



Summer 1999

## **U.S./Mexico Cross-Border Issue: Child Abduction—The Need for Cooperation**

Antoinette Sedillo Lopez  
*University of New Mexico - Main Campus*

### **Recommended Citation**

Antoinette S. Lopez, *U.S./Mexico Cross-Border Issue: Child Abduction—The Need for Cooperation*, 29 N.M. L. Rev. 289 (1999).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol29/iss2/3>

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# INTERNATIONAL LAW—U.S./MEXICO CROSS-BORDER CHILD ABDUCTION—THE NEED FOR COOPERATION

ANTOINETTE SEDILLO LÓPEZ<sup>1</sup>

## I. INTRODUCTION

Mexico and the United States have always had substantial cultural, social and political ties.<sup>1</sup> The signing of the North American Free Trade Agreement<sup>2</sup> increased the economic ties between Mexico and the United States.<sup>3</sup> Many American and Mexican citizens marry, partially because of the shared cultural heritage between northern Mexico and the southwestern United States,<sup>4</sup> and partially because of proximity.<sup>5</sup> The breakup of these marriages can cause post-divorce conflict.<sup>6</sup> American citizens and Mexican citizens may cross the border in both directions to avoid such legal consequences of divorce as custody orders<sup>7</sup> and liability for child

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\* Henry Weihofen Professor of Law, University of New Mexico. I would like to express my appreciation to Monica Ontiveros and then Attorney General Tom Udall for inviting me to make a presentation on this topic at the Border States Attorneys General Conference. I also appreciate the research assistance of Ida Hernandez and Elaine Ramirez and the comments of my colleague Jenny Moore.

1. See generally ENRIQUE KRAUZE, *MEXICO, BIOGRAPHY OF POWER: A HISTORY OF MODERN MEXICO, 1810-1996* (1997); LAURA RANDALL, *CHANGING STRUCTURE OF MEXICO: POLITICAL, SOCIAL, AND ECONOMIC PROSPECTS* (1996); SIDNEY WEINTRAUB, *A MARRIAGE OF CONVENIENCE, RELATIONS BETWEEN MEXICO AND THE UNITED STATES* (1990); HOWARD F. CLINE, *THE UNITED STATES AND MEXICO* (1963); RODOLFO O. DE LA GARZA & JESUS VELASCO, *BRIDGING THE BORDER: TRANSFORMING MEXICO-U.S. RELATIONS* (1998).

2. North American Free Trade Agreement, U.S.-Mex.-Can., Sept. 17, 1993, 32 I.L.M. 296 (1993). The treaty was approved by Congress on November 17, 1993, and according to article 2203, entered into force on January 1, 1994.

3. See Ellen G. Yost, *NAFTA—Temporary Entry Provisions—Immigration Dimensions*, 22 CAN.-U.S. L.J. 211 (1996). But c.f. Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 943-56 (1994) (noting that while NAFTA proponents hoped to break down trade barriers, there was a distinct and contradictory debate over the effect that illegal Mexican immigration would have on the U.S. economy).

4. See generally LATINOS IN THE UNITED STATES: HISTORY, LAW AND PERSPECTIVE, VOL. I. HISTORICAL THEMES AND IDENTITY: MESTIZAJE AND LABELS (Antoinette Sedillo López ed., 1975).

5. Although statistics on the number of marriages between Mexican and American citizens are not officially recorded, the number of petitions for residency through marriage between U.S. citizens and non-citizens suggests an increasing marital rate. See U.S. Immigration & Naturalization Service, Office of Policy and Planning, Annual Report (January 1999), 8, tbl 1 (Immigrants Admitted By Major Category of Admissions: Fiscal years 1994-97 170, 263 spouses of U.S. citizens (21.3 percent, up from 17.1 percent in 1995). Mexico is also the country of birth of the largest number of immigrants. See *id.* at tbl. 2. The statistics suggest an increasing number of children with dual Mexican and U.S. citizenship. Cf. Paula Gutierrez, *Mexico's Dual Nationality Amendments: They Do not Undermine U.S. Citizens Allegiance and Loyalty or U.S. Political Sovereignty*, 19 LOY. L.A. INT'L & COMP. L.J. 999 (1997); Jorge A. Vargas, *Dual Nationality for Mexicans? A Comparative Legal Analysis of the Dual Nationality Proposal and its Eventual Political and Socio-Economic Implications*, 18 CHICANO-LATINO L. REV. 1 (1996).

