section 3, previously discussed. Under the Act, American courts have declined jurisdiction in situations where the foreign forum had "closer connections" with the child. Jurisdiction has also been declined where the parent seeking custody had wrongfully taken the child, thereby falling under the "clean hands" provision.

Many international custody dispute determinations made under the UCCJA have been based on comity principles. In *In re Marriage of Ben-Yehoshua*,⁵² the wife, a U.S. citizen, and her Israeli husband were married in Israel and domiciled there for thirteen years. The wife, thereafter, took the couple's three children to California, where she filed suit for both separation from her husband and custody of their children.⁵³ Before the California proceedings had continued beyond an initial hearing, the father snatched the children and returned to Israel.⁵⁴ The husband filed for divorce and was awarded custody of the children in Israel.⁵⁵ The California Court of Appeal found that the trial court had erroneously equated personal jurisdiction over the parties with subject matter jurisdiction over the custody of the children.⁵⁶ Moreover, the home state jurisdiction prerequisite of the UCCJA was not satisfied because the children had only been in California for one month; Israel was the state with maximum contacts.⁵⁷ Apparently, given the circumstances, the clean hands doctrine was not invoked; otherwise, California could have retained jurisdiction.

51. *Id.* at § 23. Section 23 states:

The general policies of the Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

52. 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (Cal. Ct. App. 1979).

53. *Id.* at 262, 154 Cal. Rptr. at 82.

54. *Id.*

55. *Id.*

56. *Id.* at 264, 154 Cal. Rptr. at 83.

57. *Id.* 266-67, 154 Cal. Rptr. at 84-85.

Unlike *Ben-Yehoshua* where no custody determination was made, in *Woodhouse v. District Court*,⁵⁸ the Colorado court applied comity principles in recognizing the continuing jurisdiction of the British court. The court refused to modify an English custody decree awarding the mother custody of her two children. The father, who by virtue of the British decree was awarded visitation, moved to the U.S. and snatched the child. Despite a 1978 British court order demanding the child's return, the father refused to return the child. The Colorado Supreme Court overruled the trial court's award of custody to the father, stating that, "the Act demands that an English court determine whether there should be a modification of its custody decree."⁵⁹ Having found no emergency situation endangering the child's safety or welfare, the court concluded that, "the Act clearly intended to limit the discretion of the respondent court in this type of situation."⁶⁰ Absent a dangerous threat or the probability of serious harm to the child by the parent awarded custody by a foreign tribunal, comity principles dictate that modification of decrees are not within the jurisdiction of the state into which the child was abducted.

Despite the adoption of the UCCJA, American courts have not always respected the jurisdiction of foreign courts. Unlike the decisions in *Ben-Yehoshua* and *Woodhouse*, the New Hampshire court in *Brauch v. Shaw*,⁶¹ assumed jurisdiction over the custody issue, "in the best interest of the child"⁶² even though the petitioner (father) had unlawfully snatched his son from his mother in England. Noting that the primary purpose of the UCCJA is to "discourage . . . child-napping,"⁶³ the New Hampshire court recognized that it should decline jurisdiction. Nonetheless, the New Hampshire court assumed jurisdiction, rationalizing that shipping the child back to England would have harmful effects on the child by disrupting his environment.⁶⁴

In deciding whether to assume jurisdiction or enforce a prior foreign decree, *Brauch* makes clear that the discretion allowed trial judges under the UCCJA weakens the Act's effectiveness in deterring parental child abduction. The Act does not require states to

58. 196 Colo. 558, 587 P.2d 1199 (1978).

59. *Id.* at 560, 587 P.2d at 1201.

60. *Id.*

61. 121 N.H. 562, 432 A.2d 1 (1981).

62. *Id.* at 574, 432 A.2d at 7.

63. *Id.* at 571, 432 A.2d at 6.

64. *Id.* at 573, 432 A.2d at 7.

give full faith and credit to all foreign decrees but only requires that they recognize and enforce foreign custody decrees in accordance with specified jurisdictional guidelines.⁶⁵ Furthermore, as *Brauch* illustrates, the UCCJA does not punish the abducting parent. In most cases, strict application of the UCCJA effectively bars the parent who steals a child from obtaining jurisdiction in the state to which he flees. In *Brauch*, however, the state court where the abducting parent fled assumed jurisdiction, thus nullifying the deterrent effect of the Act. Finally, if the abducting parent chooses not to seek custody and remains "underground," the parent and the child fall outside the purview of the UCCJA.⁶⁶

C. *The Parental Kidnapping Prevention Act of 1980*

The Parental Kidnapping Prevention Act⁶⁷ (PKPA) was enacted to correct some of the weaknesses of the UCCJA. The PKPA's primary purpose is "to deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards."⁶⁸ Essentially, this federal act requires the appropriate authorities of every state to enforce rather than modify custody and visitation orders made by courts already exercising jurisdiction. The Act has three main aspects.⁶⁹ First and foremost, the full faith and credit mandate is specific with reference to prior custody decrees and orders.⁷⁰ Although the PKPA does not extend to international cases, it does not conflict with section 23 of the UCCJA.⁷¹ Thus, judicial discretion is limited to prevent results like those in *Brauch* which was decided under the UCCJA. If the PKPA had been applied to *Brauch* instead of the UCCJA, then the English custody decree awarding the mother custody would have been given full faith and credit. Thus, New Hampshire courts would have had to recognize and enforce the English decree and return the snatched child to the mother—a result opposite to the one reached by the New Hampshire courts.

65. See Uniform Child Custody Jurisdiction Act § 3.

66. Foster & Freed, *A Legislative Beginning to Child-Snatching Prevention*, TRIAL, Apr. 1981, at 36.

67. See Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3573.

68. *Id.* § 7.

69. Foster & Freed, *supra* note 66, at 37.

70. See 28 U.S.C. § 1738A (1982); see also Hoff, *supra* note 14.

71. *Responses to International Child Abductions*, *supra* note 7, at 433-34. See also Hoff, *supra* note 14, at 10-11.

Second, the PKPA provides for the use of federal and state parent locator services which are now available in child support cases.⁷² Federal and state locator services permit parent-victims of limited means who cannot afford private detectives to avail themselves of the services of trained federal or state detectives and investigators to assist in locating a snatched child.

