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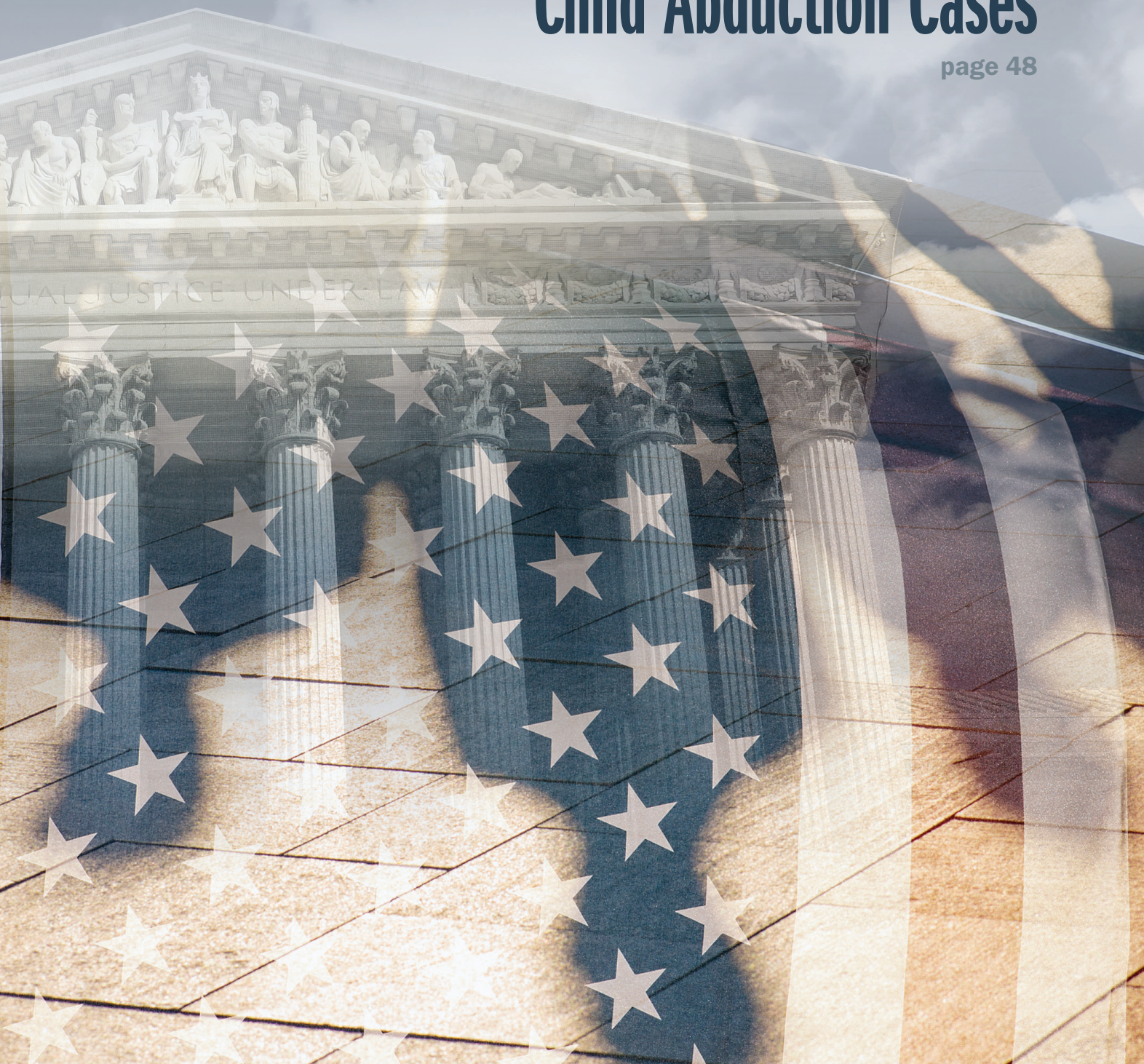


