

Spring 2014

## Reconsidering Dual Consent

Lisa V. Martin

*University of South Carolina School of Law, lvmartin@law.sc.edu*

Follow this and additional works at: [https://scholarcommons.sc.edu/law\\_facpub](https://scholarcommons.sc.edu/law_facpub)



Part of the [Family Law Commons](#)

---

### Recommended Citation

Lisa Vollendorf Martin, Reconsidering Dual Consent, 82 UMKC L. REV. 705 (2014).

This Article is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# RECONSIDERING DUAL CONSENT

Lisa Vollendorf Martin<sup>\*</sup>

*Before a child may travel internationally, many countries require proof that both of the child's parents consent. These "dual consent" requirements are aimed at preventing international child abduction, and many countries have adopted them as part of the coordinated effort to implement the 1980 Hague Convention on the Civil Aspects of International Child Abduction. In recent years, international air carriers have been urged to impose similar requirements for all children traveling on international flights. Although well-intentioned, dual consent requirements pose significant harms, especially to children of single parents and parents subjected to domestic violence. This article explores the unintended consequences of dual consent requirements and proposes alternative approaches that mitigate the harms of dual consent while also protecting against child abduction.*

## I. INTRODUCTION

Parents often are accustomed to acting on behalf of their children as they see fit. In many countries, a parent who has decision-making authority over a child has the power to act on the child's behalf without the input of the child's other parent for most purposes.<sup>1</sup> Parents can approve an operation, enroll a child in a religious school, or authorize a child to marry, all without the actual involvement of the child's other parent. A parent who disagrees with a co-parent's plan must seek court intervention to prevent the co-parent from acting.<sup>2</sup> This rule is often turned on its head in the context of international travel. Before a child will be permitted to obtain a passport, obtain a visa, or pass through border control points in many countries, both of the child's parents must affirmatively demonstrate their consent.<sup>3</sup> In these same countries, if one parent withholds consent or cannot be located, the parent intending to travel must secure consent from the courts.<sup>4</sup> These "dual consent requirements" often are

---

<sup>\*</sup> Co-Director, Families and the Law Clinic and Clinical Associate, Columbus School of Law, The Catholic University of America. I thank Dean Daniel Attridge for his support of this scholarship through the CUA Law summer research grant program. For their helpful comments and insights I am grateful to Professors Merle Weiner, Faith Mullen, Megan LaBelle, Leah Wortham, Catherine Klein, and Marcy Karin, my working group at the 2013 Clinical Law Review Writers' Workshop: Professors Martin Guggenheim, Josh Gupta-Kagan, Deeya Haldar, and Maritza Karmely, and participants in the 2013 International Society of Family Law Brooklyn Regional Conference. I am indebted to CUA law librarians Steve Young and Dawn Sobel for their invaluable support. Special thanks to Lauren Kelley, Joanna Wood, Madeline Taylor-Diaz, and Jennifer Pollack for excellent and tireless research assistance.

<sup>1</sup> See *infra* Part II.A. for a more detailed discussion.

<sup>2</sup> *Id.*

<sup>3</sup> See *infra* Appendix for a summary of dual consent travel requirements in thirty-six countries.

<sup>4</sup> See, e.g., Act on Passport Documents of July 13, 2006 (Pol.) (English translation on file with the author); Hague Conference on Private International Law, *Questionnaire on Preventative Measures*, (2003), [http://www.hcch.net/upload/wop/prevmeas\\_pl.pdf](http://www.hcch.net/upload/wop/prevmeas_pl.pdf) (Poland's response to Question B1).

considered a worthwhile intrusion on parental authority because they are viewed as establishing an effective bulwark against parental child abduction.<sup>5</sup>

The international community has united in recent decades around a shared disapprobation of international child abduction. The Hague Convention on the Civil Aspects of International Child Abduction<sup>6</sup> is one of the most widely ratified private international law treaties.<sup>7</sup> Countries have adopted numerous measures to implement the Convention and prevent child abduction, including dual consent requirements.<sup>8</sup> By many accounts, the Convention and related efforts to combat abduction are working well.<sup>9</sup>

One reason for the Convention's continued success lies in its somewhat nuanced view of abduction. Although the Convention presumes that the unilateral removal of a child by one parent is generally harmful to the child, it also recognizes several circumstances in which the taking of a child by one parent might better serve a child's interests than the continuation of the status quo.<sup>10</sup> Rather than mandate the immediate return of children in every case, the Convention outlines several circumstances in which a child may be permitted to remain with a taking parent; for example, where the left behind parent has failed to actually exercise rights of custody over the child or where return would pose a grave risk of harm to the child.<sup>11</sup> Such exceptions have proved critical in recent years, as data on the families involved in abductions have called into question the

---

<sup>5</sup> See, e.g., Permanent Bureau of Hague Conference on Private International Law, *Guide to Good Practice Preventative Measures Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part III – Preventative Measures*, 8-10 (2005), [http://www.hcch.net/upload/abdguideiii\\_e.pdf](http://www.hcch.net/upload/abdguideiii_e.pdf) [hereinafter *Preventative Measures Guide*].

<sup>6</sup> See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 42 U.S.C. § 601 [hereinafter *Hague Convention*]. Although the Hague Conference on Private International Law has promulgated numerous treaties, the author will refer to the Convention on the Civil Aspects of International Child Abduction as the "Hague Convention" for short, as that is how it is commonly referenced in the United States.

<sup>7</sup> See *id.*; see also PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 4 (2004); Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 64 (2010); Hague Conference on Private International Law, *Status Table for Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (April 25, 2014), [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) [hereinafter *Status Table*].

<sup>8</sup> See generally Hague Conference on Private International Law, *Country Profiles*, [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=42&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=42&cid=24) (last visited Jan. 16, 2014) (listing relevant law implementing the Convention by country) [hereinafter *Country Profiles*].

<sup>9</sup> See Adair Dyer, *The Hague Convention on the Civil Aspects of International Child Abduction – towards global cooperation*, 1 INT'L J. CHILD. RTS. 273 (1993); Carol S. Bruch, *The Hague Child Abduction Convention: Past Accomplishments, Future Challenges*, 1 EUR. J.L. REFORM 97 (1999); William Duncan, *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau*, 33 NYU J. INT'L L. & POL. 103 (2000).

<sup>10</sup> Hague Convention, *supra* note 6, art. 13, 20.

<sup>11</sup> Hague Convention, *supra* note 6, art. 13.

conventional vision of abduction.<sup>12</sup> Whereas drafters of the Convention envisioned abduction as typically involving a noncustodial parent taking a child away from the child's primary caretaker, data on Hague Convention cases has shown that nearly seventy percent of taking parents are sole or joint custodians.<sup>13</sup> Many of these parents assert that they left their homes to seek refuge from domestic violence.<sup>14</sup>

The application of the Convention's protections to families in these circumstances has not been perfect. Scholars have identified serious unintended harms that courts applying the Convention have caused for families, particularly where there is a history of domestic violence.<sup>15</sup> Nonetheless, by tailoring the return remedy to recognize that children may be best served by remaining with taking parents in limited circumstances, the Convention gives courts some flexibility to rule according to what is best for the child given the particular circumstances of the case.

Unlike the limited flexibility of the Convention's return remedy, dual consent travel restrictions in many countries draw a hard line, mandating the affirmative consent of both parents without contextual exceptions. For many families this blunt, one-size-fits-all approach imposes significant hardship. First, it harms parents who would have a defense to return under the Hague Convention if only they could exit the country with their child. In such circumstances, dual consent requirements can vest significant power in abusive co-parents and trap victimized parents and children in dangerous and oppressive environments. Second, blanket dual consent requirements harm the many single parents who care for their children with no involvement by the children's other biological parent. The Hague Convention itself precludes absent parents from invoking its remedy of return. The emerging understanding of abduction as often committed by custodial parents fleeing domestic violence and the continued rise in the proportion of children raised by single parents in many parts of the world call into question the assumption that two parents can (and should) readily participate in decisions about whether a child should travel.

---

<sup>12</sup> See *infra* Part III.C. and accompanying notes.

<sup>13</sup> *Id.*

<sup>14</sup> See *infra* Part III.C.1 and accompanying notes.

<sup>15</sup> See, e.g., TARYN LINDHORST & JEFFREY EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW: THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION 73-74, 91 (2012); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004); Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL'Y & FAM. 191, 193 (1999); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 625 (2000); Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701, 743-44 (2004); see also BEAUMONT & MCELEAVY, *supra* note 7, at 28-29.

Concrete examples may help elucidate the impacts of dual consent policies. Consider the cases of Marina and Jessica.<sup>16</sup> Marina migrated to the United States from Guatemala on the promise of a job in a restaurant, which she hoped would enable her to send money home to support her parents and the children she left in their care. After crossing the border on foot under the guide of a coyote, Marina was transported to a house in a large city that functioned as a brothel. Marina was told she owed the coyote thousands of dollars more than she had been led to believe the trip would cost. Her captors offered her a choice: she could engage in prostitution to pay off her debt or her family in Guatemala would be harmed. Marina was trapped at the house for six months before she was able to escape with several other women. She was referred to a legal services organization, which helped her apply for a T visa. The T visa offered significant promise to Marina as it would not only enable her to remain in the U.S. with legal status and authorization to work, but also permit her to lawfully bring her children to the U.S. to live with her. But when Marina attempted to seek passports for her children from the Guatemalan consulate, she learned that she would need to obtain her children's father's consent or a court order permitting her to seek the passports without his consent. Both options required her to locate and attempt to contact him. Marina was terrified. Her children's father had been extremely violent towards her and the children when the family lived together in Guatemala. Marina learned during this time that she could not count on the Guatemalan police for protection. The children's father had been absent from their lives for several years, and Marina feared that reconnecting with him could put the children in grave danger. She was devastated at the thought of remaining apart from her children, but decided it was safer to leave the children in Guatemala than to risk bringing their father back into their lives.

Jessica migrated to the United States from Honduras in search of work so she could support her family. She planned to cross the border on foot, and left her children behind in the care of their paternal grandmother because she feared they could be harmed during the journey. A few months after she arrived in the United States, Jessica began an intimate relationship that soon turned abusive. After the police were called during a particularly violent incident, Jessica decided she had had enough. She cooperated with the police investigation of the assault and obtained a civil protection order from the court. Court advocates referred her to a legal services organization, which assisted her with applying for a U visa. Like Marina's T visa, Jessica's U visa not only offered her the opportunity to remain lawfully in the U.S. and seek employment, but also to bring her children to join her. Jessica learned from the Consulate that to obtain passports for the

---

<sup>16</sup> Although the names are fictional, these stories recount the actual experiences of women represented by legal services organizations in New York and California, and reflect the experiences of many of the author's clients. Information about these particular stories is contained in notes on file with the author.

children she needed the children's father's consent or a court order awarding her sole custody of the children. The children's father had migrated to the U.S. soon after the birth of the youngest child and had stopped contacting the family. When Jessica contacted him, he refused to consent, telling Jessica that she should return to Honduras if she wanted to see the children so badly. Jessica next contacted her family to ask them to help her obtain an order of sole custody from the court in Honduras, but her family refused. The children's father's family had a lot of power in their town and they feared his family would harm them if they defied his wishes. Jessica could not travel to Honduras herself to seek a custody order without jeopardizing her ability to remain lawfully in the United States. Jessica and her children were left with no other recourse but to remain separated for at least four additional years, when she hoped to obtain a green card and authorization to travel outside of the United States. Only then would she have the opportunity to seek an award of sole custody from the court in Honduras, which would allow her to obtain passports for the children and bring them to the United States.

This article evaluates the unintended consequences of dual consent travel requirements on parents and children in families such as Marina's and Jessica's. In doing so, the article builds on scholarly assessments of the unintended harms caused to families by the Hague Convention.<sup>17</sup> Although not found within the text of the Convention itself, dual consent requirements loosely derive from Article 2, which obligates contracting states to implement the Convention within their territories, including by working to prevent child abduction.<sup>18</sup> Dual consent requirements have been increasing in popularity among contracting states, but they are by no means a necessary policy choice. Numerous local, national, and international tools are now available in the fight against international child abduction, and many countries strongly committed to anti-abduction efforts have responded effectively to the problem without imposing blanket dual consent restrictions.<sup>19</sup> This article posits that on balance, blanket dual consent requirements create more hardship than benefit.

This article proceeds in three parts. Part II traces the nature, source, and aims of dual consent requirements and situates them in the broader context of the problem of international parental child abduction. Part III explores several

---

<sup>17</sup> See, e.g., TARYN LINDHORST & JEFFREY EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW 73-74, 91 (2012); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004); Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL. & FAM. 191, 193 (1999); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 625 (2000); Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701, 743-44 (2004); see also BEAUMONT & McELEVAY, *supra* note 7, at 28-29.

<sup>18</sup> Hague Convention, *supra* note 6, art. 2; see also *infra* Part II.C.2.

<sup>19</sup> See *Country Profiles*, *supra* note 8; see also *infra* Appendix.

unintended harms posed to parents and children by dual consent mandates. Part IV proposes solutions and addresses potential concerns. It suggests that countries eliminate dual consent requirements from their anti-abduction arsenals, or, at a minimum, replace blanket dual consent policies with ones that accord consular officers the flexibility to issue travel documentation with the consent of only one parent in limited circumstances that serve children's interests, and eliminate dual consent requirements for short trips. Finally, the article proposes that countries empower social authorities to authorize travel where one parent disagrees or is disengaged, and thereby reserve for court adjudication only those cases in which parents have serious objections. To assist in the exploration of the issue, an appendix sets forth and compares dual consent policies in numerous countries.

## II. THE SOURCES AND AIMS OF DUAL CONSENT

To understand the impact of dual consent requirements on parents, it is useful to consider the scope of parental decision-making authority generally, and limitations countries have imposed on parental authority in the context of travel. This section briefly explores the general contours of parental decision-making authority in many countries, and analyzes how dual consent requirements limit parental discretion regarding travel. The section goes on to consider the goals of dual consent restrictions, tracing the roots of the policies to coordinated efforts to implement the Hague Convention on the Civil Aspects of International Child Abduction.

### A. The Scope of Parental Decision Making Authority

In the United States, parents have a fundamental right to the care, custody, and control of their children.<sup>20</sup> "Custody" refers to an assortment of parental rights and responsibilities regarding a child.<sup>21</sup> U.S. law often distinguishes between "physical custody," or residing with a child and providing for a child's daily needs, and "legal custody," or the authority to make significant, long-term decisions affecting a child.<sup>22</sup> Married parents and

---

<sup>20</sup> See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

<sup>21</sup> HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 481 (2d ed. 1987). Under the federalist system of government in the United States, child custody laws are governed by the fifty states rather than the federal government. *Id.*

<sup>22</sup> See, e.g., D.C. CODE § 16-914(a)(1)(B) (2013); see also CLARK, *supra* note 21, at 481-82; LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 4.1 (2013). Some U.S. states have eliminated the term "custody" in favor of "parental rights and responsibilities." See, e.g., COLO. REV. STAT. ANN. §§ 14-1-123, 14-10-124(1.5)(a) (West 2013); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2013); WASH. REV. CODE § 26.09.181 (2013); see also ELROD, *supra*, at § 1.10. Similar terminology changes have been instituted in other countries that previously used the term "custody," including Australia, England, and Wales. D. Marianne Blair & Merle Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAM. L.Q. 247, 250 (2005);

unmarried mothers enjoy full rights of physical and legal custody by operation of law from a child's birth.<sup>23</sup> Unmarried fathers generally secure full rights of custody by acknowledging or securing an adjudication of paternity.<sup>24</sup> In the absence of a court order to the contrary, parents with rights of custody share their rights equally and co-extensively with his or her co-parent.<sup>25</sup> This equal decision-making responsibility generally means that a parent with rights of legal custody has full and separate authority to make decisions affecting the child without demonstrating the affirmative consent of the child's other parent.<sup>26</sup> Stated another way, for most purposes the law presumes that parents who share legal custody act with the consent of the other. Where parents disagree about a course of action, a parent may seek court intervention to prevent a co-parent from acting.<sup>27</sup>

Parents enjoy similarly broad decision-making authority with regard to their children under the laws of many other countries. For example, in many countries with civil codes deriving from Roman law, the concept of *patria potestad*, or parental authority, accords parents the responsibility to care, reside

---

N.V. Lowe, *The Allocation of Parental Rights and Responsibilities—The Position in England and Wales*, 39 FAM. L.Q. 267, 268 (2005); Patrick Parkinson, *The Law of Postseparation Parenting in Australia*, 39 FAM. L.Q. 507, 509 (2005).

<sup>23</sup> See ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK 121 (American Bar Association, 2012); James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 766-68 (2009).