Finally, the PKPA expands the Fugitive Felon Act to include child snatching as a felony where interstate or international flight is involved.⁷³ "In addition to making the new federal law operative, raising child snatching to felony status better assures favorable results in extraditions."⁷⁴ One commentator notes that "while the possibility of extradition may well operate as a deterrent to parental kidnapping, the purpose of extradition is to bring back the parent, not the child. Once the child is returned, it is probable that the state will decline extradition."⁷⁵ According to some authorities, "the main reason status as a felony is needed for parental kidnapping is to . . . aid extradition and trigger FBI assistance."⁷⁶

In international child snatching cases, the PKPA's full faith and credit provision is essential for the mandatory recognition and enforcement of valid foreign nation custody decrees. If the PKPA full faith and credit provision were applicable to foreign custody decrees, it is more likely that a custodial parent from a foreign country would be better able to enforce a custody order against an abducting non-custodial parent, as has been the case in interstate child custody disputes under the PKPA.⁷⁷ According to the Act,

72. *Id.*; see The Child Support Enforcement Act, 42 U.S.C. § 663 (1982).

73. Foster & Freed, *supra* note 66.

74. *Id.* at 38.

75. Pfund Interview, *supra* note 7.

76. Foster & Freed, *supra* note 66, at 38. See also *Responses to International Child Abduction*, *supra* note 7, at 433.

77. See Hoff, *Federal Court Remedies in Interstate Child Custody and Parental Kidnapping Cases*, 19 FAM. L.Q. 443 (1986)[hereinafter Hoff, *Federal Court Remedies*]. Hoff focuses on the increased involvement of federal courts in enforcing the PKPA § 1738A full faith and credit provision in *interstate* child custody disputes.

Recent cases have affirmatively held that federal question jurisdiction (28 U.S.C. § 1331) lies to enforce compliance with the PKPA when a state court violates § 1738A. *Id.* at 444.

The *Flood* court determined that two traditional bars to federal involvement in child custody disputes do not apply to suits under § 1738A. The court held that the domestic relations exception, which applies to diversity jurisdiction, 28 U.S.C. § 1332 does not apply to cases based on federal question jurisdiction, and thus would not bar an action brought under PKPA. Next, the court distinguished the federal action brought pursuant to the Full Faith and Credit Clause of the U.S. Constitution (Article IV, Section 1) for enforcement of custody de-

"indeed, courts should consider the strong anti-snatching and pro-stability policies embodied in the PKPA when making a decision in an international custody dispute."⁷⁸

III. THE CASE OF CYNTHIA JOHNS, MEXICAN ALIEN #A 21324657⁷⁹

The tragic case of Cynthia Johns brings into focus the pressing need for international comity in arriving at swift custody determinations in international child custody disputes if the best interests of the child are to be served. Cynthia, a Mexican alien girl, was brought into this country illegally from Mexico by an American couple when she was one-day old and abducted back to Mexico six years later by her biological mother. This unprecedented case of child abduction, treated by the U.S. courts as a parental kidnapping, was reviewed over a six-year period, from 1976 to 1982, by Immigration and Naturalization Service Directors in two states,⁸⁰ an immigration judge,⁸¹ a Board of Immigration Appeals,⁸² Florida

crees, from actions seeking a determination as to whether a state has improperly exercised jurisdiction in a custody case in violation of § 1738A. Actions seeking compliance with the PKPA would turn on an analysis of the jurisdictional facts . . . There would be no inquiry into substantive custody law . . .

Id. at 444-46 (*Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984)).

78. *Responses to International Child Abduction*, *supra* note 7, at 434.

79. See generally *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980); and *Johns v. Department of Justice*, 653 F.2d 884 (5th Cir. 1981).

80. See Hearings and Rulings of INS: U.S. Department of Justice, Deportation Proceedings, Immigration and Naturalization Service; *In re: The Matter of Cynthia Johns*, INS File No. A-21-324-657, (San Francisco, Cal. Jan. 24, 1977).

Charles E. Hoffman, Assistant Director of Immigration and Naturalization Service, San Francisco, California, issued an Order of Deportation and Order to Show Cause on Cynthia Johns on October 4, 1976 after investigating Mrs. Macias-Rosales' claim. Appendix of Brief of Intervenor, Angela Macias-Rosales, *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980).

Raymond A. Morris, District Director, Immigration and Naturalization Service, Miami, Florida issued a subsequent Order for Deportation for Cynthia Johns in February, 1980 and subsequently granted a stay of deportation by not reinstating deportation proceedings pending a resolution of the custody dispute in state court. Appendix to Brief of Intervenor, Angela Macias-Rosales, *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980).

81. In Deportation Proceedings, In the Matter of Cynthia Johns, Respondent, INS File No. A-21-324-657 (San Francisco, Cal. Dec. 18, 1977) (J. Sipkin)(termination of proceedings pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1) (1982)). See also Appendix to Brief of Intervenor, Angela Macias-Rosales, *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980).

82. Department of Justice, Board of Immigration Appeals, In Deportation Proceedings, *In re: Cynthia Elizabeth Johns*, File No. A 21-324-657 (San Francisco, Cal. Feb. 27, 1979) pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(motion for reconsideration of deportation denied).

trial courts⁸³ and appellate courts,⁸⁴ and federal district⁸⁵ and appellate courts.⁸⁶ No final custody determination was reached, however, in any court of law. The UCCJA which was in force during the *Johns* proceedings and which was aimed at preventing or reducing the incidence of child abduction, proved ineffective.

A. *Facts and Procedural Background of the Johns Case*

On October 22, 1975, an American couple, Mark and Eileen Johns, brought into the United States a one-day old female infant born in Baja California, Mexico to Angela Macias-Rosales. It is undisputed that the Johnses crossed the border into the United States without a visa or proper documentation for the immigration of a foreign-born child. They gave officials at the border a pink paper which indicated they had registered the child. On her Mexican Birth Certificate (*Acta de Nacimiento*) the Johnses named the alien child Cynthia Elizabeth Johns. The couple registered the child as if they were her natural parents. They claimed this registration constituted a legal adoption in Baja California, Mexico.

Throughout the subsequent proceedings, Mrs. Macias-Rosales claimed she was Cynthia's mother and that the child had been kidnapped from her in Tijuana, Mexico. The Johnses claimed that the baby was "given" to them by Mrs. Macias-Rosales in what they claimed to be a "black market" adoption transaction: they had taken the child from Mexico with the knowledge and consent of the mother. In other words, Mrs. Macias-Rosales claimed that the child had been kidnapped, and the Johnses argued that there had been a "de facto" (black market) adoption.⁸⁷

83. *In re: Custody of Cynthia Johns*, No. 80-18409 FC (Fla. Cir. Ct. filed Feb. 5, 1981); *In re: Adoption of: Cynthia Elizabeth Johns by: Mark Johns and Eileen Johns*, No. 76-6481 FC 08 (Fla. Cir. Ct. filed May 9, 1979).

84. See also state custody cases, unpublished: *In re: Custody of Cynthia Johns, Macias-Rosales v. Klein*, No. 81-949 (Fla. Dist. Ct. App. June 1981)(dismissed Oct. 19, 1981).