The Need for Speed in International Child Abduction Cases

ROBERT E. RAINS

On Feb. 25, 2020, the Supreme Court decided *Monasky v. Taglieri,*[1] addressing the difficult and recurring issue of how to determine the state (country) of "habitual residence" of a child, as well as the standard of review for circuit courts on the issue of habitual residence. Under Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction, a signatory country such as the United States has a duty to effect the "prompt return" to another signatory country of a child who has been wrongfully removed from her country of habitual residence or wrongfully retained in another signatory country.[2] The United States implements its treaty obligation through the International Child Abduction Remedies Act (ICARA).[3]

Consistent with decisions from other signatory countries, the Court unanimously ruled that the determination of "habitual residence" depends on the totality of circumstances specific to the case and does not require an actual agreement between the parties. The Court also unanimously ruled that the habitual-residence determination is a task for the factfinding (district) court and "should be judged by a clear-error review standard deferential to the factfinding court."

Finally—and contrary to the suggestion of the United States as *amicus curiae*—the Court ruled that there should be no remand and that the judgment of the circuit court should simply be affirmed, given "the protraction of the proceeding thus far." That issue—the protraction of proceedings in U.S. courts in international child abduction cases—is the focus of this article and cries out for corrective action.

The facts in *Monasky*—although some are in dispute—are undeniably tragic. Michelle Monasky, an American, met Italian Domenico Taglieri, both highly educated, in Illinois, and they married there in 2011. In 2013, they moved to Italy to pursue their careers, although Monasky did not speak Italian. The marriage was troubled almost from the start, with allegations by Monasky that Taglieri physically abused her and forced her to have sex. (He has consistently denied all such allegations beyond having "smacked her.") Monasky became pregnant in May 2014, allegedly after an instance of forced sex. Monasky gave birth to a daughter, identified in court as A.M.T., by emergency cesarean section on Feb. 13, 2015. After yet another violent argument, Monasky took A.M.T. to the police, who placed them both in a social-services safe house for domestic-violence victims. Two weeks later, on April 15, 2015, the day she received A.M.T.'s U.S. passport, and without informing Taglieri, Monasky flew with A.M.T. to the United States. A.M.T. was a mere eight weeks old.

Taglieri promptly took legal action in both Italy and the United States. On April 29, 2015, he sought a judicial determination of his parental rights in an Italian court. Monasky apparently had no actual notice of this action and did not participate in the Italian proceedings. The Italian court ruled in Taglieri's favor, and, by order dated June 16, 2015, terminated Monasky's parental rights *ex parte* and granted Taglieri sole custodial rights. On May 14, 2015, Taglieri filed for the return of A.M.T. in the U.S. District Court for the Northern District of Ohio. That case was ultimately decided by the Supreme

Court in February 2020. At this writing, A.M.T.'s legal status remains unresolved. The baby who was eight weeks old when her mother removed her to the United States is now five years old. No matter which parent ultimately prevails, both have remained in legal limbo for years regarding a matter that is surely of the utmost concern to virtually every separated parent: who will care for their child and with what rights granted to the other parent?

In addition to the parental rights termination and sole custody action in Italy and the international child abduction action in Ohio, Taglieri also sued Monasky in federal court in Ohio claiming that she had converted marital funds to her exclusive use. She counterclaimed for assault and battery. The court dismissed his conversion claims, and a jury awarded her $100,000 in damages for assault and battery. The Sixth Circuit has upheld that judgment.[4] According to Monasky's Ohio attorney, Christopher Reynolds, Taglieri has not paid that judgment.[5]