<sup>24</sup> *Id.*

<sup>25</sup> See Legal Analysis, *The Hague Convention on the Civil Aspects of International Child Abduction*, 51 Fed. Reg. 10494 ("In the United States, as a general proposition both parents have equal rights of custody of their children prior to the issuance of a court order allocating rights between them."); ELROD, *supra* note 22, at § 1.1; Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1423 (1991) ("whether married or not, both parents have equal rights to custody of their children").

<sup>26</sup> See, e.g., *In re Jane Doe*, 418 S.E.2d 3, 7 (Ga. 1992) (noting in a case where parents' rights derived from operation of law rather than court order, "Where two parents have legal custody of a child, each parent shares equal decision-making responsibility for that child"); Weiner, *supra* note 15, at 637-38 (where both parents have custody rights to biological children absent a court order to the contrary, the Hague Convention's designation of a removal by one parent as potentially wrongful "goes well beyond common law and traditional criminal law in the United States"). Some exceptions exist in circumstances where both parents are actively involved in a decision and disagree, such as with regard to whether to terminate life support devices. *In re Jane Doe*, 418 S.E.2d at 3 (holding that Georgia's end of life statute, which permits "any parent" with custody of a child to make a decision to terminate life support, requires that both parents consent where both parents are present and involved in the decision). Adoption may be another exception to this general rule, apart from some circumstances in which a child is born to unmarried parents. See *Lehr v. Robertson*, 463 U.S. 248 (1983); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995).

<sup>27</sup> Parents who do not wish to share co-extensive rights and responsibilities with a co-parent or who disagree with a course of action a co-parent intends to take may seek a court order reallocating rights of physical and legal custody between them. In all fifty U.S. states, courts award custody according to the best interests of the child, and have the discretion to order one parent sole legal custody, sole physical custody, or both, order that parents share joint legal custody or joint physical custody, or some combination of the above. See ELROD, *supra* note 22, at §§ 4.1, 4.34.



with, and provide for a child, and the right to make decisions concerning the child.<sup>28</sup> Married parents and unmarried mothers typically enjoy parental authority by operation of law, whereas unmarried fathers typically secure parental authority by acknowledging or obtaining a court adjudication of paternity.<sup>29</sup> Parents vested with parental authority share the rights and responsibilities of parental authority equally, and generally are empowered to make decisions regarding their children without evidencing the express agreement of the child's other parent.<sup>30</sup> Parental authority may be suspended or limited by court order, and parents may seek court intervention in the case of disagreement.<sup>31</sup>

### **B. Limits on Parental Decision-Making: International Travel and Dual Consent**

Many countries restrict parental decision-making authority in the context of international travel. Rather than vesting each parent with full authority to enable a child to travel internationally absent a court order to the contrary, today at least twenty countries require proof that both of a child's parents affirmatively consent.<sup>32</sup> Countries implement such "dual consent" requirements by making

<sup>28</sup> See, e.g., Patricia Begne, *Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527, 527-29 (2005); Hugues Fulchiron, *Custody and Separated Families: The Example of French Law*, 39 FAM. L.Q. 301 (2005); Cecilia P. Grosman & Ida Ariana Scherman, *Argentina: Criteria for Child Custody Decision-making upon Separation and Divorce*, 39 FAM. L.Q. 543, 544 (2005).

<sup>29</sup> See, e.g., ESTIN, *supra* note at 23, at 187; Julia Alanen, *Child Travel Abroad: Legal Requirements for Proving Parentage and Documenting Consent*, 37 BNA FAM. L. REPTR. 1216 (March 2011); Nina Dethloff, *Parental Rights and Responsibilities in Germany*, 39 FAM. L.Q. 315, 317-18 (2005-2006); Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 409 (2002); see generally ANNE-MARIE HUTCHINSON & HENRY SETRIGHT, *INTERNATIONAL PARENTAL CHILD ABDUCTION* (1998) (collecting and summarizing laws on custody from numerous countries). Cf. Olga A. Khazova, *Allocation of Parental Rights and Responsibilities after Separation and Divorce under Russian Law*, 39 FAM. L.Q. 373, 376-77 (2005) (although "[u]nder the Russian Constitution, both parents have equal rights and duties to take care of their children and to raise them," fathers must acknowledge paternity or have paternity established in court proceedings for their parental rights to be recognized).

<sup>30</sup> See Antoinette Sedillo Lopez, *International Law—U.S./Mexico Cross-Border Child Abduction—The Need for Cooperation*, 29 N.M. L. REV. 289, 297 (1999). This is generally true in Argentina as well, but the express consent of both parents is required before certain acts involving a child can occur, such as marriage, foreign travel, and the sale of a child's property. See Grosman & Scherman, *supra* note 28, at 546, citing COD. CIV. art. 264 (Arg.). But see Theofano Papazissi, *The Function of Parental Care and Custody and the Minor's Opinion in Greece*, 39 FAM. L.Q. 339, 340 (2005-2006) (where parents are unmarried, the mother alone is empowered to exercise parental care by operation of law, although a father may request a court to empower him to exercise parental care as well).

<sup>31</sup> See Begne, *supra* note 28, at 530; Fulchiron, *supra* note 28, at 307; Grosman & Scherman, *supra* note 28, at 546; Khazova, *supra* note 29, at 380.

<sup>32</sup> See *infra* Appendix.

them prerequisites to the issuance of passports,<sup>33</sup> visas,<sup>34</sup> and the passage of children through border control points.<sup>35</sup>

In practice, dual consent requirements confer a parental veto over travel decisions, as they permit a child to travel internationally only where both parents are involved in the decision-making process and affirmatively demonstrate their agreement that travel should occur.<sup>36</sup> When conflict arises between the parents, a parent who wants a child to travel must seek court intervention to act upon that wish.<sup>37</sup> Conversely, a parent opposed to a child's travel is empowered to prevent the travel from occurring without recourse to the courts. A dissenting parent simply refuses to complete the steps required to demonstrate his or her consent, and travel is foreclosed in the absence of a court order. In this way, where parents disagree about whether a child should travel, the veto power created by dual consent requirements freezes the status quo pending court intervention, and thereby aims to prevent parental child abduction.<sup>38</sup>

### C. The Source of Dual Consent Limits: Abduction Prevention

Although increasingly common today, dual consent requirements are a relatively recent development, adopted by many countries within the past ten to fifteen years.<sup>39</sup> The requirements derive from the Hague Convention on the Civil Aspects of Parental Child Abduction of 25 October 1980 (the "Abduction Convention" or the "Convention") and the global effort to combat international child abduction.<sup>40</sup>

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Law on Immigration and Matters Concerning Foreigners, No. 8764, art. 265 (Sept. 2009) (Chile) (English translation on file with author); Subsidiary Legislation 61.02, Passport Regulations § 3(3), Sept. 28, 1993 (Malta), <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9184&l=1>.

<sup>37</sup> See Law of Integral Protection of Childhood and Adolescence art. 44, Legislative Decree No. 839, March 26, 2009 (El Sal.); see also Alanen, *supra* note 29, at 1216.

<sup>38</sup> Cf. Eva Ryrstedt, *Custody of Children in Sweden*, 39 FAM. L.Q. 393, 398 (2005) (describing how Sweden's laws requiring parents with joint custody to make all decisions together results in the preservation of the status quo in the case of disagreement).

<sup>39</sup> See, e.g., D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY 67 (2003).

<sup>40</sup> By international child abduction, the author is referring to one parent's removal of a child across international borders or retention of a child in a country that is not the child's country of residence without the consent of the child's other parent.

## 1. The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980

The Hague Conference on Private International Law<sup>41</sup> adopted the Abduction Convention<sup>42</sup> in 1980 to facilitate a coordinated, effective international response to the problem of international parental child abduction.<sup>43</sup> Today the Abduction Convention has entered into force in ninety-two countries, making it one of the most widely ratified Hague Conference treaties.<sup>44</sup>

### a. Historical Context

In the 1970s parental child abduction emerged as a growing “global problem without global solutions.”<sup>45</sup> Children abducted internationally were rarely returned.<sup>46</sup> Parents struggled to locate their children, manage the expense and logistics of navigating foreign courts, and secure cooperation from local and

<sup>41</sup> Hague Convention, *supra* note 6. The Hague Conference is an intergovernmental organization that works to negotiate, draft, and encourage the adoption of multinational treaties aimed at unifying private international law. The current membership of the Hague Conference includes seventy-three states and one regional economic integration organization. Hague Convention on Private International Law, Members, [http://www.hcch.net/index\\_en.php?act=states.listing](http://www.hcch.net/index_en.php?act=states.listing) (last visited Jan. 19, 2014); *see also* BLAIR & WEINER, *supra* note 40, at 67. “Public international law consists of norms governing the conduct of states and international organizations” while “private international law . . . consists of norms that resolve jurisdictional disputes between natural or juridical persons arising out of transnational circumstances.” Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 79 no.1 (1991) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101(c) (1987)).

<sup>42</sup> Hague Convention, *supra* note 6.

<sup>43</sup> Elisa Pérez-Vera, *The Explanatory Report*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION ENLÈVEMENT D’ENFANTS / CHILD ABDUCTION 426, 432-435 ¶ 1 (1982), <http://www.hcch.net/upload/exp128.pdf>.

<sup>44</sup> Contracting states to the Abduction Convention include all of the states of North America and Europe, most of South America, and a few countries in Africa, Asia, and the Pacific. *See* Status Table, *supra* note 7; *see also* Ann Laquer Estin, *Families Across Borders: The Hague Children’s Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 64 (2010). The Abduction Convention is widely viewed as the Hague Conference’s crowning achievement in the arena of international family law. BEAUMONT & MCELEAVY, *supra* note 7, at 4. The success of the Convention is particularly notable in light of the widely divergent normative views of family relations across cultures and the emotional and factual complexity of many family law disputes. *See* Estin, *supra*, at 50.

<sup>45</sup> Carol S. Bruch, *The Hague Child Abduction Convention: Past Accomplishments, Future Challenges*, 1 EUR. J.L. REFORM 97, 98 (1999); Adair Dyer, *Report on International Child Abduction by One Parent*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION ENLÈVEMENT D’ENFANTS / CHILD ABDUCTION 12, 18-19 (1982) [hereinafter *Dyer Report*]; Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 99 (1980).

<sup>46</sup> *See* BEAUMONT & MCELEAVY, *supra* note 7, at 12.

foreign law enforcement authorities.<sup>47</sup> The lack of an international legal remedy to address abduction claims hampered countries' efforts to resolve abductions through diplomacy, as there was no neutral benchmark for assessing which interests were paramount and how such interests should be weighed.<sup>48</sup> The Hague Convention addressed these issues by establishing international norms and legal and diplomatic frameworks for responding to international abduction and child custody disputes.<sup>49</sup> As a result of the Convention, "judicial and administrative authorities"<sup>50</sup> of state parties (known as "contracting states") often cooperate closely to respond to abduction claims.<sup>51</sup>

### b. Orientation and Defining Principles

Reports concerning the development of the Abduction Convention and a body of scholarship suggest that Convention framers and ratifying states viewed abduction as entailing one primary scenario: a non-primary caretaking parent (usually a father) abducting children away from their primary caretaker (usually a mother) to the father's home country to obtain an advantage with respect to child custody.<sup>52</sup> Thus, a central aim of the Convention is to remedy a child's "traumatic loss of contact with the parent who has been in charge of his upbringing."<sup>53</sup>

The Convention's underlying orientation informs its defining principles. First, the Convention presumes with limited exceptions that one parent's unilateral removal of a child from his or her home country contravenes the child's best interests.<sup>54</sup> Second, the Convention aims to deter abduction by removing incentives for parents who would seek to abduct a child to gain an advantage in a custody case.<sup>55</sup> Finally, the Convention seeks to locate custody contests in the jurisdiction with the most information about a child—presumably, the child's state of residence prior to removal. Consequently, where one parent

---

<sup>47</sup> See *id.* at 3; Bruch, *supra* note 45, at 98.

<sup>48</sup> See Melissa S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 430 (2006).

<sup>49</sup> See Estin, *supra* note 45, at 80.

<sup>50</sup> See Pérez-Vera, *supra* note 43, at 35.

<sup>51</sup> *Id.*

<sup>52</sup> See *Dyer Report*, *supra* note 45, at 12, 19-21; BEAUMONT & McELEVAY, *supra* note 7, at 8-9, 17; Bruch, *supra* note 45, at 102; Weiner, *supra* note 15, at 602; see also LINDHORST & EDLESON, *supra* note 15, at 8; Estin, *supra* note 45, at 77; Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 278 (2002).

<sup>53</sup> See *Dyer Report*, *supra* note 45, at 21.

<sup>54</sup> BEAUMONT & McELEVAY, *supra* note 7, at 21. The Hague Convention applies to children under the age of sixteen. Hague Convention, *supra* note 6, art. 4.

<sup>55</sup> See Estin, *supra* note 45, at 52.

removes a child from the child's home country in violation of a co-parent's rights of custody, the Convention works expediently to restore the pre-abduction status quo.<sup>56</sup> The Convention empowers left-behind parents to seek the automatic return of the child through expedited court proceedings, which are restricted to the determination of whether a removal was wrongful (the "return remedy").<sup>57</sup> The Convention also invests a child's home state with exclusive jurisdiction to determine the child's custody.<sup>58</sup> Through each of these means the Convention aims to deter and rectify abductions by ensuring that a parent obtains no legal or practical advantage with respect to custody by taking the child to a different country.<sup>59</sup>

Despite its general presumptions, the Abduction Convention recognizes that reinstating the status quo does not always best serve children. In articulating specific defenses to the return remedy, the Convention shields unilateral removals of children by one parent under certain circumstances, and implicitly recognizes that such removals better serve children's interests than the preservation of the status quo.<sup>60</sup> These circumstances include cases in which: the left-behind parent lacks custody rights; the left-behind parent has custody rights but has failed to actually exercise those rights; the left-behind parent initially consents or fails to raise a timely objection to the removal; the child would face a grave risk of harm or be placed in an intolerable situation if returned; the child objects to return; or return would contravene a country's commitment to protecting human rights and fundamental freedoms.<sup>61</sup> In sum, the Convention aims to return children removed from caretaking parents with expediency, except in circumstances where the Convention recognizes that removal better serves a child's interests than the status quo.

## 2. The Obligation to Adopt Preventative Measures

A singular feature of the Abduction Convention is the role it establishes for the Secretariat of the Hague Conference (known as the "Permanent Bureau"), to monitor and encourage effective coordinated implementation and enforcement

---

<sup>56</sup> See Pérez-Vera, *supra* note 43, ¶ 16.

<sup>57</sup> *Id.*

<sup>58</sup> See Hague Convention, *supra* note 6, art. 1; BEAUMONT & MCELEAVY, *supra* note 7, at 21.

<sup>59</sup> See D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 586 (2003); see also Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 J. L. & CONTEMP. PROBS. 209, 258 (1994) (noting that if Hague Convention cases were addressed according to varying national approaches, neither of the two main objectives of the treaty – deterring abduction and reserving jurisdiction over the merits of custody disputes to the state of a child's habitual residence – would be attainable).

<sup>60</sup> See Pérez-Vera, *supra* note 43, ¶ 64 (1982).

<sup>61</sup> See Hague Convention, *supra* note 6, arts. 13, 20.

of the treaty on the domestic level.<sup>62</sup> Article 2 of the Convention requires contracting states to “take all appropriate measures to secure within their territories the implementation of the objects of the Convention,” by the “most expeditious procedures available.”<sup>63</sup> The Convention’s Explanatory Report emphasizes that a state’s obligation to implement the objects of the Convention not only includes responding effectively once abductions occur, but also instituting measures to prevent abductions from taking place.<sup>64</sup> Although the Convention does not articulate the specific measures states should adopt to comply with their obligations to prevent international parental abduction,<sup>65</sup> there is broad consensus that coordination among contracting states is critical to the efficacy of the Convention.<sup>66</sup> To coordinate and enhance countries’ implementation efforts, the Permanent Bureau of the Hague Conference issues “Guides to Good Practice.”<sup>67</sup> The recommendations in the Guides are nonbinding,<sup>68</sup> but contracting states are strongly encouraged to incorporate the recommendations into their local laws and policies.<sup>69</sup>

New contracting states to the Convention especially are encouraged to adopt the practices touted by the Guides to Good Practice. New states become

---

<sup>62</sup> BLAIR & WEINER, *supra* note 40, at 68.

<sup>63</sup> Hague Convention, *supra* note 6, art. 2.

<sup>64</sup> See Pérez-Vera, *supra* note 43, at 430 ¶ 18 (1982) (noting “at the end of the day, promoting the return of the child or taking the measures necessary to avoid such removal amount to almost the same thing”); see also Pérez-Vera, *supra* note 43, at 432 ¶ 25 (describing one of the goals of the Convention as “preventative”).