85. *Macias-Rosales v. Department of Justice*, No. 79-2823-Civ-JE (S.D. Fla. June, 1979); *Johns v. Department of Justice*, No. 80-480-Civ-JWK (S.D. Fla. Feb. 20, 1980); *Macias-Rosales v. Department of Justice*, No. 79-2823-Civ-JE, slip op. (S.D. Fla. June 1979)(Eaton, J.); *Johns v. Department of Justice*, No. 80-480-Civ-JWK, slip op. (S.D. Fla. Feb. 20, 1980).

86. *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980); *Johns v. Department of Justice*, 653 F.2d 884 (5th Cir. 1981).

87. The Mexican Government agreed with Mrs. Macias-Rosales and declared the adoption illegal. The Mexican Government subsequently issued a warrant for the arrest of the Johnses for kidnapping. Original and certified English translation of Arrest Warrant issued by the Third Penal Court, Tijuana, Baja California, Mexico, issued December 1, 1978, pur-

It was not until January 29, 1976, that Cynthia's biological mother, Mrs. Macias-Rosales, having finally located the Johnses and Cynthia in California, contacted the INS.⁸⁸ Mrs. Macias-Rosales claimed that her child had been kidnapped by the couple.⁸⁹ Her action prompted an INS investigation.

1. INS Investigation and Proceedings in California

On October 4, 1976, when Cynthia was less than a year old, the INS issued an Order to Show Cause and Notice of Hearing to the Johnses, alleging that Cynthia, having entered the country illegally, was subject to deportation. Formal hearings were held on October 28, 1976 and November 5, 1976.

On January 24, 1977, an immigration judge issued an interlocutory order in which he found Cynthia to be deportable pursuant

suant to Article 317, Part VI of the Penal Code, Plagiarism on a twelve year old minor, Exhibit 21, *found in* Reply Brief of Appellants, Mark David Johns and Eileen May Johns, *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980).

88. *Johns v. Department of Justice*, 624 F.2d 522, 523 (5th Cir. 1980).

89. Throughout this case, great significance has been attached to Mrs. Macias-Rosales' unexplained delay in contacting the Mexican authorities after she discovered her baby was missing. She herself could not explain the initial delay. Mrs. Macias-Rosales stated in an interview, "I am not ignorant. I am not stupid. To this day I do not know why I did not go to the authorities. But at that moment I was not thinking." (She did go to the border by taxi from the hospital in an effort to retrieve the child there.) "I was lost. I wanted to cry, but there were no tears. There was pain where I was bleeding . . . I thought they would be stopped at the border, but they were not there. I came home from the border alone." Blais, *Mexican Standoff*, *Miami Herald* (Tropic Magazine), Nov. 30, 1980, 11-20, 27-30, 57, 58, [hereinafter Tropic Magazine].

What is clear from the record is that while Mrs. Macias-Rosales spoke with hospital staff, she left her baby in the care of a "friend" named de Leon. Mark Johns, identifying himself as a Dr. Marcos, told de Leon that he was to take the baby and left a piece of paper with that name and a non-existent Miami address on it. This paper is one of the few pieces of physical evidence in this strange and tragic case of child abduction. Tropic Magazine, *supra*.

Judge Sipkin, the immigration judge in California, stated that in his opinion (without any concrete evidence), the reason for Mrs. Macias-Rosales' delay in contacting the authorities was that, "she had a deal going with the Johns and was trying to collect her money." In *Deportation Proceedings*, In the Matter of Cynthia Johns, INS File No. A-21-324-657 (San Francisco, Cal. Jan. 24, 1977), *found in* Appendix to Brief of Intervenor, at A9, *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980)(interlocutory deportation order).

Judge Sipkin continued:

[T]he testimony of the child's mother concerning what occurred in the hospital does not ring true. As she gave the facts she could only think the child had been abducted. Unless a deal was in progress, she would have raised hell . . . She not only did not notify the police, but attempted to locate the Johnses by herself and even after she located them, she did nothing for another month.

Id. at A8-A9.

to 8 U.S.C. section 241 (a)(1), but withheld his final order for deportation to allow the natural mother to bring custody proceedings in the California state court.⁹⁰ In issuing the interlocutory order Judge Sipkin stated:

Neither the Johnses nor the mother have clean hands. Consequently, I do not feel that either are deserving of any particular sympathy. It is only the welfare of the child which is of importance. Sending her back to Mexico is not necessarily in her best interests. Unfortunately in the present posture of the case my authority to do anything else is limited.⁹¹

Concluding that Mrs. Macias-Rosales' petition for habeas corpus had been denied in the civil court in California, but not on the merits, Judge Sipkin issued a final order of deportation in December, 1977.⁹²

Further INS proceedings followed, including an appeal by the Johnses on behalf of Cynthia to the Board of Immigration Appeals (BIA), requesting the INS to reconsider its deportation order of December 1978. The motion was denied in February 1979. One month before the BIA ruling, the Johnses fled with Cynthia to Florida.

2. Florida Proceedings

(a) *INS and State Court Proceedings.* On March 20, 1979, the INS District Director for Miami, Florida granted the Johnses a temporary stay of Cynthia's deportation while they petitioned Florida's Eleventh Circuit Court, Dade County, Florida, to adopt Cynthia. A petition for adoption was filed on May 5, 1979.⁹³

(b) *Proceedings in the Federal District Court: Macias-Rosales v. Department of Justice.* In June, 1979, the child's natural

90. In Deportation Proceedings, In the Matter of Cynthia Johns, INS File No. A-21-324-567 (San Francisco, Cal., Jan. 24, 1977). See Tropic Magazine, *supra* note 89.

It is significant that although the mother located the child in October 1976, when Cynthia was less than a year old, she was over two years old when Sipkin issued his final order of deportation on December 18, 1977.

91. Appendix to Brief of Intervenor, Mrs. Angela Macias-Rosales, at A10, Johns v. Department of Justice, 624 F.2d 522 (5th Cir. 1980).

92. *Id.* at A12.

93. *In re: Custody of Cynthia Johns*, No. 80-18409 FC (11th Fla. Cir. Ct. filed Feb. 5, 1981).

In re: Custody of Cynthia Johns, Angela Macias-Rosales v. Klein, No. 81-949 (3d Fla. Dist. Ct. App. June 1981). The case was dismissed Oct. 19, 1981 after Mrs. Macias-Rosales took Cynthia and left the United States.

mother, Mrs. Macias-Rosales, filed suit for habeas corpus mandamus and money damages in the United States District Court for the Southern District of Florida.⁹⁴ The Johnses moved for an order enjoining the INS from deporting the child. The trial court granted the biological mother a temporary injunction, restraining the Johnses from proceeding with the state court adoption and declining to enjoin the INS from deporting the child.