6. See, e.g., Yvonne Chiu, *Mom Beats Odds, Gets 3 Kids Back After Abduction: Father Took Them to Mexico*, SACRAMENTO BEE, Feb. 11, 1999, at B1.

7. See Michael Perry, *Child Kidnappings on the Rise*, REUTERS N. AM. WIRE, July 29, 1993, available in LEXIS, New Library, Arcnews file; Karen Thomas, *Mother Looks for Children, Fiercely Holding on to Hope*, PORTLAND OREGONIAN, Oct. 10, 1993, available in 1993 WL 11696837 (describing Susan Morrow's search for her children who were taken to Mexico by their Mexican-born father); Michael A. Lev, *Children Found After 4 Year Search, Woman's Persistence Leads To Recovery of Sons Taken by Ex-Spouse*, L.A. DAILY NEWS, Aug. 1, 1993, at U2 (describing Theresa Lewis' lengthy and expensive, but successful, search for her children who were taken by her ex-husband to Mexico). In 1992, 268 children were abducted from the United States to Hague signatory nations. See Michael Granberry, *Prisoners of Trans-Border Custody Wars*, L.A. TIMES, July 21, 1994,

support.<sup>8</sup> Of course, a non-relative kidnapper can also try to evade the law by crossing the border. According to the State Department Office of Children's Issues, Mexico is the single most frequent destination state for child abductions from the United States and the United States is the single most frequent destination state for children abducted from Mexico.<sup>9</sup>

This article will look at the Hague Convention on the Civil Aspects of Child Abduction (Hague Convention)<sup>10</sup> as a legal mechanism<sup>11</sup> for resolving child abduction issues between citizens and residents of the United States and Mexico.<sup>12</sup> First, the article will describe the problems that the Hague Convention was designed to address and outline the relevant provisions of the Hague Convention. Second, the article will compare the law regarding child custody in the United States and the law of *patria potestad*<sup>13</sup> in Mexico. The difference in legal context in the neighboring countries presents some problems and delays in enforcing the Convention. Finally, the article will suggest ways in which courts in the United States and Mexico can cooperate in enforcing the Convention to resolve child abduction issues more effectively.

## II. THE HAGUE CONVENTION ON CIVIL ASPECTS OF CHILD ABDUCTION

Mexico and the United States<sup>14</sup> are both parties to the Hague Convention on the Civil Aspects of Child Abduction.<sup>15</sup> Prior to the entry in force of the Hague Convention between Mexico and the United States on October 1, 1991, parents

at A3. An additional 247 children were taken to countries that had not signed the Hague Convention. *See id.* In 1993, 357 children were returned from Hague signatory nations to the United States. *See id.*

8. *See Attorney Generals Urged To Eye Family Law Issues*, ALBUQ. J., Apr. 18, 1998, at B3.

9. *See* interview with state official, Department of State, Office of Children's Issues (Nov. 23, 1998) (name withheld by request); *see also* June Starr, *The Global Battlefield: Culture and International Child Custody at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791 n.5 (1998); Marjorie Miller, *Missing Kids: The Mexican Connection, Children: Couple Say Son is Among those Abducted to Mexico: Mexican Officials Say Kids also Are Taken to U.S. especially in Illegal Adoptions*, L.A. TIMES, Jan. 21, 1991, at E1 (describing difficulty of locating children taken to Mexico because of lack of information network; article was written before the Hague Convention went into force between Mexico and the United States).

10. *See* Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670 [hereinafter *Hague Convention on Child Abduction*].

11. *See* Antoinette Sedillo López, *Tracking Kidnapped Children Over the Net*, 21 FAM. ADVOCATE 42 (1999) (describing ways in which the internet can be used as a research tool to help in child kidnapping cases); Antoinette Sedillo López, *Changing the Way Lawyers Practice*, in CONFERENCE PROCEEDINGS, INT'L ASS'N OF SCIENCE TECHNOLOGY FOR DEVELOPMENT 116 (1999).