Of course, only a miniscule portion of ICARA cases are litigated all the way to the Supreme Court. But consider the timeline in *Monasky*. Monasky removed A.M.T. from Italy to the United States on April 15, 2015. Taglieri filed for her return in federal court on May 14, 2015. The district court entered an order in Taglieri's favor on Sept. 14, 2016, a full 16 months later. Surely, by then, a pre-verbal infant born in Italy had become a toddler beginning to understand and speak English and not Italian. The district court's order required Monasky to return A.M.T. to Italy within another forty-five days. Monasky appealed and sought a stay, which was denied by the Sixth Circuit and, on Dec. 6, 2016, by Justice Kagan. Finally, in December 2016, A.M.T. was returned to Italy where, per the Italian court's prior order, she was placed with Taglieri "as sole custodian with full legal rights." The Sixth Circuit Court of Appeals affirmed the district court *en banc* on October 17, 2018, more than two years after the district court's decision. Over a year later, the Supreme Court heard argument and, after another two and a half months, issued its ruling.

Several provisions in the Child Abduction Convention ("Convention") are intended to reinforce the Article 1 mandate of prompt action. Article 2 requires that "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use *the most expeditious procedures available*."[6] Article 7 mandates that, "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities of their respective States *to secure the prompt return of children*...."[7] [NB: The Department of State is our Central Authority.[8]] Article 11 provides that "The judicial or administrative authorities of Contracting States *shall act expeditiously* in proceedings for the return of children."[9] Moreover, under Article 11, "If the judicial or administrative authority concerned has not reached a decision within *six weeks* from the date of commencement of the proceedings," the applicant can request a statement of the reasons for the delay.[10]

ICARA, our implementing statute, reiterates the Convention's mandate for prompt return of abducted children, subject to "narrow exceptions."[11] ICARA grants state courts and federal district courts concurrent original jurisdiction to hear Convention applications.[12] Unfortunately, neither the statute nor the federal rules of civil procedure specify exactly what is meant by "prompt" or how that mandate is to be effectuated.

Implementation of the mandate for prompt return has been an ongoing problem, not just in the United States, but in most other contracting countries. There have been a series of statistical surveys of contracting countries conducted by Nigel Lowe and Victoria Stephens in consultation with the Permanent Bureau of the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children. The findings of the most recent survey are reported in the 2018 *Family Law Quarterly*.[13] As the survey's authors note, "Timing is vital to the successful operation of the Convention."[14] Six weeks is the accepted yardstick of promptness, but it is at best aspirational. In 2015, the average number of days to arrive at a final settlement was 164 days from the date the application was received (i.e., almost four times longer than the aspirational period).[15] Still, this was an improvement over the 188-day average reported in the 2008 survey.[16] As noted, in the *Monasky* case, 16 months elapsed between the father's federal court filing and issuance of that court's return order. It took another three months before A.M.T. was actually returned to Italy.

Under the Convention, an aggrieved parent may file an application for return (or, in a minority of cases, access) in a court of competent jurisdiction or with the Central Authority of either country. When cases were filed with a Central Authority, there was even more delay. In 2015, "Central Authorities took an average of 93 days to send applications to court, and the courts took a further 125 days on average to reach a final order."[17] In the United States, the average time for the State Department to send Convention cases to court was 142 days.[18] Only then was litigation even commenced.

In the words of the survey authors, "We hold to the view that it is basically wrong for children to be uprooted from *their* home by the unilateral act of either parent and taken to a foreign jurisdiction and thus separated from the other parent and their friends and familiar surroundings. Furthermore, research has shown that even abduction by primary caring mothers has significant detrimental effects."[19]

Unfortunately, several provisions in the Convention actually encourage delay on the part of the abducting parent. Article 4 provides, "The Convention shall cease to apply when the child attains the age of 16 years."[20] This can enable an abducting parent to "run out the clock" in the case of a teenage child. One prominent example of this phenomenon occurred in the case of *Abbott v. Abbott*, decided by the Supreme Court in 2010.[21] In *Abbott*, the mother had removed the child from Chile, his state of habitual residence, in August 2005. The father filed his Child Abduction Convention application in federal district court in Texas in May 2006. That court denied his claim on the basis that his Chilean right of *ne exeat* did not constitute a right of custody. That decision was affirmed by the court of appeals. But in May 2010, four years after the father's initial filing, the Supreme Court reversed, ruling that the father's *ne exeat* right was a right of custody under the Convention. For the father, this constituted a pyrrhic victory. In June 2011, while the case was on remand to the district court, the child turned 16, leading the district court to dismiss the action.[22]