<sup>65</sup> See *id.* at 442 ¶ 62. To the contrary, the Explanatory Report advises contracting states that Article 2 imposes no obligation to create new procedures under their laws to implement the Convention. Instead, they may use the most expeditious procedures already existing within their laws to effect the Convention’s goals. *Id.* at 442 ¶ 63.

<sup>66</sup> See, e.g., Permanent Bureau, Hague Conference On Private International Law, *The Hague Project on Preventive Measures - Background Document*, at 6 (2002) (“agencies and authorities must work together to ensure that available preventative measures are actually operating effectively”); Estin, *supra* note 45, at 49, 65.

<sup>67</sup> The Hague Conference decided to issue Guides to Good Practice at the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction held in March 2001. See Special Commission, Hague Conference On Private International Law, *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 Mar. 2001), 7 (Apr. 2001). Prior to the Fourth Meeting of the Special Commission, the U.S. Congress passed a Concurrent Resolution urging the Permanent Bureau to produce Good Practice Guides and urging fellow contracting states to do the same. 107th H. Con. Res. 69 (agreed to Mar. 23, 2001).

<sup>68</sup> See *Preventative Measures Guide*, *supra* note 5, at vii (“Nothing in this Guide may be construed as binding on States Parties to the 1980 Convention.”).

<sup>69</sup> See Permanent Bureau, Hague Conference On Private International Law, *The Hague Project on Preventive Measures - Background Document*, at 6 (2002); *Preventative Measures Guide*, *supra* note 5, at 6 (“[I]mplementation of the Convention in national legal systems should be seen not so much as an end-product, but as a process that is continually under development and review.”).

parties to the Hague Convention by ratifying or acceding to the treaty. If the new state was not a member of the Hague Conference at the time the Convention was adopted; however, the Convention does not become effective between the new state and any existing contracting states until the existing contracting states individually accept the new state's accession.<sup>70</sup> The Permanent Bureau encourages existing contracting states to scrutinize how new states propose to implement and further the aims of the Hague Convention before accepting accessions, and presumably to condition the acceptance of accessions on a new state's demonstrated ability and willingness to adhere to best practices.<sup>71</sup> Furthermore, new states are encouraged to complete a questionnaire detailing their plans for implementing the Convention, and responses are posted on the Permanent Bureau's website.<sup>72</sup> Each of these measures aims to "[strike] a balance between universality and mutual confidence." These goals are equally important to the success of the Convention but often undermine one another; since, as more parties join the Convention, the risk increases that some parties will fail to implement the Convention effectively and thereby undermine the effectiveness of the entire regime.<sup>73</sup>

In 2005, the Permanent Bureau published the Guide to Good Practice Part III – Preventative Measures (the "Preventative Measures Guide").<sup>74</sup> The Preventative Measures Guide starts from the premise that states can do the most to combat international child abduction by preventing parents from wrongfully removing children from their territories at the outset; states are less likely to succeed at retrieving children after they have been removed.<sup>75</sup> Among other things, the Preventative Measures Guide encourages states to restrict minors' ability to travel outside of the jurisdiction.<sup>76</sup> In particular, Sections 1.2.1 and 1.2.2 promote that states require the affirmative consent of both of a child's parents as a prerequisite to foreign travel through several means. Specifically, the Guide encourages states to issue passports to children only with the consent of both parents;<sup>77</sup> require proof that both parents consent to travel before permitting a child to exit<sup>78</sup> or enter<sup>79</sup> a jurisdiction; and adopt a standardized consent to travel form to facilitate compliance checks across jurisdictions.<sup>80</sup>

---

<sup>70</sup> See Hague Convention, *supra* note 6, arts. 37, 38.

<sup>71</sup> See *Preventative Measures Guide*, *supra* note 5, at 5-6.

<sup>72</sup> See *id.* at 6.

<sup>73</sup> See Estin, *supra* note 45, at 64.

<sup>74</sup> See *Preventative Measures Guide*, *supra* note 5, at vii.

<sup>75</sup> *Id.* at vi ("[I]t is widely acknowledged that it is better to prevent abduction than to have to seek a child's return after abduction.").

<sup>76</sup> *Id.* at vii.

<sup>77</sup> *Id.* at 8-9.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 10; Permanent Bureau, Hague Conference On Private International Law, *Note on the Possible Development of a Model Consent to Travel Form*, Prelim. Doc. 15 (Jan. 2012). After

Dual consent requirements promote the goals of the Abduction Convention in several ways. By safeguarding a role for both parents in travel-related decision-making, dual consent requirements ensure that parental travel with children adheres to state anti-parental kidnapping laws and preserves co-parents' rights of custody and access. In the face of dispute, dual consent requirements preserve the status quo and place the administrative burden with the parent seeking to change the status quo through travel, rather than leaving a left-behind parent with the burden to locate a child and petition for the child's return in foreign courts. Dual consent requirements also channel the adjudication of parental disputes regarding travel and the allocation of custody rights to courts in a child's home country.

Dual consent requirements have proved popular: at least twenty contracting states have adopted dual consent requirements to date,<sup>81</sup> and some have encouraged instituting dual consent as a prerequisite to child travel on all international flights.<sup>82</sup> Recently, the Permanent Bureau has begun working with the International Civil Aviation Organization ("ICAO")<sup>83</sup> to encourage international air carriers to explore the institution of a standardized parental consent to travel document for child passengers on international flights.<sup>84</sup> If adopted by the ICAO, proof of dual consent to international travel could be required for all children on all international flights, regardless of the requirements of their home countries.<sup>85</sup> Several countries have developed or are exploring similar partnerships with international air and sea carriers.<sup>86</sup>

---

further consideration, a Special Commission of the Hague Conference concluded that the wide variance in travel laws and procedures among contracting states made creating a standardized form infeasible. Permanent Bureau, Hague Conference On Private International Law, *Conclusions and Recommendations of Part I and Part II of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention and a Report of Part II of the Meeting*, at 26, (Apr. 2012) [hereinafter *Conclusions and Recommendations*].

<sup>81</sup> See *infra* Appendix.

<sup>82</sup> See *infra* note 90; see also *supra* note 32.

<sup>83</sup> "A specialized agency of the United Nations, the International Civil Aviation Organization (ICAO) was created in 1944 to promote the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection. The Organization serves as the forum for cooperation in all fields of civil aviation among its 191 Member States." *ICAO in Brief*, International Civil Aviation Organization, <http://www.icao.int/about-icao/Pages/default.aspx> (last visited Jan. 19, 2014).

<sup>84</sup> See *Conclusions and Recommendations*, *supra* note 80, at 26.

<sup>85</sup> The Council of the ICAO is charged with establishing international standards, which become annexes to the *Convention on International Civil Aviation*. *Convention on International Civil Aviation*, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, ICAO Doc. No. 7300/9 Art. 54.

<sup>86</sup> Such countries include Argentina, Canada, Chile, and Mexico. See *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_ar.pdf](http://www.hcch.net/upload/wop/prevmeas_ar.pdf) (Argentina's response to Question B7) [hereinafter *Argentina Questionnaire*]; *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_ca.pdf](http://www.hcch.net/upload/wop/prevmeas_ca.pdf); (Canada's response



### III. THE HARMS OF DUAL CONSENT

The essential harm of dual consent requirements lies in the unilateral power they confer on parents to prevent a child from traveling without judicial intervention. Although rooted in good intentions of preventing harm to children and left-behind parents, the dual consent veto is a powerful weapon, easily abused.<sup>87</sup> The veto power is significant not only for its force, but also for its broad scope. Dual consent requirements expand the authority parents customarily are understood to enjoy by virtue of rights of legal custody over long-term or “big” decisions into control over day-to-day decision-making, which typically is reserved to parents actually performing caretaking duties. Moreover, the veto power is accorded to all parents with legal custody without exceptions for circumstances in which the Hague Conference has recognized unilateral action by parents to benefit children. The burden of overcoming a parent’s non-consent to travel through judicial intervention is significant, especially for low-income parents.

#### A. Force of the Veto

The power dual consent requirements confer on parents to prevent travel is so forceful, in part, because it is not subject to judicial review when first exercised. Parents unilaterally decide whether or not to demonstrate their consent to a child’s travel. In many countries, no mechanisms exist for evaluating the merits of a parent’s decision to withhold consent, apart from court intervention.<sup>88</sup> This lack of oversight gives non-consenting parents little incentive to take a reasonable position in travel disputes.<sup>89</sup> Without the need for the endorsement of a superior authority to prevail with an objection, a parent is less likely to be circumspect about the legitimacy of his or her position or the relative weight of his or her concerns.<sup>90</sup>

---

to Questions B7-8); United States Government Accountability Office, *Commercial Aviation: Program Aimed at High-Risk Parent Abductors Could Aid in Preventing Abductions*, GAO-11-602, at 8-9, (June 2011) [hereinafter *Commercial Aviation*] (noting that the U.S. State Department reports parental consent letters are required for children to board or disembark from flights to Chile and Mexico). The United States also has explored the utility of imposing dual consent requirements for airline travel and concluded that they would be unworkable. *Id.* at 8-9, 18-21.

<sup>87</sup> Scholars have explored how the law governing the ability of custodial parents to relocate within the United States similarly “provides inappropriate opportunities for abuses of power by former partners.” See Carol S. Bruch and Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 248 (1996).

<sup>88</sup> See *infra* Appendix.

<sup>89</sup> Cf. Ryrstedt, *supra* note 38, at 403 (describing how Sweden’s current custody system, which does not provide conflict resolution for many parental decision-making disputes, “gives an ‘obstinate party’ plenty of room for maneuver”).

<sup>90</sup> See *id.* at 403-04 (“A ‘threat’ that an outsider can make a decision, if the parents cannot agree, ought to eliminate or at least reduce the danger of actions that are governed more by the parents’ own interests than those of the child, or by the desire to exercise power over the other parent.”).

Another source of the veto's strength lies in the lack of effort required for its exercise. Typically, where parents who share legal custody disagree about a decision regarding a child, a parent must initiate court proceedings and invest the time, effort, and resources such proceedings require to block a co-parent from acting.<sup>91</sup> By contrast, dual consent requirements empower parents to veto co-parents' travel plans simply by doing nothing. Where parents must invest time, effort, and resources into raising objections to co-parent's plans, they are more likely to object only to decisions with which they fundamentally disagree.<sup>92</sup>

In many countries, the ease of exercising the veto contrasts with the significant hurdles required to demonstrate consent. To satisfy consent requirements in some States, parents must provide notarized signatures,<sup>93</sup> physically appear together at passport agencies,<sup>94</sup> or appear with their children at passport agencies.<sup>95</sup> The effort required to demonstrate consent may cause parents to veto travel because they are unwilling or unable to comply with administrative procedures, rather than because they have any substantive objection to a trip.

The veto's strength, counter-intuitively, may have the potential to discourage parents from attempting to comply with dual consent requirements. For example, if a parent believes a co-parent is unlikely to consent, the parent may resort to abduction rather than trying to work out a solution with the other parent and risking giving the co-parent the opportunity to block travel plans.<sup>96</sup>

---

<sup>91</sup> See *supra* Parts II.A-B for a more detailed discussion of parental decision-making authority.

<sup>92</sup> Cf. The Law Commission, *Family Law Review of Child Law Guardianship and Custody* No. 172, HC 594 at 2.10 (July 25, 1988) (noting that "[t]he person looking after the child has to be able to take decisions in the child's best interests as and when they arise . . . it is that person who will have to put those decisions into effect . . . . The child may well suffer if that parent is prevented by the other's disapproval and thus has to go to court to resolve the matter, still more if the parent is inhibited by fear that the other may disapprove or by the difficulties of contacting him . . . . In practice, where the parents disagree about a matter of upbringing the burden should be on the one seeking to prevent a step which the other is proposing, or to impose a course of action which only the other can put into effect, to take the matter to court").

<sup>93</sup> See Law of Integral Protection of Childhood and Adolescence art. 44, Legislative Decree No. 839, March 26, 2009 (El Sal.) (English translation on file with author); Accord No. 018-2004 art. 98, May 2004 (Hond.) (English translation on file with author); Executive Body Decree Law No.3 art. 40, 2008 (Pan.) (English translation on file with author).

<sup>94</sup> See *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_il.pdf](http://www.hcch.net/upload/wop/prevmeas_il.pdf) (Israel's response to Question 1-2) (requiring divorced parents to appear before the passport authority to sign consents before the minor can receive a passport). The requirement of physical appearance may cause particular hardship for parents in rural areas and parents who have migrated outside of their country of origin.

<sup>95</sup> Regulation to the Law on Immigration and Matters Concerning Foreigners, No. 8674, for Minors art. 29(c), Executive Decree No. 36659-G (May 23, 2011) (Costa Rica) (English translation on file with author).

<sup>96</sup> See, e.g., Passport Procedures – Amendment to Passport Regulations, 69 Fed. Reg. 60811-12 (Oct. 13, 2004) (describing the motivations of parents who submitted forged evidence of dual consent to apply for child passports under prior regulation that lacked notarization requirement:

Conversely, the need to obtain a co-parent's consent or seek court authorization might deter some parents from pursuing a beneficial travel opportunity for a child if they foresee that pursuing consent or court authorization will provoke conflict or an extended court battle.<sup>97</sup>

### B. Breadth of the Veto

Another harm of the dual consent veto power lies in its expansive scope. The Preventative Measures Guide promotes the adoption of dual consent requirements that apply generally to all parents and children, rather than only where certain conditions exist.<sup>98</sup> From an abduction prevention perspective, taking a broad brush approach makes sense, as "[g]enerally applicable measures are vital in preventing abduction in cases where there was no prior warning and therefore no opportunity to implement other more specific preventive measures."<sup>99</sup>

But, the breadth of dual consent measures may generate litigation about marginal issues not typically requiring court intervention. Dual consent requirements empower parents to participate in decisions about travel without regard to its purpose. In many countries, parents are equally able to veto short term travel for recreation, visiting family, or attending funerals, as travel for relocation.<sup>100</sup> As a result, many dual consent requirements extend the decision making power of all parents beyond the sphere of long-term matters typically conferred by rights of legal custody into the sphere of routine matters typically reserved to the discretion of parents actually performing caretaking activities on a particular day. Dual consent provisions thereby elevate parental disagreements about (or indifference to) routine travel into litigable disputes.<sup>101</sup> This result can

---

"Some applying parents who submit forged consent statements often do so to abduct their child or otherwise interfere with the rights of the non-applying parent. Most, however, are only going on vacation or obtaining the passport against the wishes of the other parent.").

<sup>97</sup> Cf. The Law Commission, *Family Law Review of Child Law Guardianship and Custody* No. 172, *supra* note 92, at 2.10.

<sup>98</sup> See Preventative Measures Guide, *supra* note 5, at 4, 11.

<sup>99</sup> See *id.* at 4.

<sup>100</sup> See Regulation to the Law on Immigration and Matters Concerning Foreigners, No. 8674, for Minors arts. 53-54, Executive Decree No. 36659-G (May 23, 2011) (Costa Rica) (English translation on file with author); *Argentina Questionnaire*, *supra* note 86, at A1. But see The Children Act No. 7 § 43(a), Apr. 1981 (Nor.) (allowing a non-custodial parent to travel abroad with a minor child without the consent of the custodial parent if there is clear evidence the child will return).

<sup>101</sup> See, e.g., *Patrawke v. Liebes*, 285 P.3d 268, 268 (Alaska 2012) (granting father authority to obtain a passport for a child because permitting a child to pursue opportunities to engage in school exchanges and travel abroad are in her best interests and mother offered no countervailing reason why the passport should not be issued); *Anthony McK. v. Dawn M.*, 943 N.Y.S.2d 790, 2009 WL 8527772 (N.Y. Fam. Ct. 2009) (unreported) (granting mother sole authority to obtain a passport for a child and authority to travel internationally with the parties' child over father's objection because the school sponsored trip and international travel generally is a good opportunity for the child, the

breed conflict unnecessarily, to the detriment of parental relationships and children's well-being.<sup>102</sup>

Many dual consent requirements also bestow dual consent authority on all parents with decision-making authority regarding a child, without regard to context such as the parent's level of involvement in the child's life or whether there is a history of abuse in the family.<sup>103</sup> As a result, dual consent restrictions create the opportunity for parents to exercise their veto for reasons unrelated to concerns about the child involved.<sup>104</sup> Parents may withhold consent for various unseemly reasons: to extort money from the other parent; to reassert control over the parent where there has been a break in a formerly abusive relationship; because the parent fears that completing the steps required may bring that parent's unlawful presence in a State to the attention of that State's immigration authorities; or because the parent simply is unmotivated to complete the steps required.<sup>105</sup> For all of these reasons, the broad scope of the dual consent veto increases the potential for parents to withhold consent to vindicate their own interests, rather than keeping the well-being of the child paramount.