On January 30, 1980, the District Director of INS rescinded an earlier stay of deportation and issued a warrant for Cynthia's deportation to Mexico. When the Johnses failed to surrender Cynthia, she was taken into INS custody.⁹⁵

(c) *Proceedings in the Federal District Court: Johns v. Department of Justice.* The couple filed a suit in federal court seeking to enjoin deportation and to obtain a writ of habeas corpus. Mrs. Macias-Rosales sought to intervene.⁹⁶ The district court dismissed the Johnses' complaint with prejudice and denied Mrs. Macias-Rosales' motion to intervene, but did not rule on her habeas petition.⁹⁷

(d) *Appeal of Johns in the Fifth Circuit.* The Johnses appealed the judgment of the district court to the Fifth Circuit U.S. Court of Appeals and Mrs. Macias-Rosales was permitted by the appellate court to intervene. The court ruled that:

Because the child has not been represented by a guardian ad litem, we reverse the district court, direct it to issue a preliminary injunction against execution of the deportation order, and remand the case for the appointment of a guardian ad litem and for further proceedings contradictorily with that person.⁹⁸

94. *Macias-Rosales v. Department of Justice*, No. 79-2823-Civ-JE, slip op. (S.D. Fla. June, 1979).

95. *Johns v. Department of Justice*, 653 F.2d 884, 886 (5th Cir. 1981).

Cynthia was taken from the Johnses and placed in an institution under the care of Catholic Services Bureau for what was to have been a period of 48-72 hours pending her deportation from Mexico. Because of subsequent legal proceedings, her institutional care continued until March 1981, when her guardian ad litem, Mr. Klein, was permitted by the federal district court to have Cynthia placed with a foster family. *Id.* at 888.

In the view of this writer, Cynthia's placement with a Catholic agency was not "accidental." The Johnses are Jewish, and placement with a Catholic agency signified a growing recognition by the government that the child was the daughter of Mrs. Macias-Rosales, a Catholic, Indian mother.

96. *Id.* at 893.

97. *Id.* at 895.

98. *Johns v. Department of Justice*, 624 F.2d 522, 523 (5th Cir. 1980). Florida attorneys Rebekah Poston and Theodore Klein were subsequently appointed guardians *ad litem* by the federal district court. It was Mr. Klein alone who appears to have represented Cynthia.

It was not until this appellate court ruling that the issue of the Johnses' legal status as parents able to represent Cynthia's best interest was put to rest. The appellate court noted that while the Johnses purported to represent both themselves and Cynthia's interests, their interests and Cynthia's were not necessarily the same. The court explained that, "[the Johnses] patently [lacked] legal standing to represent her [Cynthia], being neither her natural nor her adoptive parents and having no custody order."⁹⁹ The court also considered Mrs. Macias-Rosales' ability to represent Cynthia's interests and noted that while it appeared to be undisputed that Mrs. Macias-Rosales was Cynthia's mother and that her personal interest commanded sympathy, she, like the Johnses, did not necessarily represent Cynthia's interests. The court reasoned that:

Cynthia has been raised in a different culture, speaks a different language, has resided for all but the first twenty-four hours of her life with another family and would, if deported, presumably be taken to Mrs. Macias-Rosales' home to reside with two older siblings who have never seen her and with whom she could not communicate. Under these circumstances, Mrs. Macias-Rosales does not necessarily represent Cynthia's interests.¹⁰⁰

The appellate court, citing to the Biblical story of King Solomon, distinguished the *Johns* case from the tale of Solomon's wisdom in resolving the disputed parentage between two mothers:¹⁰¹

The celebrated wise king could assume, however, that the true mother had interests identical to those of the infant. Here we cannot assume that either Mrs. Macias-Rosales or the Johns[es] seek to protect only the interests of Cynthia. In this unusual situation, it was a denial of due process to hold proceedings to deport an unrepresented infant incapable of representing herself.¹⁰²

The appellate court reversed the federal trial court's dismissal of the Johnses' petition to stay the deportation proceedings; the court remanded the case with instructions to the federal district court to appoint a guardian ad litem to represent Cynthia in the INS deportation proceedings to insure her due process.¹⁰³

Henceforth, he will be referred to as Cynthia's guardian *ad litem*.

99. *Id.* at 523-24.

100. *Id.* at 524.

101. 1 *Kings* 3:16-28.

102. *Johns v. Department of Justice*, 624 F.2d at 524.

103. *Id.*

Recognizing the harm being done to Cynthia by the aforementioned protracted legal proceedings and in order to avoid further delays, the appellate court ordered that all INS proceedings be completed within sixty days, i.e. by September 30, 1980, and all proceedings of the district court be completed thirty days thereafter (October 30, 1980), unless those limits were extended by the appellate court itself.¹⁰⁴ The Fifth Circuit panel retained jurisdiction of any further appeals.¹⁰⁵

(e) *Proceedings on Remand.* Despite the appellate court rulings requiring an expedited disposition of the deportation and federal district court proceedings, the case continued for almost another year, without a resolution by the INS or the federal district court. During this time, pursuant to the appellate court instructions, a guardian ad litem, Mr. Theodore Klein, was appointed by the federal district court on August 6, 1980.¹⁰⁶

From August 6, 1980 to August 4, 1981, Cynthia continued to be the victim of further delays as the legal proceedings continued. On November 12, 1980, a "stay of deportation" proceedings was granted by the INS director, at the request of the guardian ad litem, until a determination of the child's custody could be made in Florida state court.¹⁰⁷ In response to the INS "stay," or more accurately the agreement by the INS directors to refrain from instituting further deportation proceedings, Mrs. Macias-Rosales filed a motion requesting the federal district court to order Cynthia's deportation, or in the alternative to order "the INS to release the child forthwith to the natural mother" contending that the INS was "without further authority to detain the child."¹⁰⁸ The Johnses opposed the mother's petition and asked the district court to order Cynthia released to them.¹⁰⁹ The Johnses' petition was denied while no ruling on Mrs. Macias-Rosales' petition was made.

While the Johnses and Mrs. Macias-Rosales were battling over Cynthia's custody in federal court, Cynthia's guardian ad litem

104. *Id.*

105. *Id.*

106. *Johns v. Department of Justice*, 653 F.2d 884, 886 (5th Cir. 1981).

107. *Id.* at 877.

108. *Id.*

109. *Id.* It is important to note that, initially, the Johnses' and Mrs. Macias-Rosales' habeas petitions were being heard by two different district court judges in the same federal district. These proceedings were consolidated in 1981 when the U.S. Fifth Circuit Court of Appeals recognized the potential for contradictory determinations and further delay. *Id.* at 896.

filed a custody proceeding in the Family Division of the Florida State trial court "to determine the legal custody of Cynthia [Johns]."¹¹⁰ Mrs. Macias-Rosales, opposing Mr. Klein's petition,

110. *In re: Custody of Cynthia Johns*, No. 80-18409 FC (Fla. Cir. Ct. filed Feb. 5, 1981).