Article 12 encourages concealment of the abducting parent and child to prevent prompt filing of a Convention application in a court of competent jurisdiction. Under that article, "The judicial or administrative authority, ... where the proceedings have been commenced after the expiration of the period of one year ... shall ... order the return of the child, unless it is shown that the child is now settled in its new environment."[23] In *Lozano v. Alvarez*, in 2014, the Supreme Court unanimously ruled that this one-year period is not equitably tolled by the abducting parent's concealment of the child's location.[24]

[Query: After *Lozano*, does an attorney have an ethical obligation to inform an abducting parent of the legal advantages of hiding the child from the other parent?]

Article 13 provides that return of an abducted child is not mandated where "the child objects and has attained an age and degree of maturity at which it is appropriate to take account of his views."[25] The longer the delay, the more likely it is that the child will be acclimated in "its" new environment and will have reached an age and level of maturity at which a court will deem it proper to take account of "its" views.

Delay harms both parents and the child. In *Monasky*, the father (who certainly does not appear to be a sympathetic figure) was deprived of access to his newborn baby for 19 months. A.M.T. was deprived of her father's parental consortium for that same period of time. According to Attorney Reynolds, Monasky moved back to Italy when she returned A.M.T. in December 2016. She has been trying to undo the *ex parte* order terminating her parental rights, thus far without success. Unless and until she can reopen that order, her ability to see A.M.T. is constricted and may end. She has been able to obtain only limited, sporadic visits with A.M.T. in the intervening three years, sometimes under the watchful eye of Taglieri, who has been found by a U.S. court to have seriously abused her. Since Monasky knows very limited Italian and it appears that no one is teaching A.M.T. English, their ability to communicate, even when they see each other, is quite constricted.

It should be noted that Hague Convention cases do not determine custody; they only determine where the child should reside, which will normally be the jurisdiction where custody is to be decided. Thus, delay in adjudicating Child Abduction Convention cases typically leads to delay in finalizing a child's custody arrangements.

Of course, one might argue that it was Monasky who, first, created her unfortunate position and, then, prolonged it for years. If medically feasible, she might have departed Italy and a bad marriage while she was still pregnant, and the Convention would not have applied to her fetus. (Whether it might arguably apply after the birth of a child who was removed from her country of residence while in utero is far from clear.) No doubt, Monasky had her reasons for remaining in Italy to give birth. Nevertheless, it was she who removed A.M.T. from Italy without notice to the father, she who defended the return petition, she who sought stays of the return order from both the Sixth Circuit and the Supreme Court, she who appealed to a panel of the Sixth Circuit, she who sought and obtained *en banc* review from the circuit, and she who sought and obtained certiorari in the Supreme Court. This is not to criticize her or her counsel. She certainly had strong motivations, and the courts in Italy have thus far not been responsive to her attempts to reestablish her parental rights and have reasonable contact with her daughter. Moreover, the issue of determination of "habitual residence" has been vexing for courts both here and overseas, and the Supreme Court had never addressed that issue directly.

In addition to the emotional toll of delay on each party separately and on the child, there is the harm to what would normally be ongoing family relations. It certainly does not appear that Monasky and Taglieri are likely candidates for a reconciliation, but they will likely need to deal with each other at least until A.M.T. reaches the age of majority. Years of adversarial litigation are unlikely to help smooth ongoing interactions. Additionally, there is, of course, the financial cost incurred on both sides. The *Monasky-Taglieri* litigation has been ongoing on two continents for half a decade and shows no signs of ending in Italy anytime soon. The expenses incurred by both parties on both sides of the Atlantic must be staggering. To the extent that the financial resources of parents are expended on litigation in any child abduction case, they will not be available for the support and benefit of the child.