### C. Undermining Hague Convention Protections

As a result of their broad scope, many dual consent requirements create stronger barriers against removals of children by one parent than what the Hague Convention contemplates. Dual consent requirements in many countries fail to take into account circumstances such as the presence of a grave risk of harm, the failure of a parent to actually exercise rights of custody, the child's wishes, and the State's commitment to protecting human rights and fundamental freedoms.<sup>106</sup> Only a minority of countries enumerate any exceptions to otherwise broadly

---

father was using the issue as an excuse to generate additional litigation, and the father provided no credible evidence of a risk of abduction).

<sup>102</sup> See *Commercial Aviation*, *supra* note 86, at 19-20 (concluding that requiring parental consent letters as a prerequisite to children boarding international flights appears impractical, and reporting the concerns of several stakeholders that "single and divorced parents would have to take burdensome additional steps to contact the other parent and obtain their permission for the international travel. This requirement could be particularly difficult for a single parent traveling legitimately with a child if that single parent faced an uncooperative ex-spouse or if the parent had to provide documentation such as custody papers. This requirement could impact and burden parents and children traveling when there is very little risk of an abduction situation.").

<sup>103</sup> See *infra* Appendix.

<sup>104</sup> Of course, this could happen even in the case of involved, non-abusive parents, but ulterior motives may be especially likely to prompt the withholding of consent in these contexts. Cf. Bruch, *supra* note 15, at 541 (noting a similar harm posed where the Hague Convention's return remedy is made available to parents who hold only *ne exeat* rights of custody: "Specifically, return may be sought for improper motives such as control, intimidation, or financial advantage, and this danger increases whenever a return order is available to a petitioner whose claim to custody on the merits is extremely weak.").

<sup>105</sup> These examples have arisen in cases handled by the author. Case details withheld to protect confidentiality.

<sup>106</sup> See *infra* Appendix.

applicable dual consent requirements.<sup>107</sup> The failure of dual consent requirements to account for circumstances in which travel would serve a child's interests absent consent is especially significant in light of the frequency with which such circumstances arise. Data on cases invoking Hague Convention protections show that nearly 70% of taking parents are mothers<sup>108</sup> who are sole or joint custodians of their children.<sup>109</sup> Many of these mothers are fleeing domestic violence.<sup>110</sup> In short, the data reveals that the abduction scenario the Convention was created to address—a noncustodial parent abducting a child from a custodial parent in bad faith—occurs in the minority of cases brought to seek a child's return under the Hague Convention. The majority of cases involve primary caretaking custodial parents, with many occurring in circumstances that fall within one of the exceptions the Convention created to the general rule of return. Blanket dual consent requirements undermine the protections built into the Hague Convention by preventing children from traveling with one parent in circumstances where traveling better serves children's interests than the status quo.<sup>111</sup>

---

<sup>107</sup> See 22 C.F.R. § 51.28(a)(5) (2012) (if exigent circumstances exist concerning the health of the child or special circumstances regarding the family); *Australian Passports Act 2005* s 11 (if special circumstances exist, the child's welfare would be adversely affected, or the child has an urgent need for travel because of a family crisis); *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_is.pdf](http://www.hcch.net/upload/wop/prevmeas_is.pdf) [hereinafter *Iceland Questionnaire*] (Iceland's response to Question 2) (if a parent is sick, absent, or cannot sign the relevant application for any other reason); *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_se.pdf](http://www.hcch.net/upload/wop/prevmeas_se.pdf) [hereinafter *Sweden Questionnaire*] (Sweden's response to Question 4) (if there are very strong reasons for doing so).

<sup>108</sup> This percentage has remained constant across the three surveys of applications made under the Hague Convention, undertaken by the Hague Conference in 1999, 2003, and 2008. Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 14, Prelim. Doc. No. 8A (Nov. 2011) [hereinafter Lowe 2008]; Nigel Lowe, *A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 274, Prelim. Doc. No. 3 (Oct. 2006) [hereinafter Lowe 2003].

<sup>109</sup> See Lowe 2008, *supra* note 108, at 15; Lowe 2003, *supra* note 108, at 275.

<sup>110</sup> *Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper*, at 4, Prelim. Doc. No. 9 (May 2011); Linda Silberman, Symposium, Divorcing the Multi-national Family, *The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe* – Abbott, Neulinger, Zarraga, 63 OKLA. L. REV. 733, 736 (2011); Weiner, *supra* note 15, at 595-98; see generally LINDHORST & EDLESON, *supra* note 15.

<sup>111</sup> See Pérez-Vera, *supra* note 43, at 443 ¶ 62 (general duty of contracting states); BEAUMONT & MCELEAVY, *supra* note 7, at 28-29 (noting that "The [Abduction Convention] drafters recognized that a prima facie wrongful removal or retention might actually serve a child's interests."); Bruch, *supra* note 15, at 530 ("Each defense to return . . . addresses a concrete factual situation in which an individual child's best interests are, indeed, meant to control the outcome of the Hague proceeding.").

## 1. Travel to Escape Domestic Violence or Child Abuse

Dual consent requirements create barriers to safety and well-being for mothers and children fleeing abusive homes.<sup>112</sup> As noted by Professor Joan Meier:

While courts and observers often assume abduction is unnecessary because safety can and should be achieved through the legal process, the realities of domestic violence suggest there are no legal panaceas for abuse. The painful reality is that often the only way to ensure the safety of oneself and one's children is to get completely away—and in most cases women do so by returning home.<sup>113</sup>

Parents may feel they need to leave their current country of residence with their children for several reasons. Parents may have been forced to move to the country to begin with under threats of harm or may have been deceived into doing so.<sup>114</sup> A parent fleeing abuse may lack the language skills, immigration status, or social supports that would allow her to live independently from her abusive partner in the country and continue to provide for the children's needs.<sup>115</sup> The country of residence may not have adequate social services or legal protections against domestic violence, or the legal system may not adequately enforce existing legal protections.<sup>116</sup> Even where effective legal protections or social services exist, a parent may be unsuccessful in securing assistance, or may understand that an abusive co-parent will be undeterred by legal consequences.<sup>117</sup>

The Abduction Convention prioritizes children's safety and well-being over the status quo in return proceedings by exempting children from return where return would subject the child to a grave risk of harm or place the child in

<sup>112</sup> Cf. Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433 (1998) (exploring how U.S. laws restricting the relocation of custodial parents without the permission of noncustodial parents prevent custodial parents from escaping domestic violence).

<sup>113</sup> Brief of the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP), et al., as Amici Curiae Supporting Respondents, *Abbott v. Abbott*, 560 U.S. 1 (2010) (No. 08-645), 2009 WL 4247974 at 12.

<sup>114</sup> See LINDHORST & EDLESON, *supra* note 15, at 58-63.

<sup>115</sup> See *id.* at 73-74, 91; Kaye, *supra* note 15, at 193 (if women escape domestic violence with their children, they are vulnerable to stalking, assault, abuse, and homicide); Weiner, *supra* note 15, at 625 (language as a barrier to obtaining social services).

<sup>116</sup> See LINDHORST & EDLESON, *supra* note 15, at 63-74; Weiner, *supra* note 15, at 624-25 (sometimes victims may not be able to access social services for protection, even if they exist).

<sup>117</sup> See LINDHORST & EDLESON, *supra* note 15, at 63-72; Weiner, *supra* note 15, at 626 (women who chose to abduct their children rather than seeking legal custody don't believe that the legal system will generally protect them or their children).

an intolerable situation.<sup>118</sup> This Article 13(b) “grave risk defense” may protect children from having to return to previous countries of residence where they would face a risk of child abuse or exposure to the abuse of a caretaking parent.<sup>119</sup> The grave risk defense itself is an imperfect solution to the problem of domestic violence and child abuse in Hague Convention cases, as many courts have interpreted the provision narrowly and declined to find that a risk of domestic violence to a parent or even abuse to a child merits the application of Article 13(b).<sup>120</sup> The growing recognition of the major role domestic violence plays in international child abduction has resulted in calls to reform Hague Convention implementing legislation in contracting states to better address cases involving allegations of abuse.<sup>121</sup>

Despite its imperfections, the grave risk defense provides victimized parents and children a critical potential avenue of relief from continued abuse. By contrast, dual consent requirements inhibit parents’ and children’s ability to escape domestic violence and child abuse because they require that abusive parents be notified of co-parents’ plans to leave the country with their children. In most countries, to overcome dual consent barriers, victimized parents must either reveal their plans to travel to their abusive partners and secure their consent, or initiate custody proceedings against their abusive partners and seek court authorization to travel. Only a few countries, including Australia, Sweden, and the United States, incorporate exceptions to dual consent requirements that could permit parents and children fleeing abuse to obtain travel documentation without notifying an abusive co-parent.<sup>122</sup>

---

<sup>118</sup> Hague Convention, *supra* note 6, art. 13(b).

<sup>119</sup> See Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115, 123-29 (2005); Weiner, *supra* note 15, at 651-62 (evaluating how potential victims of domestic violence could avoid the return remedy by utilizing Article 13(b) of the Hague Convention).

<sup>120</sup> See Bruch, *supra* note 15, at 532-37 (discussing judicial opinions that have emphasized perceived benefits of returning children as a matter of discretion even if valid defenses to return exist); Kaye, *supra* note 15, at 194 (discussing an English case where a finding of a child’s habitual residence in Australia precluded the decision of whether to return the child to that country).

<sup>121</sup> The Hague Conference has begun to take these calls seriously. In 2012, the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention called for “work to be undertaken to promote consistency in the interpretation and application of Article 13(1)(b) including, but not limited to, allegations of domestic and family violence,” and the establishment of a working group to develop a Guide to Good Practice on the interpretation and application of Article 13(b)(1). See *Conclusions and Recommendations*, *supra* note 80, at i-ii.

<sup>122</sup> See *Yaman v. U.S. Dept. of State*, 709 F. Supp. 2d 85 (D.D.C. 2010) (describing a case in which the U.S. State Department issued direct return limited validity passports for two children after their mother repeatedly sought waiver of the dual consent requirement based on allegations that the children’s father had sexually abused at least one of the children and a Turkish court had awarded him full custody); see also *supra* note 107 and accompanying text; see generally *infra* Appendix, containing a summary of all dual consent laws identified.

Having to notify an abusive partner of her intent to travel with the children may put a victimized parent and her children at significant risk.<sup>123</sup> An abusive parent who suspects that a co-parent's travel plans are an attempt to leave the relationship might retaliate with violence.<sup>124</sup> The time of separation is often one of heightened danger as abusers attempt to reassert control by stalking, assaulting, and even killing their partners.<sup>125</sup> Providing notice might also undermine a victim's ability to escape by depriving her of the element of surprise or inspiring the abuser to seize travel documents or monitor her behavior.<sup>126</sup> Parents who must wait out extended court battles for custody and travel authorization may be subjected to "a life of fear and danger."<sup>127</sup>

Absent consent or court authorization, parents fleeing domestic violence must either remain in their current state of residence, leave their children behind, or resort to unlawful conduct—all of which, among other things, pose risks to their and their children's physical safety. The significant challenges and risks presented by each of these alternatives may trap victimized parents in their current countries of residence and even their households.<sup>128</sup> Dual consent requirements that prevent parents and children from traveling internationally to seek refuge from abuse undermine the Convention's recognition that travel without parental consent serves children's interests when it protects them from a grave risk of harm or an intolerable situation.

---

<sup>123</sup> Cf. Weiner, *supra* note 53, at 330 (describing the risks posed to victims of domestic violence by *ne exeat* provisions, which give parents the right to participate in decisions about where a child will live).

<sup>124</sup> See Bruch, *supra* note 15, at 543.

<sup>125</sup> See J.C. Campbell, N. Glass, P.W. Sharps, K. Laughton & T. Bloom, *Intimate Partner Homicide: Review and Implications of Research and Policy*, TRAUMA, VIOLENCE, & ABUSE 8(3) at 254 (2007); J.C. Campbell, D. Webster, J. Koziol-McLain, C. Block, D. Campbell, M.A. Curry, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, AM. J. PUB. HEALTH 93(7) at 1090-91 (2003); see also Bruch, *supra* note 15, at 530 (collecting authorities); Kaye, *supra* note 15, at 193 (collecting authorities); Weiner, *supra* note 15, at 637-38 (collecting authorities).

<sup>126</sup> See LINDHORST & EDLESON, *supra* note 15, at 48-49, 77-78.

<sup>127</sup> See Weiner, *supra* note 53, at 330 (analyzing how *ne exeat* provisions, which grant parents without physical custody the right to receive notice before a custodial parent relocates with a child, enable abusive partners to trap their co-parents and children in their countries of residence and thereby subject them to "a life of fear and danger"). Cf. Bowermaster, *supra* note 112, at 450 (noting, in the context of U.S. law regarding relocation of custodial parents, "Moveaway restrictions give violent men the power to prevent their ex-partners from escaping and to continue controlling essential aspects of their lives after separation and divorce.").

<sup>128</sup> See Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL'Y & L. 749, 769 (2003) (noting that the success of the Hague Convention at deterring unilateral removals of children may prevent victims of domestic violence from attempting to escape violent households).



## 2. Travel Where One Parent Is Absent

Dual consent requirements also create barriers that prevent single parents from taking care of their families. Single parenting is on the rise in much of the world.<sup>129</sup> As many as 24% of children in the United Kingdom, 24% of children in New Zealand, 27% of children in the United States, 35% of children in Columbia, and 43% of children in South Africa are being raised in homes with only one parent.<sup>130</sup> Mothers raise most of these children,<sup>131</sup> and in many of these families, fathers are completely absent.<sup>132</sup>

Many absent parents retain decision-making authority over their children despite their absence.<sup>133</sup> Single parent families may lack court orders setting forth the caretaking roles and decision-making powers of each parent. Parents may feel no need to obtain a court order after they separate for many reasons; for example, if they remain married, never married, have had no disputes about the care of their children (or none they could not resolve themselves), or have no contact with one another. Even if parents have obtained a court custody order, the order may not reflect the caretaking and decision making responsibilities

<sup>129</sup> See *Family Structure*, WORLD FAMILY MAP 2013, MAPPING FAMILY CHANGE AND CHILD WELL-BEING OUTCOMES, <http://worldfamilymap.org/2013/articles/world-family-indicators/family-structure> (last visited Jan. 20, 2014) (finding that “although a small percentage of children in North America, Oceania, and Europe lived in households without at least one of their parents, a large minority – about one-fifth – lived in single-parent households” and “children were especially likely to live with two parents . . . in Asia and the Middle East”); Rose M. Kreider & Renee Ellis, *U.S. Census Bureau, Living Arrangements of Children: 2009*, 2-3 (June 2011), [http://www.resource.library.gcyf.org/sites/gcyf.org/files/resources/2011/living\\_arrangements\\_of\\_children.pdf](http://www.resource.library.gcyf.org/sites/gcyf.org/files/resources/2011/living_arrangements_of_children.pdf) (“Forty percent of births today are to unmarried mothers, and these children may grow up in single parent families or spend significant portions of their lives with other relatives or stepparents.”).

<sup>130</sup> See *Family Structure*, *supra* note 129; Dethloff, *supra* note 29, at 330 (noting that thirty-two percent of children residing with one parent in Germany have no contact with their other parent).

<sup>131</sup> See TIMOTHY CASEY & LAURIE MALDONADO, WORST OFF-SINGLE-PARENT FAMILIES IN THE UNITED STATES: A CROSS-NATIONAL COMPARISON OF SINGLE PARENTHOOD IN THE U.S. AND SIXTEEN OTHER HIGH-INCOME COUNTRIES, Legal Momentum Report, at 4 (Dec. 2012), <http://www.legalmomentum.org/sites/default/files/reports/worst-off-single-parent.pdf> (finding in the U.S. and sixteen additional countries that “more than 80% of single parents are single mothers”); see also Kreider & Ellis, *supra* note 129, at 4-6 (finding that 86% of children in the U.S. living with only one parent live with their mothers).

<sup>132</sup> See, e.g., GARY BARKER & FABIO VERANI, MEN’S PARTICIPATION AS FATHERS IN THE LATIN AMERICAN AND CARIBBEAN REGION: A CRITICAL LITERATURE REVIEW WITH POLICY CONSIDERATIONS 26 (2003) (finding that approximately 25% of children in Honduras and El Salvador and 30% of children in Costa Rica have no registered fathers); Ryrstedt, *supra* note 38, at 401 (“as many as one-third of Swedish children between the ages of ten and eighteen who live only with their mothers do not ever see their fathers”); Gretchen Livingston & Kim Parker, *A Tale of Two Fathers: More Are Active, But More Are Absent*, Pew Research (June 15, 2011), <http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers/> (stating that 27% of fathers living apart from their children in the United States never see their children).