Cynthia's guardian ad litem, Mr. Klein, requested and obtained the trial court's authorization to conduct psychological evaluations of all the parties and to have home studies of the battling parents. The psychological evaluation of Mrs. Macias-Rosales indicated that she was a "fit" parent. The home study of Mrs. Macias-Rosales also indicated that she was not in fact married to Cynthia's father, who was already married and, presumably, unable to obtain a divorce. It was also discovered that, in addition to two young children whom she acknowledged, Mrs. Macias-Rosales had two older children residing with her mother. See *Tropic Magazine*, *supra* note 89, at 29-30, 58.

While the information regarding Mrs. Macias-Rosales may have raised some questions regarding her veracity and the legal status of her relationship with Cynthia's father, the questions raised by the investigation regarding the Johnses' suitability as parents were much more serious. Eileen Johns' sister testified on deposition that her sister was mentally retarded and quite gullible. Eileen Johns' sister also testified, and Mark Johns himself admitted, that although he was not a physician, he passed himself off as one and even had stationery printed, "Mark D. Johns, M.D." *Id.* at 18-19.

On deposition, Mr. Johns also claimed to have a bachelor's degree from Columbia University, but the registrar at Columbia University wrote that no such degree was ever issued to a Mark David Johns. From testimony of Mr. Johns and others, and from physical evidence, it is clear that Mark David Johns often lied without compunction, showing contempt for those who trusted and believed in him as well as for the legal system. See *Tropic Magazine*, *supra* note 89. This picture of Mr. Johns appeared early in the investigation of this case. The following statement was made by Mary Lou Lustig, INS investigator, on September 1, 1976:

Subject Mark Johns has continued to heap lie upon lie during the entire course of this investigation.

It is unfortunate that the prosecution of Mark Johns was declined. This Service [the INS] must not allow individuals such as the conniving subject Mark Johns to knowingly and flagrantly break the federal laws of this country.

See *Tropic Magazine*, *supra* note 89, at 28 (quoting from the deposition of Mary Lou Lustig, Sept. 1, 1976).

When the Johnses petitioned to adopt Cynthia in May, 1979, Donna Silverman of the Department of Health and Rehabilitative Services conducted an extensive home study of the Johnses. She concluded that the couple was unsuitable as adoptive parents. *Id.* at 30.

Silverman's report included an investigation of the allegation by Eileen Johns' sister that Mr. Johns was a homosexual whose sexual activities were conducted in the home. The investigation proved inconclusive. However, in a private interview with Eileen Johns, "she admitted that her husband did have several nude pictures of a male friend who stays in their home." *Id.*

The HRS report also noted the Johnses' financial instability. At the time of the study, Johns was employed as a chemical analyst earning \$300.00 per week. Johns claimed also to own and operate a nutrition consulting business, listing his qualifications as a "degree" in healthology from Ventura, California. In addition, Johns is being sued by a number of chiropractors in California who claim he sold or leased them medical and laboratory equipment not available for use to chiropractors under state law. Johns told them he was a physician and that he had arranged for them to legally use the equipment. *Id.* at 20, 28.

HRS interviews with neighbors also yielded mixed results regarding the Johnses' treatment of Cynthia. Some neighbors reported that the Johnses appeared to be doting parents, especially Mr. Johns. Other neighbors reported that Cynthia was neglected, especially by

disputed the court's jurisdiction.¹¹¹ From the Family Court's decision that it had jurisdiction, she appealed to the Florida Third District Court of Appeal.¹¹²

Back in the federal legal arena, the district court declared that the INS "stay" of deportation was not an abuse of discretion. The district judge added:

A determination as to the legal custodian of Cynthia is a factor of the utmost importance as to whether or not she will be deported. For that reason, the guardian ad litem's report supports the Director's stay to allow further proceedings to determine what is in the best interests of Cynthia.¹¹³

Having apparently ignored the Fifth Circuit's retention of jurisdiction, the Johnses and Mrs. Macias-Rosales then filed a new appeal from the district court's order upholding the INS Director's refusal to vacate the stay of deportation and/or to grant temporary custody to either party. This appeal was handled routinely causing additional delay.

Mrs. Johns, that she was often locked out of the house for hours during the day, and that she "urinated in the back yard" if her pleas to get inside were ignored. *Id.* at 30.

The Catholic Services Bureau (CSB) foster parents reported that the child appeared to have been pampered, that when she came to them, at age 5, she could not brush her own hair or buckle her shoes. They also reported that unlike other foster children, she did not cry for her parents and easily attached herself to them. *Id.*

Like others involved in the case, the foster parents found "Cindy" loveable. *Id.* Unlike the psychiatrists, the foster parents did not observe any significant depression or confusion. HRS had serious concerns about the Johnses' parenting abilities. The report concluded that:

[I]f we were conducting an adoptive study on them now, we would not select them as a couple who could properly nurture and guide a child. We would have to question the very nature of their marriage as it appears not to be a marriage that is typical or normal. We see their marriage as one in which the husband is so strong that there is little room for the wife. Consequently, she has been unable to grow or develop and instead is treated as a child. Thus, it would seem unlikely that they would be able to be adequate role models needed for the development of any child. We would be concerned about their ability to handle their own lives in a rational way. We would even question their emotional stability and even something more simple, their financial stability.

Id.

It is ironic that the argument concerning the passage of time and Cynthia's adjustment to the Johnses, initially put forth to justify the Johnses retaining custody of Cynthia, was used five years later by CSB in its recommendation that Cynthia not be returned to them.

111. *Johns v. Department of Justice*, 653 F.2d at 887.

112. Mrs. Macias-Rosales' counsel moved to dismiss the state appeal following Mrs. Macias-Rosales' "abduction" of her daughter on September 20, 1981. See *In re: Custody of Cynthia Johns*, No. 81-949 (Fla. Dist. Ct. App. June, 1981), *dismissed* Oct. 19, 1981 (motions and order granting dismissal of appeal).

113. *Johns v. Department of Justice*, 653 F.2d at 887-88.

(f) *Johns II*. In this second appellate review, the Fifth Circuit affirmed the jurisdiction of the federal district court to review the "stay" of deportation by the INS Director, acting under the delegated authority of the U.S. Attorney General.¹¹⁴ The appeals court next attempted to clarify its previous direction with respect to the duties of Cynthia's guardian ad litem. The court emphasized that Mr. Klein's duties were restricted to that of "assuring Cynthia due process [in the deportation proceedings] and to safeguard her best interests."¹¹⁵ The appellate court went on to state that:

It was not our direction that the District Director's decision await another indefinitely prolonged period of legal thrust and counter-thrust, but only that Cynthia's due process rights be protected and her status [with respect to deportation] be adjudicated without delay.¹¹⁶

The appellate court emphasized that, "[d]elay is an act of injustice to Cynthia, not of mercy,"¹¹⁷ (emphasis added).