The *Monasky* decision is not the first time that the Supreme Court has noted "the protraction of proceedings" in a Child Abduction Convention case. Seven years earlier, in *Chafin v. Chafin*, the Court unanimously ruled that the court-ordered return of a child to its original country did not moot the abducting parent's appeal of that order.[26] The *Chafin* case began when the mother filed a return petition in federal district court in Alabama in May 2011. The Supreme Court issued its ruling in February 2013, and that ruling sent the case back for further proceedings. Writing for the Court, Chief Justice Roberts noted that Child Abduction Convention "Cases in American courts often take two years from filing to resolution."[27] He quite properly asserted, "Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation."[28] He optimistically added that many courts already do so, but the very study he relied on for that appraisal, *Federal Judicial Center, J. Garbolino, The 1980 Hague Convention of the Civil Aspects of International Child Abduction: A Guide for Judges,* hardly supported such a rosy view.[29] Among the cases cited by Judge Garbolino for promptness were one that took four years from filing to resolution, one that took four and a half years, and one (*Gaudin v. Remis*[30]) that took an astonishing nine years.[31]

Justice Ginsburg, joined by Justices Scalia and Breyer, filed a concurring opinion in *Chafin*.[32] Her concurrence focused on delay in these cases and the absence of rules to expedite them. She suggested, "For the federal courts, the Advisory Committee on Federal Rules of Civil and Appellate Procedures might consider whether uniform rules for expediting Convention Proceedings are in order."[33] She noted with apparent approval procedural limitations imposed in England and Wales on filing appeals in these cases. She concluded that, "For future cases, rulemakers and legislators might pay sustained attention to the means by which the United States can best serve the Convention's aims: 'to secure the prompt return of children wrongfully removed to or retained in' this Nation; and to 'ensure that rights of custody... under the law of one Contracting State are effectively respected in the other Contracting States.'"[34]

Sadly, Justice Ginsburg's suggestions have been not simply ignored but outright rejected. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sent Ginsburg a letter in response setting forth opposition to any such rules. "The Judicial Committee has a long-established policy of opposing statutes or court rules that mandate docket priority and timelines for categories of cases."[35]

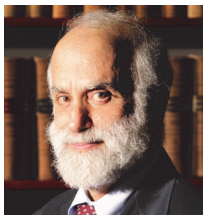
So, here we are, seven years after the *Chafin* decision in which all the justices agreed on the need to act expeditiously in Child Abduction Convention cases, with no concrete action and, not surprisingly, an ongoing pattern of delay. I have elsewhere suggested concrete statutory and regulatory changes that hold the promise of improving this situation,[36] and I will not repeat all the details here. But, first and foremost, at the statutory level, Congress needs to amend ICARA to specify that Convention cases shall be given priority by the federal

courts, as is recommended by the Hague Conference Guide to Good Practice.[37] Such an amendment would trigger Rule 40 of the Federal Rules of Civil Procedure: "The court must give priority to actions entitled to priority by a federal statute."

In turn, the Federal Rules of Civil Procedure should be amended to address Convention cases with specificity and require the sort of expeditious handling with which family lawyers in many jurisdictions will be familiar for custody matters. For example, in Pennsylvania, where I supervised students in a Family Law Clinic for three decades, state court rules mandate that parties to a custody proceeding have in-person contact with the court within 45 days of the commencement of proceedings, that no answer is required to be filed, that there is no discovery without special order of court, and that the judge's decision must ordinarily be entered within 15 days of the conclusion of trial.[38]

Similarly, the Federal Rules of Appellate Procedure should be amended to provide for "fast-track" appeals for Convention cases, patterned on fast-track rules in custody cases in various state courts.[39] Such rules would limit the time for filing appeals, shorten briefing schedules, and severely restrict extensions of time. Such limitations could also be fashioned at the Supreme Court level.