<sup>133</sup> See, e.g., Papazissi, *supra* note 30, at 340 (“Parental care is a personal right and is not forfeited by non-use.”).

actually undertaken by each parent. In the United States, for example, custody and visitation orders only grant each parent the opportunity to reside with, visit with, and participate in decisions about a child; custody orders impose no obligation on parents to take advantage of those opportunities.<sup>134</sup> Parents may not bother to return to courts to amend custody orders to reflect the responsibilities actually undertaken by each parent if the family is managing fine. Incentivizing families to seek court intervention unnecessarily poses many potential downsides, which are further explored in Section D.

Articles 3(b) and 13(a) of the Hague Convention limit access to its return remedy to parents who actually exercise rights of custody over a child at the time of a child's removal.<sup>135</sup> The actual exercise restriction ensures that the return remedy furthers the Convention's goals of protecting children from harm and securing emotional and social stability in children's lives.<sup>136</sup> Where one parent has been absent, the parent and child do not share the type of relationship the Convention's return remedy is intended to protect.<sup>137</sup> In these circumstances, the absent parent is not empowered to seek the child's automatic return to the previous state of residence, and instead must pursue claims for custody or access rights in the child's new state of residence.<sup>138</sup> Even as the weight of international authority has shifted to permit parents with only limited *ne exeat* custodial rights to invoke the return remedy, the Hague Conference has maintained a sharp line between parents who play some role in their children's lives and those who are uninvolved.<sup>139</sup> The Hague Conference has reaffirmed that for parents seeking to invoke the return remedy on the basis of *ne exeat* rights, "the requirement of

---

<sup>134</sup> See, e.g., Czapanskiy, *supra* note 25, at 1442-48.

<sup>135</sup> Hague Convention, *supra* note 6, arts. 3(b), 13(a). Courts have interpreted what constitutes "actual exercise" broadly. In the United States, for example, the Third, Fourth, Fifth, and Sixth United States Circuit Courts of Appeal have determined that courts must "liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with the child." *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996); *accord Bader v. Kramer*, 484 F.3d 666 (4th Cir. 2007); *Baxter v. Baxter*, 423 F.3d 363 (3d Cir. 2005); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338 (5th Cir. 2004).

<sup>136</sup> 1980 conference de La Haye de droit international prive, *Enlèvement d'engants*, E. Perez-Vera, Explanatory Report ("Perez-Vera Report"), in 3 Actes et Documents de la Quatorzieme session P72, p.448 (1982).

<sup>137</sup> *Id.* at 432-33.

<sup>138</sup> See Hague Convention, *supra* note 6, arts. 3(b), 13(a), 21; ESTIN, *supra* note 23, at 199.

<sup>139</sup> There is an emerging international consensus that parents with *ne exeat* rights have custody rights that permit them to invoke the return remedy. See *Abbott v. Abbott*, 560 U.S. 1, 18 (2010) ("scholars agree that there is an emerging international consensus that *ne exeat* rights are rights of custody"); Silberman, *supra* note 110, at 740. *Ne exeat* rights derive from provisions in laws or court orders that restrict parents from taking a child outside of the jurisdiction without the consent of the co-parent or the court. ESTIN, *supra* note 23, at 130. Like dual consent travel restrictions, *ne exeat* rights prevent one parent from defeating the custody or access rights of a co-parent by unilaterally removing a child from a jurisdiction. Silberman, *supra* note 110, at 736.

actual exercise of custody rights under Article 3(b) of the Convention in effect demands that the parent has maintained some contacts with the child.”<sup>140</sup>

Dual consent requirements often override the distinction between involved and uninvolved parents drawn by the Hague Convention. In most countries, dual consent requirements apply to all parents with rights of custody under the law, regardless of whether parents actually exercise those rights.<sup>141</sup> Notable exceptions are Costa Rica and Iceland, which permit the issuance of a passport with the consent of one parent with proof that the child’s other parent is absent.<sup>142</sup> The more open-ended exceptions in Australia, Sweden, and the United States may also permit passport issuance without dual consent where one parent is uninvolved in a child’s life.<sup>143</sup>

Without actual exercise limitations, dual consent requirements present the opportunity for a parent who plays no role in a child’s life to prevent the child

---

<sup>140</sup> PERMANENT BUREAU, REPORT ON THE THIRD MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 7 (1997). Although the Special Reports issued by the Hague Conference have no binding effect on the courts adjudicating Hague cases in contracting states, the reports are persuasive authority concerning the meaning of the Convention, as they reflect the consensus of contracting states participating in Special Commission sessions. BEAUMONT & MCELEAVY, *supra* note 7, at 25.

<sup>141</sup> See *infra* Appendix.

<sup>142</sup> See Reg. No. 36659-G, 23 May 2011, Reglamento para La Aplicación de la Ley General de Migración y Extranjería número 8764 a las Personas Menores de Edad [Regulation for the Application of the General Law of Migration and Foreign Affairs number 8764 for Minors] LA GACETA [L.G.], 18 Jul. 2011 (Costa Rica); *Iceland Questionnaire*, *supra* note 107, at 2. Iceland also permits the issuance of a passport with the consent of only one parent upon proof that the other parent is sick or cannot sign the application for any other reason. *Id.* Panama permits one parent to apply alone from abroad if the child has been residing with that parent alone continuously for two or more years. See Executive Body Decree Law No.3 art. 40, 2008 (Pan.).

<sup>143</sup> Australia permits passport issuance if “special circumstances exist,” or a “child’s welfare (physical or psychological) would be adversely affected if the child were not able to travel internationally.” *Australian Passports Act 2005* s 11. Sweden permits passport issuance without the consent of one parent if there are “very strong reasons for doing so.” See PASPORTS USA, [http://www.passportsusa.com/family/abduction/country/country\\_524.html](http://www.passportsusa.com/family/abduction/country/country_524.html) (last visited Jan. 20, 2014) (describing the 1978 Swedish Passport Act); *Sweden Questionnaire*, *supra* note 107, at 4. The United States permits passport issuance without the consent of one parent if compelling humanitarian or emergency reasons regarding the minor’s welfare or exigent or special family circumstances exist. See 22 C.F.R. § 51.28(a)(5) (2012). In response to concerns raised about satisfying the U.S.’s dual consent passport requirement by “single parents who are no longer in contact with the minor’s other parent,” the U.S. State Department, Bureau of Consular Affairs instructed, “The regulation provides that parents need only present documentary evidence of sole custody, i.e., a birth certificate or adoption decree listing only one parent, evidence of the death of a parent, a decree granting sole custody, or a court order terminating the other parent’s parental rights. The Department will consider other documentary evidence as warranted by the circumstances. If no documentary evidence is available, the applying parent may submit a written statement under penalty of perjury setting out the circumstances that prevent him or her from presenting the requested documentation.” Passport Procedures – Amendment to Requirements for Executing a Passport Application on Behalf of a Minor, 66 Fed. Reg. 29904-05 (June 4, 2001).

from traveling, overriding the wishes of the child's sole parental caretaker. In some circumstances, such as when single parents migrate without their children and later seek to bring the children to join them, dual consent requirements may keep children and their only caretaking parents apart.<sup>144</sup> In these ways, dual consent requirements not only generate issues of fairness but also can negatively impact single parent families.

Dual consent provisions require single parents to locate and contact co-parents who may have been absent since the birth of their children. This task itself may present an insurmountable barrier, particularly in countries with high rates of migration. Even if locating her former partner were possible, contacting an absent parent may pose challenges. First, approaching the father may risk opening up emotional wounds for the mother or the child. A mother may fear that re-engaging the father may cause a child to suffer additional rejection if the father has some contact with the child and disappears again. Second, to locate the father, the mother may be required to contact family members or friends of the father with whom she may not have great relationships, and she might open herself up to hostility or scorn as a result. Where a father formerly abused the mother or the child, re-engaging the father may put the family's safety at risk by making the family's whereabouts known or by presenting a new opportunity to exercise power and control. If a single parent is unable to locate an absent co-parent or secure his consent, her only recourse often is to seek court authorization, which, in many countries, requires that the court adjudicate custody and award sole custody to the parent wanting the child to travel.<sup>145</sup>

Apart from these specific barriers, the imposition of a dual consent requirement on a single parent may prevent travel in practice because it presents one too many burdens to overcome.<sup>146</sup> Single parents face numerous challenges in childrearing that often are mitigated for parents sharing responsibilities for

---

<sup>144</sup> Cf. Alanen, *supra* note 29, at 1216 (describing as one example of the need for legal assistance to navigate dual consent travel restrictions: "an immigrant mother wants to bring her child to join her in the United States – the child's father has been out of the picture since the child's birth").

<sup>145</sup> For a more detailed discussion of the challenges posed by initiating court proceedings, see *infra* Part III.D. In El Salvador, parents can seek an opinion from the Attorney General's Office authorizing a child to leave the country where a co-parent is absent. Dec. Ley No. 839, 16 Apr. 2009, Ley de Protección Integral de la Niñez y Adolescencia [Law on Protection of Children and Adolescents] tit. ii, Art 44, DIARIO OFICIAL, 16 Apr. 2009 (El Sal.).

<sup>146</sup> Cf. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 816 (1997) ("A jurisdiction like the District of Columbia, where single parenthood and poverty are prevalent, should be concerned about whether structural changes in its custody laws will undermine the ability of the single parent to persevere"); Bruch & Bowermaster, *supra* note 87, at 248 (concluding that the state of the law on custodial parent relocation "has made the job of rearing children after parental separation or divorce far more financially and emotionally burdensome than sound policy requires or should condone"); see also *Commercial Aviation*, *supra* note 86, at 20 (noting the burdens that requiring parental consent letters as a prerequisite to children taking international flights would impose on single and divorced parents).

raising children. The prospect of having to overcome an additional challenge to travel or relocate with a child may cause a parent to abandon the plan, regardless of its potential benefits to the family. For all of these reasons, for single parent families, dual consent requirements that lack actual exercise exceptions may inadvertently safeguard inchoate parental rights to the detriment of the parent child relationship the Hague Convention aims to protect.

### 3. Travel to Escape Human Rights Violations

Dual consent requirements may prevent parents and children from fleeing their countries of residence to escape violations of their fundamental human rights. Parents and children may seek to escape persecution because of their membership in a particular social group; they may fear they will be deprived of their lives, liberty, or physical integrity if they remain; they may be persecuted by the state itself or be unable to count on the state for protection or legal redress for persecution by others.<sup>147</sup>

The Hague Abduction Convention recognizes that abduction may serve children's interests where parents remove children in circumstances where the parent or the child would suffer violations of their fundamental human rights. Article 20 permits states to decline to return a child when doing so "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."<sup>148</sup> States have declined to return children in order to protect them or their taking parents where courts concluded: a mother would be denied due process in the courts of the child's prior country of residence, a mother would be precluded from relocating in violation of her rights, a taking parent would be unable to appear at custody proceedings in the prior country of residence, and a mother would not be adequately protected from domestic violence.<sup>149</sup>

By contrast, dual consent requirements generally lack provisions that would enable children to travel with the consent of only one parent to avoid

---

<sup>147</sup> See Weiner, *supra* note 15, at 744 (describing the importance of Article 20 to protect refugee parents and children and parents and children fleeing domestic violence).

<sup>148</sup> Hague Convention, *supra* note 6, art. 20. The human rights recognized by individual countries vary according to domestic law and countries' international obligations. For a detailed summary of the international human rights treaty obligations of most state parties to the Abduction Convention, see Weiner, *supra* note 15, at 744.

<sup>149</sup> See Weiner, *supra* note 15, at 721-22 (collecting and describing cases from Australia, France, and Spain); see also Nigel V. Lowe & Katarina Horosova, *The Operation of the 1980 Hague Abduction Convention – A Global View*, 41 FAM. L.Q. 59, 86 & n.83 (2007) (finding that courts in Chile relied on Article 20 of the Hague Convention in refusing to return children to their previous countries of residence in eight cases in 2003 and citing a 2006 case in which Romania refused to return a child based in part on Article 20); Nigel V. Lowe & Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41, 63 (2012) (finding that courts in Bulgaria and Spain relied in part on Article 20 in refusing to return children in 2008).

violations of fundamental human rights.<sup>150</sup> Where parents and children are fleeing human rights violations that are state sanctioned and accepted or perpetrated by a co-parent, blanket dual consent requirements erect a double barrier to freedom, as neither parental consent nor court authorization are likely. Only Australia, Sweden, and the United States appear to incorporate exceptions to dual consent requirements that could permit parents and children fleeing human rights abuses to obtain travel documentation absent consent or court authorization.<sup>151</sup> The United States, for example, permits passport issuance without the consent of one parent in the event of compelling humanitarian or emergency reasons regarding the minor's welfare, or when there are exigent or special family circumstances.<sup>152</sup>

Blanket dual consent requirements may violate States' international and regional human rights obligations where they prevent travel and thereby result in further human rights abuses to children or the parents who remain with them.<sup>153</sup> For example, to the extent that dual consent requirements prevent children from traveling to join or visit their parents in other countries, they may violate Article 10(2) of the United Nations Convention on the Rights of the Child, which requires States to "respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country."<sup>154</sup> When dual consent requirements lack exceptions aimed at preventing human rights violations, they undermine the balance between protecting human rights and preventing abduction struck by contracting States within the Abduction Convention.

#### 4. Travel that the Child Wishes to Pursue

Dual consent requirements may restrict mature children from traveling against their own wishes. Indeed, children typically have no voice in determinations of whether they should receive travel documentation. Apart from a few countries that permit children sixteen years of age and older to apply for travel documents on their own, no dual consent provisions appear to explicitly consider the views of a mature child as to whether travel should occur.<sup>155</sup> Only

---

<sup>150</sup> See *infra* Appendix.

<sup>151</sup> See 22 C.F.R. § 51.28(a)(5) (2012) (if exigent circumstances exist concerning the health of the child or special circumstances regarding the family); *Australian Passports Act 2005* s 11 (if special circumstances exist, the child's welfare would be adversely affected, or the child has an urgent need for travel because of a family crisis); *Sweden Questionnaire*, *supra* note 107, at 4 (if there are "very strong reasons for doing so").

<sup>152</sup> See 22 C.F.R. § 51.28(a)(5).

<sup>153</sup> See Weiner, *supra* note 15, at 745 (outlining the international human rights obligations of numerous contracting states to the Hague Convention).

<sup>154</sup> United Nations Human Rights, *Convention on the Rights of the Child* (1992), <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

<sup>155</sup> See *infra* Appendix.

the few jurisdictions with contextual exceptions appear to permit State authorities to consider a child's views.<sup>156</sup>

The Abduction Convention reserves to mature minors the discretion to choose where they will reside. The Convention excludes children over sixteen years of age from the return remedy<sup>157</sup> and permits States to reject return applications if a mature child objects to return.<sup>158</sup> This position accords with the United Nations Convention on the Rights of the Child, which requires States to give weight to the views of mature children in matters affecting them.<sup>159</sup>

Where travel regulations lack mechanisms for soliciting children's views, children may have no viable alternate recourse. Children may lack standing to seek the entry or modification of the custody orders needed if one parent fails to consent and the other is unable or unwilling to seek court intervention.<sup>160</sup> A child may be left with pursuing emancipation or delaying travel (where possible) until the child reaches the age of majority. Both of these alternatives may be detrimental. Although emancipation, where available, gives children the authority to apply for travel documentation without parental authorization, emancipation also may deprive children of the right to receive monetary support from parents and certain government benefits.<sup>161</sup> And, although some travel opportunities might be deferrable, others will not be, such as a school trip, a visit to an ailing relative, or the opportunity to travel to join a migrating parent, where a child's eligibility for immigration status is tied to his or her status as a dependent minor child. Dual consent requirements that lack a mechanism for taking a mature child's wishes into account ignore that children "are quite capable of being moral actors in their own right,"<sup>162</sup> and undermine the

---

<sup>156</sup> See 22 C.F.R. § 51.28(a)(5) (if exigent circumstances exist concerning the health of the child or special circumstances regarding the family); *Australian Passports Act 2005* s 11 (if special circumstances exist, the child's welfare would be adversely affected, or the child has an urgent need for travel because of a family crisis); *Sweden Questionnaire*, *supra* note 107, at 4 (if there are "very strong reasons for doing so").

<sup>157</sup> Hague Convention, *supra* note 6, art. 4.

<sup>158</sup> *Id.* at art. 13.