The appellate court, while stating that it would not "intimate in the slightest, an opinion of what the [custody] decision should be," quoted from the Catholic Services Bureau (CSB) report, submitted as an amicus brief in the Florida state court proceedings, as follows:

[I]n light of the length of the separation between the child and the "adoptive" parents [fourteen months] and, importantly, in view of the material subsequently presented regarding the suitability of the "adoptive" parents, and from CSB's observation and evaluation of the child during these past months, CSB does not feel placement with the "adoptive parents" is at all in the child's best interests It is time that those who lament our system's inability to make Solomonian decisions, stop trying to make one.¹¹⁸

During August and part of September 1981, while the Johnses and Mrs. Macias-Rosales' counsel continued to wage their legal battles in state and federal courts, Mrs. Macias-Rosales arranged

114. *Id.* at 894-95.

115. *Id.* at 895 n.26. Federal immigration authorities lack authority to determine custody of a child. See *Huynn Thi Anh v. Levi*, 427 F. Supp. 1281, 1286 (E.D. Mich. 1977), *aff'd*, 586 F.2d 625 (6th Cir. 1978).

116. *Johns v. Department of Justice*, 653 F.2d at 894.

117. *Id.* at 895.

118. *Id.* at 895 n.31 (citing amicus brief of Catholic Services Bureau, *In re: Custody of Cynthia Johns*, No. 80-18409 FC (Fla. Cir. Ct. filed Feb. 5, 1981)).

with the CSB to visit with the child away from the foster home. On September 20, 1981, Mrs. Macias-Rosales absconded with Cynthia, presumably to Mexico.¹¹⁹ Aside from a motion for contempt filed against Mrs. Macias-Rosales,¹²⁰ all other legal proceedings were dismissed.¹²¹

B. Analysis of the Johns Case

Cynthia Johns was "returned" to her biological mother, not by operation of law, but by the rule of "seize and run" which the UCCJA was implemented to correct.¹²² It is disturbing that the Johnses never had legal standing to represent Cynthia's rights or best interests even though they had been able to assert those parental rights on her behalf until the U.S. Court of Appeals decided the standing issue.

Mrs. Macias-Rosales located the Johnses when Cynthia was less than three months old and initiated legal proceedings for her daughter's return long before the Johnses could have established themselves as Cynthia's "psychological parents."¹²³ It was the protracted legal proceedings which afforded the Johnses the opportu-

119. See Ft. Lauderdale, Florida Police Report, Abduction Offense, O.R. No. 81-124002 (Sept. 20, 1981), *Johns v. Department of Justice*, No. 80-480-Civ-JWK, slip op. (S.D. Fla. 1980).

120. *In re: Custody of Cynthia Johns*, No. 81-949 (Fla. Dist. Ct. App. Oct. 19, 1981)(Motion and Order Dismissing Appeal).

121. *Id.*

122. Uniform Child Custody Jurisdiction Act, prefatory note (1968), 9 U.L.A. 111, 113 (1979).

123. See J. GOLDSTEIN, A. FREUD & A.J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)[hereinafter *BEYOND THE BEST INTERESTS OF THE CHILD*].

The determinations by professionals, with respect to the Johnses as Cynthia's "psychological parents" did not go far enough. If it is true that psychological parenthood is acquired from "day-to-day interaction, companionship, and shared experiences," then in all probability the Johnses were her "psychological parents." *Tropic Magazine*, *supra* note 89, at 19.

The HRS report challenging the Johnses' fitness gives rise to serious questions about the value of perpetuating that tie.

Where the tie is to adults who are "unfit" as parents, unbroken closeness to them, and especially identification with them, may cease to be a benefit and may become a threat.

BEYOND THE BEST INTERESTS OF THE CHILD, *supra*, at 19-20 (emphasis added).

Thus, in making determinations about separating children from their "psychological" parents, the parents' fitness should also be an essential factor to be considered.

Taking the parents' fitness into account and deciding that separation, rather than perpetuation of the tie, is in the child's best interests, is in no way intended to minimize the painfulness of that separation. "[S]o far as the child's emotions are concerned, interference with the tie, whether to a 'fit' or 'unfit' psychological parent, is extremely painful." *Id.* at 20.

nity to become her psychological parents, to benefit from their wrong-doing, and to be able to assert their own interests in the child in a court of law.

There has been only one other case of international child abduction in which the non-relative abductors have been able to assert custody rights in the children they abducted. The case of *In re B.G.*,¹²⁴ involved two children who were born in Czechoslovakia in 1963 and 1964. In August 1968, shortly after the Russian occupation of Czechoslovakia, the father fled with them to West Germany where he waited for his wife to join him. After waiting six months in Munich due to his wife's refusal to accompany him, the father took his two children, then five and six years old, to live with his parents in California.¹²⁵ Less than a year after their departure from Munich, in July 1969, the father died, leaving a "will" in which he stated that the children should remain in the United States.¹²⁶ The children were placed with foster parents who had, prior to the father's death, provided day care for them.¹²⁷ In this case, unlike the *Johns* case, the children were declared dependent and custody was awarded to the foster parents by the California Juvenile Court.¹²⁸

Like Mrs. Macias-Rosales in the *Johns* case, the mother in *In re B.G.*, having learned in May, 1969 of the father's illness, made repeated attempts to have the children returned to her.¹²⁹ On November 4, 1971, a California juvenile court ordered the children returned to the mother and arrangements were made for their flight to Czechoslovakia. Like the *Johnses* who fled to Florida to avoid Cynthia's deportation, the foster parents in this case, rather than bringing the children to the airport as had been pre-arranged, went into hiding with them.¹³⁰ Like Mrs. Macias-Rosales, the mother then went to California to retrieve her children. The juvenile court found that the mother was a fit parent;¹³¹ nonetheless, the court concluded, as in the *Johns* case, that "the children had adapted to living in America . . . had largely forgotten the Czech

124. *In re B.G. v. San Bernardino County Welfare Department*, 11 Cal. 3d 679, 114 Cal. Rptr. 444, 523 P.2d 244 (1974).

125. *Id.* at 683-84, 114 Cal. Rptr. at 446-47, 523 P.2d at 246-47.

126. *Id.* at 648 n.3, 114 Cal. Rptr. at 447 n.3, 523 P.2d at 247 n.3.

127. *Id.* at 685, 114 Cal. Rptr. at 447, 523 P.2d at 247.