12. Additional United States jurisdictional statutes include the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994) and the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111 (1979), a version of which has been adopted in all fifty states. *See, e.g.*, N.M. STAT. ANN. §§ 40-10-1 to 40-10-24 (1978). Linda M. DeMelis, Note, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 HASTINGS L.J. 1329 (1994).

13. *See* discussion *infra* Part III B.

14. The U.S. signed the convention on December 23, 1981. On October 30, 1985, then President Reagan transmitted the Convention to the Senate for its advice and consent to ratification. The Senate, after hearings, ratified the Convention on a vote of 98 to 0 on October 9, 1986. On April 29, 1988, the International Child Abduction Remedies Act, 42 U.S.C. § 11601 et. seq. was enacted. The Convention took effect on July 1, 1988. *See* 53 Fed. Reg. 23608-10 (1988).

15. For an analysis of the issues raised for non-signatory countries, see Lara Cardin, *The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141 (1997).

would take children across the border in both directions to evade family court orders and decisions.<sup>16</sup> The Hague Convention intended to address the problems presented by an abduction of a child.<sup>17</sup> One major problem after a child has been removed from a jurisdiction involves the parents not knowing where the abductor took the child. A second problem is the need of the parents for financial resources for travel, to hire detectives, attorneys, court fees, and other incidentals. A third problem is that of overcoming language and cultural barriers that may make retrieving the child difficult. A fourth is the difficulty parents may have with unfamiliarity with the legal system in another country.<sup>18</sup> Finally, an abduction of a child presents problems of differing custody standards and potential national favoritism. On the other hand, some individuals who flee with their children may be fleeing domestic violence, child abuse<sup>19</sup> or another intolerable situation.<sup>20</sup> Of course, a child who is abducted suffers from the displacement.<sup>21</sup>

The articulated goals<sup>22</sup> of the Hague Convention are to secure immediate return of a child wrongfully removed from a jurisdiction and to protect a parent's custody and access rights.<sup>23</sup> The Hague Convention seeks to establish that the proper forum for resolving a child custody dispute is the jurisdiction where the child resided prior to the child's removal or retention.<sup>24</sup> It attempts to return to the factual scenario to that which existed prior to the child's retention or removal so that the underlying dispute will be resolved in the appropriate forum.

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16. See, e.g., *Garza v. Harney*, 726 S.W.2d 198 (Tex. Ct. App. 1987) (describing a father who sued in Texas to enforce Mexican divorce decree which provided temporary child custody to the mother but ordered her not to remove the children from Mexico); *Suarez Ortega v. Pujals de Suarez*, 465 So. 2d 607 (Fla. Ct. App. 1985) (describing conflicting custody orders entered by Mexican and U.S. courts after mother filed petition for custody in Florida and father filed in Mexico). See also *supra* note 7.

17. Commentators have reviewed the efficacy of the Hague Convention. See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994); Mark Dorosin, *You Must Go Home Again: Friedrich v. Friedrich, The Hague Convention and the International Child Abduction Remedies Act*, 18 N.C. J. INT'L L. & COM. REG. 743 (1993); Richard E. Crouch, *Resolving International Custody Disputes in the United States*, 13 J. AM. ACAD. MATRIM. LAW. 229 (1996); Dorothy Carol Daigle, *Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exception*, 26 VAND. J. TRANSNAT'L L. 865 (1993).

18. See Julia Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals being Achieved*, 2 IND. J. GLOBAL LEGAL STUD. 553 (1995).

19. See *Morgan v. Foretich*, 546 A.2d 407 (App. D.C. 1988) (affirming the indefinite incarceration for contempt of mother who secreted her daughter rather than comply with visitation order); JONATHAN GRONER, *HILARY'S TRIAL* (1991); See *infra* note 44.

20. The Hague Convention provides that a court has discretion not to return a child if the return of child would subject the child to a grave risk of harm. See Hague Convention on Child Abduction, *supra* note 10, at art. 13(b). The Convention also allows the court to decide not to return the child if it would be against fundamental principles relating to protection of human rights and fundamental freedoms. See *id.* at art. 20.

21. See Monica Marie Copertino, Comment, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of its Efficacy*, 6 CONN. J. INT'L L. 715, 716 (1991).