<sup>159</sup> United Nations Human Rights, *supra* note 153, at art. 12(1). The United Nations Convention on the Rights of the Child has 140 signatories and 193 parties to date. United Nations Treaty Collection, *Status of Treaties, Convention on the Rights of the Child* (Aug. 5, 2013), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV11&chapter=4&lang=en). Because it has so many signatories, the United Nations Convention on the Rights of the Child is argued to have obtained the status of customary international law, which binds all countries in the international community. See, e.g., Linda D. Elrod, "Please Let Me Stay": Hearing the Voice of the Child in Hague Abduction Cases, 63 OKLA. L. REV. 663, 672 (2011).

<sup>160</sup> See Lisa Vollendorf Martin, *What's Love Got to Do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457, 470-71 (2012) (explaining the concept of standing and the challenges it poses to children who seek to initiate legal claims).

<sup>161</sup> See Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 245 (1992).

<sup>162</sup> Elrod, *supra* note 159, at 664.

Hague Convention's recognition that older children should determine what serves their interests.

In short, dual consent requirements in most countries are more obstructive with regard to children's international travel with one parent than what is contemplated by the Hague Abduction Convention itself. Although this restrictiveness enhances the efficacy of dual consent requirements in preventing abduction, it often precludes parental conduct that would benefit children more than preserving the status quo.

#### D. Funneling Families to Court

By defaulting to the status quo, dual consent requirements funnel families into court in circumstances where no serious disputes exist regarding a child's travel. If a co-parent cannot be located or declines to consent to a child's travel, a parent's only alternative in most countries is to turn to court. By placing the burden to seek court approval on the parent who desires travel, dual consent requirements often generate custody cases in which there is no real contested issue to resolve because one parent is absent or lacks a serious objection. The frequency with which such cases arise in countries such as El Salvador has resulted in the creation of a separate court procedure to address travel authorization requests.<sup>163</sup> Funneling families to court in the absence of conflict may do more harm to families than good. Child custody cases involve high stakes; they shape the contours of one of the most important human relationships. Court intervention into families that are managing fine risks making families worse off by depleting family resources, generating conflict, and opening up settled parenting arrangements to court scrutiny.<sup>164</sup>

Even if an absent parent fails to participate, court proceedings often exact a significant toll on the parent who pursues the case. Such parents may accrue court costs and legal fees and may have to miss work to prepare and file paperwork and attend court hearings, which could result in lost wages.<sup>165</sup> Parents may experience anxiety about the uncertainty of the process or having private information put on public display, which can impact their interactions with their children.<sup>166</sup> The need to secure a court order may delay or foreclose the

---

<sup>163</sup> Interviews with Salvadoran lawyers, notes on file with author.

<sup>164</sup> See generally Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123-34 (1997).

<sup>165</sup> See generally Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123 (1993).

<sup>166</sup> See Weinstein, *supra* note 164, at 124.



opportunity for a child to travel where court dockets are overburdened or where a parent struggles to save for the required costs.<sup>167</sup>

Requiring single parents to initiate child custody litigation in the absence of parental conflict risks generating unnecessary tension and harming family relationships. Litigation rarely serves as a tool to build rapport and trust between adverse parties.<sup>168</sup> Custody litigation has a particular tendency to foment conflict between parents.<sup>169</sup> Legal standards encourage parents to highlight one another's deficiencies,<sup>170</sup> and may subject sensitive, intensely personal information about parents to court scrutiny, including physical and mental health conditions, living conditions, and romantic relationships. In contested proceedings, parents may call family members, friends, teachers, and other community members to take sides as witnesses. In countries such as the United States, parents also may have to open their homes to court social workers and undergo mental health evaluations.<sup>171</sup> All of these aspects of custody litigation tend to put parents on the defensive and encourage them to attack one another's character and choices.<sup>172</sup> For all of these reasons, custody litigation may denigrate parents' relationships with one another, which may negatively impact their children.<sup>173</sup>

The recognition of the detrimental impact of custody litigation on families has led courts in much of the United States to encourage families to pursue alternative dispute resolution in lieu of litigation.<sup>174</sup> Some countries have gone so far as to direct courts not to intervene in child custody arrangements unless intervention offers some specific benefit.<sup>175</sup> In the United Kingdom, for example, The Children Act of 1989 precludes a court from entering any orders relating to childrearing "unless it considers that doing so would be better for the

---

<sup>167</sup> Cf. Bruch & Bowermaster, *supra* note 87, at 248 (noting that custodial parents who wish to relocate with children within the United States face similar litigation burdens absent the consent of the other parent, even if the other parent is not interested in residential custody).

<sup>168</sup> See Weinstein, *supra* note 164, at 122.

<sup>169</sup> See, e.g., Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131-32 (2002); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 894-95 (2010); Weinstein, *supra* note 164, at 122.

<sup>170</sup> See Kelly, *supra* note 169, at 131.

<sup>171</sup> See Murphy, *supra* note 169, at 911-14.

<sup>172</sup> See Kelly, *supra* note 169, at 131-32.

<sup>173</sup> See, e.g., Kelly, *supra* note 169, at 131-32; Murphy, *supra* note 169, at 894-95.

<sup>174</sup> See, e.g., Murphy, *supra* note 169, at 891; Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009).

<sup>175</sup> Such countries include Germany, New Zealand, and the United Kingdom. See, e.g., Dethloff, *supra* note 29, at 319; N.V. Lowe, *The Allocation of Parental Rights and Responsibilities – The Position in England and Wales*, 39 FAM. L.Q. 267, 273 (2005). The Russian Federation has taken the opposite approach, requiring courts to address issues relating to children's residence and support before a divorce can be granted. Khazova, *supra* note 29, at 383.

child than making no order at all.”<sup>176</sup> The Act aims to “respect the integrity and independence of the family save where the court orders have some positive contribution to make towards the child’s welfare,”<sup>177</sup> and “reduce conflict and promote parental agreement and cooperation.”<sup>178</sup> To this end, the principle of non-intervention preserves parents’ “power to act independently of one another unless and until a court orders otherwise.”<sup>179</sup>

Dual consent requirements that force parents to seek court intervention in the absence of a co-parent’s consent buck this trend by requiring litigation before a parent can act, even in the absence of parental conflict regarding the decision. By requiring parents to seek court authorization even in the absence of conflict, dual consent requirements risk needlessly opening up settled parenting arrangements to scrutiny and possible reallocation. In every custody case, courts struggle to determine the best result for children. Courts have only limited information before them about parents and children and are constrained by legal standards that parents may not understand.<sup>180</sup> Some countries do not provide counsel in child custody proceedings to parents who cannot afford attorneys.<sup>181</sup>

<sup>176</sup> Children Act 1989 § 1(5) (U.K.), available at <http://www.legislation.gov.uk/ukpga/1989/41>. Some scholars and researchers argue that courts have taken the principle of non-intervention too far by resisting adjudicating custody disputes where parents want court intervention and vigorously pressuring parents to settle cases. See Rebecca Bailey-Harris, Jacqueline Barron & Julia Pearce, *Settlement Culture and the Use of the ‘No Order’ Principle under the Children Act 1989*, 11 CHILD & FAM. L.Q. 53, 53 (1999); S. Phillimore & A. Drane, *No More of the ‘No Order’ Principle*, FAM. LAW 40, 42 (1999).

<sup>177</sup> See Lowe, *supra* note 175, at 273.

<sup>178</sup> United Kingdom Department of Health, 1 GUIDANCE & REGULATIONS, *Court Orders* at ¶ 1.15 (2008).

<sup>179</sup> The Law Commission, *Family Law Review of Child Law Guardianship and Custody* No. 172, HC 594, at 2.10 (July 25, 1988).

<sup>180</sup> See Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 112-16 (2001).

<sup>181</sup> There is no federal right to counsel in civil proceedings in the United States. See *Turner v. Rogers*, 131 S. Ct. 2507, 2513 (2011). The federal government provides a limited amount of funding to civil legal aid programs. See Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009) [hereinafter *Documenting the Justice Gap in America*]. Most states in the U.S. have enacted legislation providing state funded counsel for low income parties in selected types of proceedings, typically cases regarding the termination of parental rights. See Alan W. Houseman, *Civil Legal Aid in the United States: An Update for 2009*, CENTER FOR L. & SOC. POL’Y REP., 15-17 (July 2009); Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (July-Aug. 2006). Only a handful of states in the U.S. have also extended the right to the appointment of state funded counsel to certain child custody proceedings. See Abel & Rettig, *supra*, at 245 (collecting state laws, and identifying Louisiana, Massachusetts, New York, and Oregon as providing counsel in some child custody proceedings). By contrast, most European and Commonwealth countries recognize a right to civil legal aid and provide free civil legal assistance to the poor in a range of matters, including child custody proceedings. See, e.g., AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES

In countries such as the United States, low-income parents often represent themselves in custody proceedings because providers of free civil legal services can meet only a fraction of the demand for their assistance.<sup>182</sup> Often, cases turn out very differently than parents hope or expect. In the United States, for example, courts on several occasions have switched custody to a previously uninvolved parent when a custodial parent sought permission to relocate with a child.<sup>183</sup> Dramatic changes in parenting arrangements do not ensue from every custody case. Nonetheless, the risk that unexpected changes may result from custody proceedings may deter some parents from seeking court intervention, even when they believe travel would benefit a child.

In sum, the custody litigation generated by dual consent requirements has the potential to create significant harm for families. From an abduction prevention perspective, such harm may be viewed as a worthwhile cost of ensuring that parents' custody rights are not deprived by a co-parent's unilateral decision to remove a child from the jurisdiction. Yet, in the many families in which one parent is absent and in the cases where there is no real dispute about whether a child should travel, no countervailing benefit exists. Instead, in these cases, dual consent requirements safeguard inchoate parental rights to a greater extent than what the Abduction Convention contemplates, to the detriment of children and caretaking parents.

### E. Imposing Special Hardships on the Poor

Dual consent requirements disproportionately burden families living in poverty, for several reasons. First, low-income parents—especially mothers—are much more likely to be parenting on their own than middle and upper class parents. For example, in the United States, where education level is often related

---

112A, RESOLUTION ON A CIVIL RIGHT TO COUNSEL 3 (2006); Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 789 (2006) (collecting and comparing laws on the provision of free civil legal aid); Lua Kamal Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863 (2003-2004) (collecting and analyzing the provision of civil legal aid in several Western European countries).

<sup>182</sup> See Berenson, *supra* note 180, at 105; Murphy, *supra* note 165, at 123.

<sup>183</sup> See, e.g., *Nichols v. Nichols*, 792 S.W.2d 713 (Tenn. 1990), *overruled by Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996); *Melton v. Collins*, 134 S.W.3d 749, 755 (Mo. Ct. App. 2004) (holding that the mother's failure to adequately notify the father of relocation constituted a change in circumstances warranting custody to be awarded to the father); *Helentjaris v. Sudano*, 476 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1984) (overturning lower court ruling that mother could retain custody only if she moved back to New Jersey with the child and resided within forty miles of the child's father); *Helen H. v. Christopher T.*, 850 N.Y.S.2d 99, 100 (N.Y. App. Div. 2008) (modifying custody order and granting custody to the father since the mother's relocation to Australia would "irreparably harm" the father's relationship with his child); see also Bruch & Bowermaster, *supra* note 87, at 248 ("[C]ustodial parents in many states are unable to make reasonable plans for themselves and their families . . . without placing the custody of their children seriously at risk.").

to financial wealth, “[l]ess than 10 percent of the births to college-educated women occur outside marriage, while for women with high school degrees or less [education] the figure is nearly 60 percent.”<sup>184</sup> The absence of fathers is often a contributing cause of poverty for children raised by single mothers.<sup>185</sup>

Locating an absent low income individual to seek consent presents numerous challenges unlikely to exist in the case of a higher income individual. Individuals with limited financial means may live in informal arrangements such as boarding houses, or with family members or friends, and therefore may not have a registered home address. Poor people are more likely to exclusively use pay as you go cell phones for telephone communication, which results in frequently changing phone numbers and exclusion from published telephone number listings.<sup>186</sup> Poor people also are less likely to have an Internet presence on business or social networking sites or email addresses that they use with regularity.<sup>187</sup> In countries where migration is common, an absent father might be deliberately living “underground” in a country where he lacks immigration status to avoid detection by government authorities.<sup>188</sup> If a single mother also has limited economic resources, she may have limited time and money to devote to a search.<sup>189</sup> For all of these reasons, it may be difficult for a low income parent even to locate an absent co-parent to seek his or her consent.

Second, low income parents are less likely than their middle and upper class counterparts to have a court custody order in place that designates each parent’s authority over travel decisions and outlines how to resolve conflicts. Low-income parents may lack knowledge about custody, abduction, and travel laws, and may be unaware that they must seek court intervention to resolve disputes about travel.<sup>190</sup> Even if they are aware of the need for judicial intervention, low-income parents often lack the resources to seek court custody

---

<sup>184</sup> Steven Strauss, *The Connection Between Education, Income Inequality, and Unemployment*, HUFFINGTON POST, Nov. 2, 2011; Jason DeParle, *Two Classes in America, Divided by ‘I Do,’* N.Y. TIMES, July 15, 2012 at 1, 16.

<sup>185</sup> See Karen Czapanskiy, *supra*, note 25, at 1455 (“A woman who loses access to the economic support of a partner is more likely than a man to experience poverty.”).

<sup>186</sup> See Marc Lifsher, *More cellphone users switch to prepaid plans*, L.A. TIMES (Feb. 19, 2013), <http://articles.latimes.com/2013/feb/19/business/la-fi-0220-prepaid-cellphone-boom-20130220>.

<sup>187</sup> See Denise Narcisse, *Disconnected, Disenfranchised, and Poor: Addressing Digital Inequality in America* (Nov. 8, 2010), <http://workingclassstudies.wordpress.com/2010/11/08/disconnected-disenfranchised-and-poor-addressing-digital-inequality-in-america/>.

<sup>188</sup> See Lucas Guttentag, *Immigration Reform: A Civil Rights Issue*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 157, 159 (2007).

<sup>189</sup> See Matthew Shin, *The Race to Get in, and the Struggle to Get Out: The Problem of Inter-Generational Poverty in Federal Housing Programs*, 40 WASH. U. J.L. & POL’Y 337, 359 (2012).

<sup>190</sup> J.R. Johnston, I. Sagatun-Edwards, M. Blomquist & L.K. Girdner, *Prevention of Parent or Family Abduction Through Early Identification of Risk Factors*, 2-6 (1998).

determinations,<sup>191</sup> and may lack faith in the ability of the legal system to meet their needs.<sup>192</sup>

Obtaining a custody order to resolve a travel dispute is no simple matter for any parent, and especially for a parent of limited financial means. To access the courts, parents living in poverty may need to overcome multiple barriers that do not generally similarly limit people with greater financial resources.<sup>193</sup> These barriers include having limited access to information about the law and court processes, low literacy, limited proficiency in the local language, and limited ability to absorb the economic costs of litigation such as lost wages, travel, and filing fees.<sup>194</sup>

The limited availability of free legal services for low-income parents in some countries presents an additional barrier to accessing the courts to resolve custody disputes.<sup>195</sup> For example, in the United States, child custody issues are among the most frequently identified needs for legal representation by the low income community, and legal aid providers are able to meet only a small fraction of the demand.<sup>196</sup> The typical complexity, high stakes, and emotional nature of child custody determinations make them especially difficult to navigate without counsel. To the extent that low income parents are more likely to have experienced issues such as a history of domestic violence, a history of child abuse by one parent, or a history of substance abuse or mental health problems by one or both parents, their custody cases may be more complex and high conflict, making the need for full legal representation more pressing. For all of these reasons, dual consent requirements may pose disproportionate barriers to low income parents.

#### IV. WHERE DO WE GO FROM HERE?

Generalized requirements that both of a child's parents affirmatively consent before a child travels outside the child's country of residence pose

---

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See Timothy Noelker, *The Uniform Child Custody Jurisdiction Act: The Difficulties It Presents for Poor People*, 11 CLEARINGHOUSE REV. 222, 223 (1977-78) ("Under the current system it is too easy for the parent with the most money to make the best custody case."); see also Donald J. Horowitz, *Technology, Values, and the Justice System: The Evolution of the Access to Justice Technology Bill of Rights*, 79 WASH. L. REV. 77, 79 (2004).

<sup>194</sup> Similar barriers prevent some indigent individuals from seeking civil legal assistance. See *Documenting the Justice Gap in America*, *supra* note 181, at 11.

<sup>195</sup> For more detailed information about the provision of free civil legal aid in several countries, see *supra* note 183 and accompanying text.

<sup>196</sup> See, e.g., DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMMISSION, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW-INCOME COMMUNITY (2008); Murphy, *supra* note 165, at 123; *Documenting the Justice Gap in America*, *supra* note 181, at 11 (documenting that family law represented the area in which civil legal aid programs were most often unable to provide services to individuals seeking assistance).

numerous potential harms to families. Proponents of strong preventative measures may submit that the effectiveness of dual consent requirements in preventing international child abduction far outweighs their costs. Abduction is devastating for many children and parents and the work the global community has undertaken to combat the problem is commendable.