128. *Id.* 114 Cal. Rptr. at 448, 523 P.2d at 247.

129. *Id.*, 114 Cal. Rptr. at 448, 523 P.2d at 247.

130. *Id.* at 685-86, 114 Cal. Rptr. at 448, 523 P.2d at 248.

131. *Id.* at 686, 114 Cal. Rptr. at 448, 523 P.2d at 248.

language . . . and that the welfare and best interests of the children require that they be continued as dependent children of the Court and [until a custody determination is made], be detained at the grandparents' home."¹³² The reasoning of the court is disturbingly similar to that found in the *Johnses* 1980 Fifth Circuit Appellate case where the court found that "while Mrs. Macias-Rosales' personal interest aroused sympathy . . . Cynthia has been raised in a different culture, speaks a different language, and has resided for all but the first twenty-four hours of her life with another family . . . Under these circumstances, Mrs. Macias-Rosales does not necessarily represent Cynthia's interests."¹³³ Unlike in the *Johns* case, the biological mother's parental rights were not in question in *In re B.G.* Rather, the issue in that case was whether the foster parents, as de facto parents, like the *Johnses*, had standing to assert their own interests in the "care, custody and management of the child[ren],"¹³⁴ having in the course of time become her "psychological parents." The court there, as in *Johns*, had to decide whether returning the children to the biological parent would be detrimental, that is, not in the children's "best interests."

In *In re B.G.*, as in *Johns*, by the time the California Supreme Court remanded the case for renewed trial proceedings, the children had been away from their mother and their native country for as long as six years.¹³⁵ Unlike *Johns*, where the mother employed self-help, custody in *In re B.G.* was ultimately awarded by the trial court to the foster parents,¹³⁶ "despite the doctrine of parental preference."¹³⁷

From an examination of the *Johns* and *In re B.G.* cases, it is unquestionable that existing federal and state legislation (i.e. the PKPA and the UCCJA), is ineffective as a deterrent to international child abduction. In fact, the court's application of traditional recognition and enforcement standards of the law in the

132. *Id.* at 686-87, 114 Cal. Rptr. at 449, 523 P.2d at 249.

133. *Johns v. Department of Justice*, 624 F.2d 522, 524 (5th Cir. 1980).

134. 11 Cal. 3d at 692, 114 Cal. Rptr. at 453, 523 P.2d at 254.

135. Bodenheimer, *supra* note 28, at 96 citing *In re B.G.*, Superior Court of San Bernardino County, California, Nos. J-49661 and J-49662 (Sept. 4, 1974).

136. *Id.*

137. *In re B.G.*, 11 Cal. 3d at 698, 114 Cal. Rptr. at 457, 523 P.2d at 257. The court recognized that California law [the Family Law Act] expressly "recognizes that custody should be awarded to parents in preference to non-parents. As between parents it permits the court to award custody according to the 'best interests of the child,' but in a dispute between parents and non-parents, the [Act] imposes the additional stipulation that an award of custody to a parent would be detrimental to the child." *Id.*

aforementioned cases appears to encourage the very self-help measures it was enacted to prevent.

IV. THE HAGUE CONVENTION

Unlike the UCCJA, the Hague Convention¹³⁸ does not formulate recognition and enforcement standards; rather, it requires restoring the custody that existed before the abduction.¹³⁹ The Hague Convention addresses both pre-decree and post-decree abductions and emphasizes administrative cooperation and the accommodation of non-European countries.¹⁴⁰

In his Letter of Transmittal of October 3, 1985, President Reagan succinctly summarized the approach and the effect of the Convention and urged its ratification by the Senate:

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can

138. Hague Convention, 19 I.L.M. 1501 (1980).

At the Fourteenth Session of the Hague Conference, held in October 1980, representatives of the 28 states present unanimously adopted a Convention on the Civil Aspects of Child Abduction. The Convention was signed on behalf of Canada, France, Greece and Switzerland. The Convention has been ratified by France, Portugal, Canada and Switzerland. In addition, Luxembourg, Hungary, and the United Kingdom recently ratified the Convention. Nat'l L.J., Nov. 24, 1986, at 29 col. 2.

The Convention was signed, but not ratified, by the United States on December 31, 1981. See *Responses to International Child Abductions*, *supra* note 7, at 440-41. On October 30, 1985, President Reagan sent a letter of transmittal to the Senate urging ratification of the Convention. 51 Fed. Reg. 10,495 app. A (Mar. 26, 1986).

The Senate gave its advice and consent on October 9, 1986. President Reagan signed the instrument of ratification (Executive order) on November 10, 1986; the instrument has not been deposited internationally. Telephone Interview with George Taft, Esq., Office of the legal Adviser for Private International Law, U.S. Dep't of State (Dec. 18, 1986)[hereinafter Taft Interview].

139. *Responses to International Child Abduction*, *supra* note 7, at 440. See Hague Convention arts. 3, 12.

140. *Id.*

be heard and settled. The Convention calls for the establishment of a Central Authority in every Contracting State to assist applicants in securing the return of their children or in exercising their custody or visitation rights, and to cooperate and coordinate with their counterparts in other countries toward these ends. Moreover, the Convention establishes a judicial remedy in wrongful removal or retention cases which permits an aggrieved parent to seek a court order for the prompt return of the child when voluntary agreement cannot be achieved. An aggrieved parent may pursue both of these courses of action or seek a judicial remedy directly without involving the Central Authority of the country where the child is located.¹⁴¹

On October 9, 1986, one year after President Reagan sent his letter of transmittal, the U.S. Senate gave its advice and consent to the Convention.¹⁴² President Reagan signed the instrument of ratification on November 10, 1986.¹⁴³ While the United States has ratified the Convention, it has not deposited its instrument of ratification internationally.¹⁴⁴

In essence, the Hague Convention is structured to secure the prompt return of a child under age sixteen¹⁴⁵ who is wrongfully removed or retained¹⁴⁶ either before or after an award of custody by a court has been made. Thus, to order the immediate return of the child, the court, under the Convention, need only find that (1) the child was wrongfully removed from his/her habitual residence,¹⁴⁷ and (2) proceedings were instituted within the Convention's one-year statute of limitations.¹⁴⁸ If a year or more has passed, the court "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."¹⁴⁹

In addition to the "settled in its new environment" exception after the one-year statute of limitations, the Convention recognizes three other limited exceptions to the duty of the judicial authority

141. 51 Fed. Reg. 10,495, app. A (Mar. 26, 1986).