22. See generally Todd, *supra* note 18 (providing an overview of the convention and analysis of major cases).

23. See Hague Convention on Child Abduction, *supra* note 10, at art. 1. Custody rights involve "the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* at art 5(a). Custody rights "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." *Id.* at art. 3.

24. For an informative practice manual, see ABA SECTION OF FAMILY LAW, *INTERNATIONAL CHILD ABDUCTION: A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS* (Gloria F. Dehart ed., 1993).

The Convention on Child Abduction requires each contracting state to designate a central authority to execute the duties imposed by the Convention.<sup>25</sup> In the United States, the officially designated Central Authority is the Department of State in conjunction with the National Center for Missing and Exploited Children.<sup>26</sup> Mexico's designated Central authority is the Ministry for External Affairs in conjunction with the Department for Full Development of the Family, Desarrollo Integral de la Familia, (DIF).<sup>27</sup> The designated central authority has a duty to initiate and facilitate the institution of judicial or administrative proceedings and make arrangements for organizing or securing effective exercise of rights of access.<sup>28</sup>

Persons claiming that a child has been wrongfully removed may apply to the central authority of the child's habitual residence or any other contracting state.<sup>29</sup> A person may also go directly to the court in the state where the child is present. In the United States, a litigant may choose state or Federal court to litigate a case under the Hague Convention.<sup>30</sup> In Mexico, the only choice for a litigant is a state court.<sup>31</sup>

A person alleging the child has been wrongfully removed has the burden of proving all of the elements of wrongful removal or retention to a court of law.<sup>32</sup> That is, the parent must show that the child was wrongfully removed in violation of his/her custody right under the law of the state of the child's "habitual residence."<sup>33</sup>

Custody rights may arise by court order, by operation of law, or an agreement that is legally enforceable in the state of habitual residence.<sup>34</sup> That is, a custody decree or order is not required. A showing that a custody right has been violated may be made in a variety of ways. Under Article 14, the requested state may take notice of the law of the child's habitual residence.<sup>35</sup> The central authority or other qualified person may submit an affidavit of certificate concerning the relevant state's law.<sup>36</sup> A court may also request the applicant to "obtain from the authorities

25. See Hague Convention on Child Abduction, *supra* note 10, at art. 6.

26. See International Child Abduction Remedies Act [hereinafter ICARA] 42 U.S.C. § 11601 (1994). The Office of Children's Issues in the Bureau of Consular Affairs is the designated U.S. central authority. See 22 C.F.R. § 94.2 (1999). In 1995, incoming requests began being routed through and processed by the National Center for Missing and Exploited Children, International Division, a non-governmental office. See Exec. Order No. 12,648, 22 C.F.R. 94.6. The toll free number for the Center is 1 (800) 843-5678.

27. To contact the Mexican central authority: Consultoria Jurídica Secretaria de Relaciones Exteriores Homero No 213, Piso 17 Colonia Chapultepec Morales 11570 Mexico, Distrito Federal Telephone Number: (52)-5-327-3218 (52)-5-254-7306 (52)-5-327-3219 Telex Number: 176 3479 (SREME) Telefax Number: (52)-5-327-3201 (52)-5-327-3282. Contact: Hernan de J. Ruiz Bravo, Director de Derecho Estadounidense Litigios y Asesoría.

28. See Hague Convention on Child Abduction, *supra* note 10, at art 7(f); Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

29. See Hague Convention on Child Abduction, *supra* note 10, at art. 8.

30. See 42 U.S.C. § 11603.

31. Dr. Jesús Villalobos Jirón, Professor, Autonomous University of Chihuahua School of Law, Presentation at the U.S./Mexico Judicial Exchange Program Border Conference (Mar. 20, 1999).

32. See Hague Convention on Child Abduction, *supra* note 10, at art. 8.

33. See *id.* at art. 3; Flores v. Contreras, 981 S.W.2d 246 (Tex. Ct. App. 1998) (holding that a child under 6 months old had a habitual residence in Mexico since he had resided there since birth).