But, with the continued rise of single parent families and the frequency with which parents abduct their children to protect them, there is room for debate as to whether the harms of dual consent requirements outweigh their costs. Reforming dual consent measures to give parents greater latitude to make unilateral travel decisions for their children may better serve children's interests overall. Three approaches would advance this goal while continuing to protect against abduction: permitting officials to waive dual consent for relocation travel in limited circumstances, permitting children to travel on short trips with the consent of one parent, and granting state social agencies the authority to determine whether travel should occur when parents disagree. The Permanent Bureau should revise the recommendations regarding dual consent requirements within the Guide to Good Practice Part III: Preventative Measures to encourage contracting states to adopt these modified approaches.

#### A. Dual Consent with Limited Exceptions

To better serve children's interests while also preventing harmful abductions, countries could reconfigure dual consent requirements to match the contours of the Hague Convention, limiting the children to whom they apply and giving officials discretion to waive the requirements in limited circumstances that benefit the child. Several countries do not require dual consent where a child has reached a certain age,<sup>197</sup> has only one living parent,<sup>198</sup> has only one parent with rights of custody,<sup>199</sup> or where a court has given one parent permission to obtain travel documentation.<sup>200</sup> Such limitations align dual consent measures more closely to the contours of the Hague Convention by granting only parents who would be entitled to invoke the return remedy in the case of abduction (those

---

<sup>197</sup> In the United States, minor children over the age of sixteen may apply for their own passports without parental consent, although passport officials have the discretion to require the consent of one parent. 22 C.F.R. § 51.28(b) (2012). In Croatia, children over the age of sixteen may depart the country without a parent's consent. *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_hr.pdf](http://www.hcch.net/upload/wop/prevmeas_hr.pdf) (Croatia's response to Question 2) [hereinafter *Croatia Questionnaire*].

<sup>198</sup> 22 C.F.R. § 51.28(a)(3).

<sup>199</sup> *Id.*; *Questionnaire on Preventative Measures*, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_de.pdf](http://www.hcch.net/upload/wop/prevmeas_de.pdf) (Germany's response to Question 2); *Sweden Questionnaire*, *supra* note 107, at 4.

<sup>200</sup> 22 CFR § 51.28(a)(3); Law of Integral Protection of Childhood and Adolescence, Legislative Decree No. 839, March 26, 2009 (El Sal.); *See* Dec. No. 95-98, Dec. 17, 1998, c. ii, art. 53 (Guat.).

with rights of custody) the right to consent to travel before it occurs,<sup>201</sup> and by permitting older children to make their own decisions about travel.<sup>202</sup>

Countries also have created exceptions to dual consent requirements in particular circumstances where issuing travel documentation without a demonstration of parental consent would benefit a child, such as where: one parent is absent;<sup>203</sup> the safety, health or welfare of the child is at imminent risk;<sup>204</sup> the child would be separated from the rest of the child's traveling party;<sup>205</sup> a child's family situation makes it "exceptionally difficult" for a parent to demonstrate consent;<sup>206</sup> compelling humanitarian circumstances exist in which the lack of a passport would jeopardize a child's health, safety, or welfare;<sup>207</sup> and travel to a child's home state is necessary to permit a court to adjudicate or enforce a custody determination.<sup>208</sup> Some countries have accorded government officials discretion to issue travel documentation absent dual consent in a broader range of circumstances. In Croatia, for example, when parents disagree, the Center for Social Welfare determines whether travel documents should issue based on "the wellbeing of the child."<sup>209</sup> In Finland, officials are directed to keep the best interest of a child in mind when deciding whether to issue a passport.<sup>210</sup> In Sweden, a passport may be issued without one parent's consent if there "are very strong reasons for doing so;"<sup>211</sup> in Iceland, upon proof that a parent cannot sign a passport application "for any other reason," and in Australia, "where special circumstances exist."<sup>212</sup> Such exceptions have the potential to enable children to travel with one parent in circumstances the Hague Convention recognizes to serve children's interests, including where one parent fails to actually exercise his or her rights; the child would face a grave risk of harm, an

<sup>201</sup> Hague Convention, *supra* note 6, art. 3.

<sup>202</sup> Hague Convention, *supra* note 6, art. 4.

<sup>203</sup> See Act. No. 136/1998 (Ice.); Regulation no. 624/1999 (Ice.); *Iceland Questionnaire*, *supra* note 107, at 2; Law of Integral Protection of Childhood and Adolescence, Legislative Decree No. 839, March 26, 2009 (El Sal.) (authorizing the Attorney General's Office to enter an opinion permitting issuance of a passport where one parent is absent).

<sup>204</sup> 22 C.F.R. § 51.28(a)(5)(i) (2012); Act. No. 136/1998 (Ice.); Regulation no. 624/1999 (Ice.).

<sup>205</sup> *Id.*

<sup>206</sup> 22 C.F.R. § 51.28(a)(5)(ii) (2012).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *Croatia Questionnaire*, *supra* note 197, at 2.

<sup>210</sup> *Response of Finland to Questionnaire on Preventative Measures* at 2, Hague Conference on Private International Law (2003), [http://www.hcch.net/upload/wop/prevmeas\\_fi.pdf](http://www.hcch.net/upload/wop/prevmeas_fi.pdf).

<sup>211</sup> See 1978 Swedish Passport Act; *Sweden Questionnaire*, *supra* note 107, at 4. According to the Swedish government, the exception is applied "very restrictively" in practice. As an example, "a passport might be issued even though consent has not been given by both custodians if one of the custodians cannot be reached and where it is obvious that a consent would have been given." *Id.*

<sup>212</sup> See Act. No. 136/1998 (Ice.); Regulation no. 624/1999 (Ice.); *Iceland Questionnaire*, *supra* note 107, at 2; *Australian Passports Act 2005* s 11.

intolerable situation, or violations of human rights; or the child wishes to travel for some serious reason.

By tailoring dual consent requirements to reflect the contours of the Hague Convention's remedy of return, this approach takes greater account of the interests of children in travel and could avoid some of the harms caused by blanket dual consent provisions. The approach requires that notice be given and consent obtained from most parents before a child travels, but enables children and parents to bypass parental notice and consent requirements when important interests are at stake.

The approach recognizes that when a parent makes a *prima facie* showing to consular officials that an enumerated circumstance exists, it better serves a child to permit travel than to prioritize notifying a co-parent or enabling a co-parent's objection to preserve the status quo. This approach, therefore, in some circumstances places the burden on left behind parents to litigate any objections in the child's new country. This approach would not immunize parents who receive approval to travel from other potential sources of liability. Determinations of consular officials regarding a parent's authority to secure a passport for or exit the country with a child are limited to that issue alone. Simply because a parent is permitted to secure a passport for or exit the country with a child neither relieves the parent of potential liability for violating criminal anti-abduction provisions, nor insulates the parent from the adverse determinations in a proceeding for return under the Hague Convention or in a child custody adjudication that could result from a wrongful removal. The magnitude of these potential consequences are likely to deter many parents from traveling without a co-parent's consent even if they could qualify for an exemption. Additionally, in many countries, parents who have reason to believe their child is at risk of abduction can invoke protective mechanisms that preclude the issuance of a child's passport under any circumstance, revoke passports previously issued, and alert border control authorities to prohibit a child from exiting the country.<sup>213</sup>

It also might be objected that this approach could convert reviews of passport applications to mini-custody adjudications not within the expertise or purview of passport officers to resolve. To prevent backlogs and ensure that applications invoking exceptions are handled with care, countries could require officials with special training to address such cases and provide detailed guidance for decision-makers.<sup>214</sup>

## **B. Single Consent for Short Trips**

---

<sup>213</sup> See *Preventive Measures Guide*, *supra* note 5.

<sup>214</sup> See 22 C.F.R. § 51.28(a)(5)(iv) (2012) (requiring all determinations of whether exceptions to the dual consent requirement apply to be made by senior passport officers in accordance with guidance issued by the U.S. State Department); see also 7 FAM 1300 Passport Services (citing specific guidance to be used by passport officers when determining whether to issue a United States passport).



In addition to tailoring dual consent requirements to better advance children's interests, countries with exit controls could adopt the approach of Norway and permit children to travel on short trips abroad with parents who have decision-making authority without the second parent's consent.<sup>215</sup> Parents who object to travel or are concerned about a risk of abduction in Norway can seek a court order prohibiting travel and imposing protective measures including the revocation of a child's passport, the institution of a police travel ban, or the temporary transfer of a child's residence while a dispute regarding travel is ongoing.<sup>216</sup> This approach assumes that short-term travel with one parent typically benefits children, and creates mechanisms for preventing travel where this is demonstrated not to be the case. By placing the burden on a parent objecting to travel to take action to preclude it, this approach ensures that a child will not be prevented from traveling where a parent is absent, unmotivated to demonstrate consent, or simply displeased with the idea of a child traveling, but is not sufficiently concerned about travel plans to pursue court intervention.

To the extent this approach makes it easier for one parent to travel without notifying a child's other parent, it increases the risk that a child will be abducted in circumstances that are harmful to the child. As the Preventative Measures Guide notes, "[g]enerally applicable measures are vital in preventing abduction in cases where there was no prior warning and therefore no opportunity to implement other more specific preventative measures."<sup>217</sup> Fears of abduction are well-founded, especially because only about half of abductions generating Hague petitions result in the return of the child.<sup>218</sup> To mitigate the risk that a parent asserting plans to take a short trip with a child will not return, countries could require parents to affirm a promise to return under oath and submit to consular officials proof of their intent to return, which could include evidence similar to that evaluated when determining whether to issue tourist visas, including proof of ongoing financial, employment, or social ties to the

---

<sup>215</sup> The Children Act No. 7, § 43a, Apr. 1981 (Nor.). Norway's laws regarding the allocation of parental decision-making authority set forth parents' rights to participate in decisions regarding travel. It is not clear whether border officials in Norway demand proof that these standards are satisfied when one parent attempts to leave Norway with a child. Chile also permits courts to issue an order enabling a parent with custody of a child to take short trips abroad with the child without seeking consent of a co-parent or court approval where a co-parent has failed to maintain a regular relationship with the child. Minors Law 16,618, art. 49 (Chile). Denmark's Regional State Administration may authorize short trips abroad for minors where parents disagree. The Danish Act on Parental Responsibility, ch. 4, art. 25.

<sup>216</sup> *Id.*

<sup>217</sup> *Preventative Measures Guide*, *supra* note 5, at 4.

<sup>218</sup> See Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Global Report*, May 2011, available at: <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>; Nigel V. Lowe and Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41 (2012).

home country. Countries could also require parents with sufficient economic means to post bonds, which would obligate a traveling parent to pay a significant financial penalty if the parent fails to return.

Permitting single consent for short trips might also be criticized as risking an increase in abduction overall by reducing deterrence. Dual consent requirements are thought to discourage parents from abducting children by making it difficult for them to leave the country with a child.<sup>219</sup> Without the hurdle of dual consent to overcome, abduction might seem a more viable option and more parents might be tempted to pursue it. Although this concern is important, it is impossible to measure the relative deterrent effect of preventative measures to understand how one preventative measure works better or worse than another. Most contracting states to the Hague Convention have adopted a wide range of measures to deter abduction, including travel restrictions, criminal penalties, factors in child custody determinations, and the return remedy itself.<sup>220</sup> Several countries with robust anti-abduction protections have chosen not to incorporate dual consent restrictions. The United Kingdom and New Zealand, for example, permit children to obtain passports and exit their countries where only one parent with rights of custody consents.<sup>221</sup> Similarly, although the United States requires dual consent for passport issuance, it lacks exit controls and therefore has no system in place for monitoring parental consent to particular trips, and no passports are required for travel between many countries, such as the twenty-six European countries within the Schengen Borders.<sup>222</sup> Although some parents might be less apt to abduct a child if hampered in securing travel documentation, for others more important concerns might be the risk of criminal consequences or adverse future custody determinations. Given the range of deterrent mechanisms in place worldwide, eliminating dual consent requirements alone for short trips seems unlikely to increase the desirability of abduction for parents.

### C. A Role for Social Authorities

---

<sup>219</sup> See *Preventative Measures Guide*, *supra* note 5, at 8.

<sup>220</sup> See *Preventative Measures Guide*, *supra* note 5.

<sup>221</sup> See Child Abduction Act, 1984, c. 37, §1(1)–(3) (Eng.); Passports Act 1992 art. 4(3)(a) (N.Z.).

<sup>222</sup> See *Written testimony of U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement for a House Committee on Homeland Security, Subcommittee on Border and Maritime Security hearing titled “Fulfilling A Key 9/11 Commission Recommendation: Implementing Biometric Exit,”* UNITED STATES DEPARTMENT OF HOMELAND SECURITY <http://www.dhs.gov/news/2013/09/26/written-testimony-cbp-and-ice-house-homeland-security-subcommittee-border-and> (last visited April 25, 2014); *Schengen Borders Code*, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006.

Countries with dual consent requirements also might consider granting social agencies the authority in the first instance to determine whether a child should travel when no clear exception to dual consent requirements applies and parents disagree, while reserving to parents the option to seek a court custody order or modify an existing order if they remain unsatisfied with an agency's determination. Social authorities currently play a role in resolving parental disputes regarding travel in countries such as Croatia<sup>223</sup> and Sweden.<sup>224</sup> Granting social agencies a role in resolving travel disputes between parents has several potential benefits. First, this approach reduces the power of the dual consent veto to deter parents from pursuing beneficial travel because of access to justice issues or a general wariness of litigation. Directing parental disputes over travel documentation to social authorities in the first instance may encourage parents to advocate for a child to travel in circumstances where cost, employment obligations, prior negative court experiences, or simple weariness of custody litigation might otherwise deter them from pushing the issue in court regardless of the potential benefit for the child.<sup>225</sup> Second, involving social agencies may discourage parents from opposing travel for unmeritorious reasons by providing oversight. Requiring parents opposed to travel to explain and justify their position to social authorities could decrease the potential for parents to abuse the veto power and prevent parents from stymieing travel through inaction. Finally, creating an alternative mechanism for resolving parental travel disputes may limit court involvement to cases where one parent believes court intervention is necessary and is sufficiently concerned about travel to invest the requisite resources in initiating a case. This, in turn, may relieve burdens on court dockets and avoid imposing the potential harms of custody litigation on families where it can be avoided.

Vesting power in social agencies is not without potential downsides. The same lack of formal procedures and public accountability that make social agencies more accessible may risk undermining parents' ability to fully and fairly articulate their concerns and understand their legal rights.<sup>226</sup> States could reduce these harms by providing parents with information about applicable laws and processes and notifying parents that they have the right to seek court resolution of travel disputes if they object to the resolution reached by social authorities.

---

<sup>223</sup> See *Croatia Questionnaire*, *supra* note 197, at 2. Where one parent fails to consent to the issuance of travel documentation for a child, the State Center for Social Welfare determines whether the documents should issue based on "the wellbeing of the child."

<sup>224</sup> See *Sweden Questionnaire*, *supra* note 107, at 4. When parents disagree, officials must consult social authorities as to whether travel documents should issue.

<sup>225</sup> See *supra* Part III.D-E.

<sup>226</sup> See generally Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891 (2010).

## V. CONCLUSION

The key assumption behind dual consent policies—that preventing children’s travel unless both parents are involved best serves children’s interests—does not hold true for many families. A recalibration of dual consent requirements is needed to enable parents to act alone to authorize travel in circumstances that benefit their children. The good news is that the problems caused by dual consent requirements are fixable. Unlike analogous problems with the Hague Convention’s return remedy, they require policy change only at the domestic level, and several model policies are in force in countries with robust anti-abduction programs. Giving parents greater latitude to travel with children will better protect children’s interests without opening the floodgates to international abduction.

## VI. APPENDIX – DUAL CONSENT REQUIREMENTS BY COUNTRY

Appendix – Dual Consent Requirements by Country

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Algeria <sup>i</sup>	Yes – if the parents share joint custody, the father's consent is needed.	A parent with sole custody can apply alone.			Evidence of father's consent required for child to travel, memorialized on official form, <i>Authorisation Paternelle de Sortie du Territoire National d'un Enfant Mineur</i> . Local police must also endorse the form, on father's application.		Evidence of father's consent required for child to travel, memorialized on official form.
Argentina <sup>ii</sup>	Yes				Yes – must present a notarized document with both parents' signatures		Air and sea carriers demand evidence of dual consent for minors boarding internationally bound vessels.
Australia <sup>iii</sup>	Yes	A parent may apply alone if special circumstances exist, if the child's welfare would be adversely affected if the child were unable to travel, or if the child urgently needs to travel because of a family crisis.	No		No		Parents may serve air carriers with notice of custody proceeding or court orders barring removal of a child; air carriers may be fined for ignoring notification.