142. Taft Interview, *supra* note 138.

143. *Id.*

144. *Id.* "It is expected that the United States will deposit its instrument of ratification internationally when the implementing legislation is passed, probably early in the 100th Congress, hopefully by mid-year, 1987." *Id.*

145. See Hague Convention art. 4.

146. See Hague Convention art. 3.

147. *Id.*

148. See Hague Convention art. 12.

149. *Id.*

to order the immediate return of the child. Article 13 of the Convention provides that the judicial authority is not duty-bound to return the child if the person opposing return establishes that (1) the person or institution . . . having custody of the child was not exercising it at the time of the abduction or had consented to or subsequently acquiesced in the removal or retention;¹⁵⁰ or (2) there is grave risk that the child would be exposed to physical or psychological harm if returned, or the child would be placed in an intolerable situation.¹⁵¹ The judicial authority may also refuse to return the child if the court finds the child is of sufficient age and maturity and the child objects to the return.¹⁵² Under Article 13, the burden of proof is on the abductor to prove either of the first two exceptions.

The third exception to immediate return is stated in Article 20 of the Convention, which provides that the "return of the child . . . may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."¹⁵³ Article 20 does not specify upon whom the burden of proof falls.

Cooperation among governmental authorities is insured through the establishment of central authorities in each contracting state.¹⁵⁴ Three federal governmental agencies were initially considered as candidates for central authority in the United States: (1) the Justice Department, (2) the Department of Health and Human Services, and (3) the Department of State.¹⁵⁵ According to government authorities, the Consular Affairs Bureau of the State Department will probably be the central authority in the United States as soon as Congress passes the implementing legislation.¹⁵⁶

150. Hague Convention art. 13(a).

151. Hague Convention art. 13(b).

152. *Id.*

153. Hague Convention art. 20.

154. Hague Convention arts. 6, 7.

155. Pfund Interview, *supra* note 7. Mr. Pfund supports the preference for the State Department as the Central Authority under the Hague Convention on the basis that (1) cooperative relationships between State and foreign countries already exists; (2) access to F.B.I. assistance, Parent Locator Services is available to State; and (3) State has been involved in the drafting and analysis of the Convention provisions and in the proposed "implementing" legislation to be submitted to Congress once the Convention is ratified.

156. Taft Interview, *supra* note 138. According to Taft:

It is anticipated that the Central Authority will be housed in the Consular Affairs Bureau. However, as of now [December 1986], the Senate Foreign Relations Committee is meeting to determine what agency will be the Central Authority. The choices the Committee is considering are: (1) State Department, (2) Office

By the terms of the Convention, the central authority is obligated to attempt to effect the voluntary return of the child,¹⁵⁷ and if that is unsuccessful, it must expeditiously begin legal proceedings.¹⁵⁸ The judicial authority in the requested state must reach a decision within six weeks from the date of the commencement of the proceedings or if requested, provide a statement of the reasons for the delay.¹⁵⁹ Since no dispute is required—or allowed—a judicial determination restoring the child to the status quo prior to the abduction can be made without lengthy adjudication.

One of the principal weaknesses of the Hague Convention is that a limited number of states have ratified it. If more international support is not achieved, non-participating nations might well become notorious as havens for children snatchers.¹⁶⁰ Another weakness is the judicial discretion still permitted under the aforementioned exceptions to immediate return. If these exceptions are too broadly construed by the courts, the purpose of the Convention—the prompt return of the child—will be significantly diluted.

V. APPLYING THE HAGUE CONVENTION TO THE JOHNS CASE

The Convention was primarily designed to deter international *parental* child abductions. Still, it is not inappropriate to apply the convention provisions to the *Johns* case, since it was regarded by U.S. courts as a parental child abduction. Assuming, arguendo, that both Mexico and the United States are contracting states to the Hague Convention, Mrs. Macias-Rosales would have applied to the Mexican central authority with her claim that her child had been abducted. As Mrs. Macias-Rosales had, in fact, gone to the Mexican authorities within at least two months after the abduction, she does not fall into the one-year statute of limitation exception to the prompt return mandate. Since the Mexican authorities had already declared the taking wrongful, the U.S. Central Authority, upon locating the child, would have attempted her voluntary return by the Johnses. If that had failed, a period of six weeks [not

of Management and Budget, (3) Department of Health and Human Services.

Id.

157. Hague Convention art. 10.

158. Hague Convention art. 11.

159. *Id.* Other articles provide for (1) the enjoyment of access rights (art. 21); and (2) the apportionment of costs (arts. 26, 42).

160. Pfund Interview, *supra* note 7. See Nat'l L.J., Nov. 24, 1986 at 29, col. 2; *supra* note 138.

six years] of judicial proceedings would have followed in which the Johnses would have had to be able to prove one of the very limited exceptions to prompt return. The Johnses would have had to show proof that the natural mother had consented to the adoption or that she did not have custody of the child at the time of the abduction or proof of great risk to the child if she were returned. Failing to prove one of these exceptions, and in the absence of evidence that the United States would bar the child's return to Mexico on the basis of its view of human rights and fundamental freedoms, Cynthia Johns would have been returned before she reached five months of age instead of five years.¹⁶¹

VI. CONCLUSION

The *Johns* case underscores the need for the United States to pass the implementing legislation for the Hague Convention in order to serve the "best interests of the child" in cases where children are wrongfully removed from their habitual residence or domicile.¹⁶² Implementation of the Hague Convention would significantly limit the broad judicial discretion which presently exists. This discretion is responsible in large measure for the protracted legal proceedings which preclude making any satisfactory custody determination based on the best interests of the child. The Convention calls for the prompt return of the child to the status prior to abduction, thus preventing abductors from benefiting from their wrong-doing and thereby providing a potent deterrent to international child abduction. Based on the near automatic application of comity principles, the Convention will eliminate the lengthy adjudications necessary to determine whether a foreign order is to be recognized, and once recognized, if it will be enforced. Custody determinations on the merits are precluded by the Convention's

161. Had the Johnses been the first to file a complaint with the Central Authority in the United States after Mrs. Macias-Rosales' abduction of Cynthia in September 1981, and had Mrs. Macias-Rosales never complained to the Mexican authorities about Cynthia's abduction from Mexico, under the Hague provisions, U.S. authorities would have contacted the Mexican authorities. Assuming that both Mexico and the United States were members of the Hague Convention, the Mexican authorities, at the request of the U.S. Central Authority would attempt to locate the child and seek her voluntary return. If Mrs. Macias-Rosales refused to return the child then judicial proceedings would be initiated in the United States and Mrs. Macias-Rosales would have the burden of proving one of the limited exceptions to the return of the child to the Johnses.

162. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 104 n.25 (1980).

provisions except if there is grave danger or threat to the child's freedom or well-being if returned. Thus, the child's prompt return is virtually assured absent a grave threat to the child's safety and welfare. It is evident that implementation of the Hague Convention by the United States and ratification by a significant number of other nations will be a more effective deterrent to international child abduction than the existing federal and state legislation.

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