34. See Hague Convention on Child Abduction, *supra* note 10, at art. 3.

35. See *id.* at art. 14.

36. See *id.*

of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful."<sup>37</sup>

If the applicant meets the burden of proof, the child must be immediately returned if proceedings have been brought within one year.<sup>38</sup> If the proceedings are not brought within one year after the removal of the child, the child must be returned unless the court determines that the child is "settled" in the new environment.<sup>39</sup> If the child is "settled" in a new environment, the court has discretion to order a return or not.<sup>40</sup> The court may direct the abductor to pay necessary expenses including travel costs, location costs, legal representation and costs of returning the child.<sup>41</sup>

The Hague Convention contains five exceptions. It does not apply if: 1) the child has reached his or her sixteenth birthday,<sup>42</sup> 2) the child is sufficiently mature to decide residence,<sup>43</sup> 3) the child faces a grave risk of harm if returned,<sup>44</sup> 4) custody was not actually exercised or the person with legal custody acquiesced to the child's relocation,<sup>45</sup> or 5) returning the child would violate fundamental principles relating to protection of human rights and fundamental freedoms.<sup>46</sup>

While Article 21 of the Hague Convention recognizes a right of visitation or access rights and urges the central authority to remove barriers to visitation,<sup>47</sup> the Convention has been criticized for failing to impose duties on judicial authorities to facilitate visitation.<sup>48</sup>

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37. *Id.* at art. 15.

38. *See id.* at art. 12.

39. *See id.*

40. *See id.*

41. *See* ICARA, *supra* note 26, at § 11607(b)(3).

42. *See* Hague Convention on Child Abduction, *supra* note 10, at art. 4.

43. *See id.* at art. 13; *see also* De Arrendondo v. Salto (Cal. Super. 1997) Santa Clara County no. FI 065075 (finding that two girls, ages 11 and 12, were not of sufficient age and maturity to decide residence and ordering their return to Mexico with their father despite their expressed wish to remain in California), available at <[http://www.hiltonhouse.com/cases/Martinez\\_california.txt](http://www.hiltonhouse.com/cases/Martinez_california.txt)>.

44. *See* Hague Convention on Child Abduction, *supra* note 10, at art. 13(b); Caroline LeGette, Note, *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L L.J. 287, 297 (1990). Cases brought in the United States require proof of this defense by "clear and convincing" evidence. *See* ICARA, *supra* note 26, at § 11603(e)(2)(A); Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (1995) (remanding case, in which mother proved that she was sexually and physically abused, to determine whether return of child to Mexico would subject child to severe risk of harm or otherwise place him in an intolerable situation). It seems obvious to me that the *Nunez-Escudero* evidence satisfied 13(b); however, this case demonstrates how narrowly courts can interpret 13(b). *See also* Regan Fordice Grilli, *Domestic Violence: Is it Being Sanctioned by the Hague Convention?* 4 SW J. L. & TRADE AM. 71 (1997) (critiquing courts' interpretation of 13(b)).

45. *See* Hague Convention on Child Abduction, *supra* note 10, at 13(a).

46. *See id.* at art. 20.

47. *See id.* at art. 21.

48. *See* *Re G.* (A minor) 1 Fam. 669, 675 (Eng. 1993) available on LEXIS, Enggen Library cases file. *But see* *Costa v. Costa* (Eng. 1991) (ordering that arrangements be made for the exercise of the applicants' visitation rights and ordering the mother to bear some of the cost of the fathers travel expenses after the father alleged interference with access).

### III. DIFFERENCES IN MEXICAN AND U.S. FAMILY LAW

Because the custody rights under the convention may arise by operation of law as well as by a judicial determination or court order,<sup>49</sup> an understanding of the law of child custody in Mexico and the United States is important.<sup>50</sup> Comparing the substantive law of parental rights and obligations requires an understanding of the different conceptualization of parental rights and responsibilities and a careful consideration of the legal, cultural and social context in each country.<sup>51</sup> Each country's conceptual approach to child custody is distinct, due in part to their differing historical antecedents.<sup>52</sup> The United States' legal system derives from the English common law, and Mexico's legal system derives from the civil law tradition.<sup>53</sup> In a common law jurisdiction, judges look to how judges have decided previous cases and how they have interpreted statutory authority. In a civil law jurisdiction, judges look primarily to the code. Although statutes are an important source of law in the United States, and Mexico has developed a body of case law,<sup>54</sup> their legal systems are still quite different.<sup>55</sup>

#### A. U.S. Custody Law

Since the United States legal system derives from the common law, the legal doctrines involving child custody are established by legislative enactment of state

49. In practice, a court will look to the reality of the custody and visitation situation outlined in the custody agreement.