All of these suggestions are bound to be met with resistance. They will undoubtedly burden the litigants, their counsel, and the courts. But the current situation where Convention cases frequently drag on for two years or more is harmful to children who have already undergone a wrenching dislocation, as well as to their parents, and is quite simply unconscionable and indefensible. ⊙



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Endnotes

[1]*Monasky v. Taglieri*, 140 S. Ct. 719 (2020).
[2]Convention on the Civil Aspects of International Child Abduction, Art. 1, Sec.a. (Oct. 25, 1980), https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (hereinafter "Convention").
[3]22 U.S.C. §§ 9001-11.
[4]*Taglieri v. Monasky*, 767 F. App'x 597 (6th Cir. 2019).
[5]E-mail from Christopher Reynolds, Attorney at Law, Cleveland, OH (Sept. 21, 2020, 1:14 PM EDST) (on file with author).
[6]Convention, *supra*, note 2, Article 2.
[7]*Id*., Article 7.
[8]Exec. Order No. 12648, 53 Fed. Reg. 30637 (Aug. 11, 1988).
[9]Convention, *supra,* note 2, Article 11.
[10]*Id.*
[11]22 USC § 9001(a)(4).
[12]22 U.S.C. § 9003(a).
[13]Nigel V. Lowe & Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention: The 2015 Statistics*, 52 Fam. L.Q. 349 (2018).
[14]*Id*. at 373.
[15]*Id.* at 374.
[16]*Id.*
[17]*Id*. at 376.
[18]*Id*. at 377.
[19]*Id*. at 354.
[20]Convention, *supra*, note 2, Article 4.
[21]*Abbott v. Abbott,* 560 U.S. 1 (2010).
[22]*Abbott v. Abbott*, CAUSE No. A-06-CV-359-LY, Final Order of Dismissal (W.D.Tex., Feb. 10, 2012).
[23]Convention, *supra*, note 2, Article 12.
[24]*Lozano v. Alavarez*, 572 U.S. 1 (2014).
[25]Convention, *supra*, note 2, Article 13.
[26]*Chafin v. Chafin*, 568 U.S. 165 (2013).
[27]*Id.* at 179.
[28]*Id*.
[29]J. Garbolino, The 1980 Hague Convention of the Civil Aspects of International Child Abduction: A Guide for Judges 116 n. 435 Fed. Judicial Ctr. (2012).
[30]*Gaudin v. Remis*, 282 F.3d 1178 (9th Cir. 2002); 379 F.3d 631 (9th Cir. 2004); 415 F.3d 1028 (9th Cir. 2005); 334 F. App'x 133 (9th Cir. 2009).
[31]*See* Robert E. Rains, *Possession Is 9/10 of the Law: The Need for Strict Procedural Rules in Hague Abduction Convention Cases*, J. Comparative L., (UK), Vol. IX, No. 1, 253 (2014), *reprinted* in Robert E. Rains ed., The 1980 Hague Abduction Convention: Comparative Aspects (Wildy, Simmonds & Hill Publishing) (London 2014).
[32]Chafin, *supra*, n. 26, at 180. (Ginsburg, J. concurring).
[33]*Id*. at 183, n. 3.
[34]*Id*. at 185.
[35]https://www.uscourts.gov/sites/default/files/fr_import/2014-04-Appeals-Agenda-Book.pdf.
[36]Rains, *supra* note 31.
[37]Hague Conference Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II–Implementing Measures, 6. Summary: Legal Procedural Matters, ¶6.3, available for purchase at https://www.hcch.net/en/publications-and-studies/details4/?pid=2781.
[38]*See generally* PA. R. Civ. P. 1915.4.
[39]*See, e.g.*, PA. R. A. P. 2185(2), Children's fast track appeals.