<sup>i</sup> See Anne-Marie Hutchinson & Henry Setright, INTERNATIONAL PARENTAL CHILD ABDUCTION 61-62 (1998); Consulate of Algeria (Sept. 2, 2013), <http://www.algerian-consulate.org.uk/Passportid.asp>.

<sup>ii</sup> See Response of Argentina to the Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at: [http://www.hcch.net/upload/wop/prevmeas\\_ar.pdf](http://www.hcch.net/upload/wop/prevmeas_ar.pdf).

<sup>iii</sup> See Anne-Marie Hutchinson & Henry Setright, INTERNATIONAL PARENTAL CHILD ABDUCTION 63-65 (1998).

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Austria <sup>i</sup>	Yes – both parents must sign an affidavit at the issuing agency or before a notary.	If parents are divorced, the custodial parent may apply, but the divorce decree must be presented			No		No
Belize <sup>ii</sup>	No		Yes. Children traveling with one parent must produce a notarized letter demonstrating the other parents' consent or evidence of parent's sole authority.		No		No
Canada <sup>iii</sup>	No	If parents are divorced or separated and a court order or separation agreement grants a noncustodial parent access, parent must provide evidence that passport issuance complies with the order or agreement.	No firm requirement, but children traveling with only one parent are encouraged to have notarized parental consent letters or evidence that the accompanying parent has sole custody.		No firm requirement, but children traveling with only one parent are encouraged to have notarized parental consent letters or evidence that the accompanying parent has sole custody.		Air carriers may request notarized parental consent letters if a child is traveling with only one parent.

<sup>i</sup> See Response of Austria to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_at.pdf](http://www.hcch.net/upload/wop/prevmeas_at.pdf); Press and Information Service, Embassy of Austria, <http://www.austria.org/austrians/citizens/passport> (last visited Sept. 30, 2013).

<sup>ii</sup> See Passports Act, 2003, c. 164 (Belize): Belize Child Passport Application, BELIZE GOVERNMENT, available at <http://www.nifa.gov.bz/images/documents/New%20Child%20Passport%20Form.pdf> (last visited Aug. 8, 2013); <http://travelbelize.org/getting-here-visas-and-immigration>.

<sup>iii</sup> See Canadian Passport Order, SI/81-86; see also Citizenship and Immigration Canada, Prepare for arrival – Visit Canada, available at <http://www.cic.gc.ca/english/visit/arriving.asp>; Travel.gc.ca, Consent Letter for Children Traveling Abroad, available at <http://travel.gc.ca/traveling/children/consent-letter>; Response of Canada to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_ca.pdf](http://www.hcch.net/upload/wop/prevmeas_ca.pdf)

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Chile <sup>i</sup>	Yes		Minor traveling with only one parent must have a notarized consent from the other parent.		Yes. Must have notarized consent from each parent with custody or visitation rights.	A court may issue an order permitting a custodial parent to travel with a child on short trips without seeking parental consent if the other parent has failed to maintain a regular relationship with the child.	
Costa Rica <sup>ii</sup>	Yes. Parents must both be present to apply.	One parent may apply alone if the other parent is found absent.	Yes. Minors must present evidence of parental consent to depart from their country of habitual residence.		Yes. Notarized consent of both parents with parental authority is required or a child's legal guardian or persons authorized by parents to give consent in their absence.	Married Child 16 or older, parent has sole authority, one parent is found absent, court authorization or authorization of Executive President of the National Council for Children in urgent circumstances.	
Croatia <sup>iii</sup>	Yes	The Center for Social Welfare will consider whether documents should be issued based on the wellbeing of the child if parents do not agree.			Yes if child under 16 and not traveling with a parent	Child 16 or older	Yes

<sup>i</sup> See Minors Law 16,618, art. 49 (Chile); Chile Abroad, Embassies, Consulates and Multilateral Missions of Chile, <http://chileabroad.gov.cl/en/tramites/para-chilenos/asuntos-familiares/autorizacion-a-menores-para-viajar/> (last visited Sept. 30, 2013).

<sup>ii</sup> See Regulation for the Application of the General Law of Migration and Foreign No. 8674, for Minors, Executive Decree No. 36659-G, May 23, 2011, (Costa Rica).

<sup>iii</sup> See Response of Croatia to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_hr.pdf](http://www.hcch.net/upload/wop/prevmeas_hr.pdf).

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Denmark <sup>i</sup>	Yes		No		If parents with joint custody disagree about travel or the parent without custody wishes to take the child abroad and the parent with sole custody won't agree, the "regional administration" may allow travel abroad for a short period.		No
Dominican Republic <sup>ii</sup>	Yes – non-custodial parents must sign a notarized affidavit				Yes. Children traveling without parents must present notarized authorization of their parents. A child traveling with only one parent must present the written consent of the other parent.	A court may authorize travel where parents disagree.	
El Salvador <sup>iii</sup>	Yes	If one parent is absent the Attorney General's Office can issue a binding opinion permitting issuance of the passport. If one parent disagrees, parent can seek authorization from a court or an award of sole custody.			Yes. Notarized consent of all parents with legal authority required.	If one parent is absent the Attorney General's Office can issue a binding opinion authorizing the child to leave the country. If one parent disagrees, parent can seek authorization from a court or an award of sole custody.	

<sup>i</sup> See The Danish Act on Parental Responsibility, Response of Denmark to Questionnaire on Preventative Measures, Hague Conference on Private International Law (Apr. 2, 2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_dk.pdf](http://www.hcch.net/upload/wop/prevmeas_dk.pdf); <http://www.boerborfoetelse.dk/en/moving-and-travelling/going-abroad/>

<sup>ii</sup> See The Code of the Minor, enacted by Law No. 136-03, art. 204, Aug. 7, 2003 (Dom. Rep.).

<sup>iii</sup> See Dec. Ley No. 1020, 10 Mar. 1982, Ley de Expedición y Revalidación de Pasaportes y Autorizaciones de Entrada a la Republica [Law of Issue and Revalidation of Passports and Authorization of Entry to the Republic] ch. IX, Art. 53 DIARIO OFICIAL, 10 Mar. 1982 (El Sal.).

Dec. Ley No. 839, 16 Apr. 2009, Ley de Protección Integral de la Niñez y Adolescencia [Law on Protection of Children and Adolescents] tit. ii, Art. 44, DIARIO OFICIAL, 16 Apr. 2009 (El Sal.).



Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Estonia <sup>i</sup>	No						No
Finland <sup>ii</sup>	Yes	Passport officials must keep the best interest of the child in mind when determining whether to issue or withdraw a passport. May issue passport without consent of both parents under "special grounds" if consent can't be given due to illness, travel or similar reason.	Yes				No
Germany <sup>iii</sup>	Yes	A parent with sole custody can apply alone.	No		No		No
Greece <sup>iv</sup>	Yes	A parent with sole custody can apply alone.	No		Custodial parent can file a "Warning to Police Authorities" to prevent minor child from leaving the country.		No
Guatemala <sup>v</sup>	Yes. Parents must appear in person or at a consulate abroad or submit notarized authorization	A parent with sole parental authority can apply alone. A court can authorize a parent to act alone in the case of disagreement.			Yes. Notarized consent of all parents with legal authority required.	A parent with sole parental authority can authorize alone. A court can authorize travel with only one parent's consent.	

<sup>i</sup> See Response of Estonia to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hchb.net/upload/wop/prevmeas\\_ee.pdf](http://www.hchb.net/upload/wop/prevmeas_ee.pdf); Police and Border Guard, Estonian citizen's passport for a child, <https://www.politsei.ee/en/teenused/sisikut-toendavad-dokumendid/deest-kodaniku-pass/lapsele/> (last visited Sept. 30, 2013).

<sup>ii</sup> See Response of Finland to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hchb.net/upload/wop/prevmeas\\_fi.pdf](http://www.hchb.net/upload/wop/prevmeas_fi.pdf); The Finnish Police website. Issuing a passport to a minor, <http://www.politisi.fi/politisi/home.nsf/pages/6C8BEB774DDE0FF1C22578D0D0396318?opendocument> (last visited Sept. 30, 2013).

<sup>iii</sup> See Response of Germany to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hchb.net/upload/wop/prevmeas\\_de.pdf](http://www.hchb.net/upload/wop/prevmeas_de.pdf).

<sup>iv</sup> See Anne-Marie Hutchinson & Henry Setright, INTERNATIONAL PARENTAL CHILD ABDUCTION 104-06 (Jordan Publ'g Ltd., 1998).

<sup>v</sup> See Dec. No. 95-98, Dec. 17, 1998, c. ii, art. 53 (Guat.).

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Honduras <sup>i</sup>	Yes. Parents must appear in person or submit notarized authorization.	A parent with sole parental authority can apply alone. Emancipated minors do not need parental consent.			Yes. Notarized consent of all parents with legal authority required.	A parent with sole authority can authorize alone. A court can authorize travel with only one parent's consent. One-time authorization for any travel is sufficient for minors 18-21 years old.	
Hong Kong <sup>ii</sup>	No						No
Iceland <sup>iii</sup>	Yes	If one parent is sick, absent, or for any other reason cannot sign the application.	Yes. Consent of both parents and accompaniment by one parent required.		No		Can be notified if restraining order obtained preventing travel
Ireland <sup>iv</sup>	Yes	Children born to unmarried mothers are automatically included in the mother's passport. Consent of the mother is required for the child to be issued a separate passport in these circumstances. A court can authorize issuance where parents disagree.			No		

<sup>i</sup> See Accord No. 018-2004, May 2004 (Hond.); Decree 208-2003 of December 12, 2003 (Hond.).

<sup>ii</sup> See Response of Hong Kong to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmcas\\_hk.pdf](http://www.hcch.net/upload/wop/prevmcas_hk.pdf).

<sup>iii</sup> See Act No. 136/1998 (Icc.); Regulation No. 624/1999 (Icc.); Response of Iceland to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmcas\\_is.pdf](http://www.hcch.net/upload/wop/prevmcas_is.pdf).

<sup>iv</sup> See Anne-Marie Hutchinson & Henry Serright, INTERNATIONAL PARENTAL CHILD ABDUCTION 121-22 (1998).

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Israel <sup>i</sup>	Yes. If parents are married, only one parent must appear in person with written consent of the other parent. If parents are divorced or separated, both must appear.				No		
Italy <sup>ii</sup>	Yes. If parents are separated, evidence of court authorization also required.						
Malta <sup>iii</sup>	Yes						
New Zealand <sup>iv</sup>	No. A parent will only be restricted from applying if a court order limiting issuance is made or registered in NZ		No				No
Nicaragua <sup>v</sup>	No				Yes. Notarized consent of both parents required.		

<sup>i</sup> See Response of Israel to Questionnaire on Preventative Measures, Hague Conference on Private International Law (Mar. 30, 2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_il.pdf](http://www.hcch.net/upload/wop/prevmeas_il.pdf).

<sup>ii</sup> See Anne-Marie Hutchinson & Henry Seiright, INTERNATIONAL PARENTAL CHILD ABDUCTION 132-34 (1998).

<sup>iii</sup> See Subsidiary Legislation 61.02, Passport Regulations, Sept. 28, 1993 (Malta).

<sup>iv</sup> See Passports Act 1992 (N.Z.).

<sup>v</sup> See Law on Immigration and Matters Concerning Foreigners, Ley. No. 761, Mar. 2011 (Nicar.).

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Norway <sup>i</sup>	Yes				No. Parents with parental responsibility are authorized to travel with children on short trips abroad without consent of the other parent.		
Panama <sup>ii</sup>	Yes. Only one parent must sign the passport application but both parents must physically appear to apply or grant a relative the authority to appear on their behalf via notarized document.	If a Panamanian child is residing abroad with only one parent, the parent may apply alone at the consulate by submitting a declaration that the child has lived with him or her alone continuously for two or more years.			Yes. Notarized consent of both parents with parental authority.	Non-Panamanian minors are exempt. A court can authorize travel with only one parent's consent.	No.
Poland <sup>iii</sup>	Yes. Consent of both parents must be given before the passport authority or a notary.	A parent with sole parental authority may apply alone. A court can authorize issuance where parents disagree.			No regulations exist, but border control officials may inquire into parental authorization in practice.		No laws on point
Russia <sup>iv</sup>	No. However, Russian authorities are encouraged not to issue passports to parents that do not have custody.				Yes. Notarized signatures confirming consent of both parents required.	If there is disagreement between parents, the decision will be settled by the courts.	

<sup>i</sup> See The Children Act No. 7, Apr. 1981 (Nor.); Oslo Police website (Sept. 7, 2013), [https://www.politi.no/oso/tenester/pass/barn\\_og\\_pass/](https://www.politi.no/oso/tenester/pass/barn_og_pass/) (translation on file with author).

<sup>ii</sup> See Executive Body Decree Law No. 3 art. 40, 2008 (Pan.).

<sup>iii</sup> See Act on Passport Documents of July 13, 2006 (Pol.); Response of Poland to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3075&did=33](http://www.hcch.net/index_en.php?act=publications.details&pid=3075&did=33).

<sup>iv</sup> See Olga A. Khazova, Allocation of Parental Rights and Responsibilities after Separation and Divorce under Russian Law, 39 Fam. L.Q. 373, 379 (2005-2006) (citing Federal Law on the Order of Exit from RF and Entry to RF 1996 (as amended 2003)); U.S. Dept. of State website, International Parental Child Abduction Russia, [http://www.travel.state.gov/abduction/country/country\\_5075.html](http://www.travel.state.gov/abduction/country/country_5075.html) (last visited Sept. 30, 2013).

Country:	Passport:	Exceptions to Dual Consent for Passport:	Entry Controls:	Exceptions to Dual Consent for Entry:	Exit Controls:	Exceptions to Dual Consent for Exit Controls:	Air Carriers:
Slovak Republic <sup>d</sup>	No						No
South Africa <sup>e</sup>	Yes. Both parents must appear in person.	A parent with sole parental authority may apply alone.					
Spain <sup>f</sup>	No						
Sweden <sup>g</sup>	Yes. Written consent of both parents is required.	Can be waived if there are very strong reasons for doing so. If parents disagree, the office can seek the opinion of the social authorities as to whether the passport should be issued. A parent with sole custody can apply alone.					
United Kingdom <sup>h</sup>	No. Consent of one parent with parental authority is sufficient.		No				No
United States <sup>i</sup>	Yes. Notarized consent of both parents required for issuance.	May be issued without consent of both parents if exigent or special family circumstances exist. A parent with sole legal custody may apply alone. Minors 16 years and old may apply alone.	Yes. Evidence of the consent of both parents required for visa issuance.	A parent with sole custody may apply alone.	No		No

<sup>d</sup> See Response of Slovak Republic to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_sk.pdf](http://www.hcch.net/upload/wop/prevmeas_sk.pdf).

<sup>e</sup> See South Africa Passports and Travel Documents Act 4 of 1994.

<sup>f</sup> See Anne-Marie Hutchinson & Henry Setright, International Parental Child Abduction 163-66 (1998).

<sup>g</sup> See 1978 Swedish Passport Act; Response of Sweden to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_se.pdf](http://www.hcch.net/upload/wop/prevmeas_se.pdf).

<sup>h</sup> See Child Abduction Act, 1984, c. 37, §1(1)-(3) (Eng.).

<sup>i</sup> See Child Abduction Act, 1984, c. 37, §1(1)-(3) (Eng.). Response of Scotland to Questionnaire on Preventative Measures, Hague Conference on Private International Law (2003), available at [http://www.hcch.net/upload/wop/prevmeas\\_sc.pdf](http://www.hcch.net/upload/wop/prevmeas_sc.pdf).

<sup>j</sup> See 22 C.F.R. § 51.28 (2012). Exigent circumstances are "time-sensitive circumstances in which the inability of the minor to obtain a passport would jeopardize the health and safety or welfare of the minor or would result in the minor being separated from the rest of his or her traveling party. Id. "Time sensitive" generally means that there is not enough time before the minor's emergency travel to obtain either the required consent of both parents/legal guardians or documentation reflecting a sole parent's/legal guardian's custody rights. Id. "Special family circumstances" are defined as circumstances in which the minor's family situation makes it exceptionally difficult for one or both parents to execute the passport application; and/or compelling humanitarian circumstances where the minor's lack of a passport would jeopardize the health, safety, or welfare of the minor; or, pursuant to guidance issued by the Department, circumstances in which return of a minor to the jurisdiction of his or her home state or habitual residence is necessary to permit a court of competent jurisdiction to adjudicate or enforce a custody determination. A passport issued due to such special family circumstances may be limited for direct return to the United States in accordance with § 51.60(e).