50. Parties in child abduction cases involving legal proceedings between Mexico and the United States may also have conflicts of law issues. In 1996, the 18th Session of Hague Conference on Private International Law concluded by adopting the "Convention of Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measure for Protection of the Children." The Hague Convention provides for a choice of law analysis in child custody and child support cases because the goal of the convention is to resolve conflicts of jurisdiction, legal recognition and enforcement. See Hague Convention on Child Abduction, *supra* note 10, at art. 5. The court of the child's habitual residence has jurisdiction, and the law of the child's habitual residence applies. See *id.*

51. See generally Antoinette Sedillo López, *A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology*, 10 HASTINGS WOMEN'S L.J. 347 (1999).

52. Mexico's legal system is western in the sense that it derives from some the same European origins as those of the United States. It shares much in common with the United States; some of its legal frameworks were patterned after U.S. models. However, in researching Mexican laws there is a translation risk of using false cognates and importing the wrong meaning. For example, the terms "jurisprudence" and "*jurisprudencia*" are false cognates. In the United States, jurisprudence means legal philosophy, legal reasoning, legal thought. In Mexico, *jurisprudencia* refers to the situation where the Mexican Supreme Court has decided a case the same way more than five times. Thus, *jurisprudencia* does not have the same meaning as "jurisprudence" and should not be used in a translation of the term. Therefore, a United States student of Mexican law must avoid interpreting Mexican law using Anglo-American understanding and values. Understanding definitional and legal subtleties is important because they may have profound implications upon how the law actually applies to people's lives. See Antoinette Sedillo López, *Translating Legal Terms in Context*, 17(4) LEGAL REF. SERVS. Q. 105 (1999); Antoinette Sedillo López, *Two Legal Constructs of Motherhood: "Protective" Legislation in Mexico and the United States*, 1 S. CAL. REV. L. & WOMEN'S STUD. 239 (1992).

53. See Sedillo López, *supra* note 51, at 361.

54. For an interesting and informative comparative analysis of the relationship between family law and tort law in Mexico and Texas, see Margarita Teveno Balli & Davis S. Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN. J. INT'L L. 29 (1995).

55. For an analysis of recent changes in Mexico's legal system and laws, see Jorge A. Vargas, *Mexico's Legal Revolution: An Appraisal of Its Recent Constitutional Changes, 1988-1995*, 25 GA. J. INT'L & COMP. L. 497 (1996).

statutes and by judicially created common law.<sup>56</sup> As a matter of legal doctrine, parental rights include many rights and obligations; chief among them is the right to have custody, care and control of the child. Conceptually, after a divorce, courts have traditionally viewed their decision about custody as deciding which parent should have care and control of the child. Before the nineteenth century, custody was usually awarded to the father.<sup>57</sup> In the mid-nineteenth century, courts began to award custody to the mother—when the father was found to be at fault—reasoning that children would be better cared for and guided by the innocent spouse.<sup>58</sup> This focus on the fault of the parent gradually gave way to a focus on the “best interests of the child” and in the early 1900s, a preference for maternal custody of a child of tender years.<sup>59</sup> After the feminist litigation of the 1960s, the maternal preference gave way to a principle of equality.<sup>60</sup> More recently, as legislatures have enacted family law codes and as judges have developed the common law, family law in the United States has become increasingly informed by psychological and social theory.<sup>61</sup> In sum, current United States custody law seeks to further “the best interests of the child”—a heavily case-specific, fact-based determination.<sup>62</sup>

A parent who is awarded sole custody may generally make all of the decisions about the child including the child’s residence. A parent granted visitation has the right to see the child on a regular basis but does not have decision-making authority and may not absolutely veto the determination of residence of the custodial parent.<sup>63</sup> However, the party with visitation may seek an order from the court attempting to preserve visitation by prohibiting the child (and custodial parent) from moving away.<sup>64</sup>

A relatively recent trend in the United States is the trend toward awarding joint custody to the parents after divorce.<sup>65</sup> A joint custody award requires that the parents make joint decisions with regard to major issues affecting the child. Typically these issues include: residence, education, health care, religion and major

56. See generally MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994).

57. See *id.* at 6.

58. See *id.* at 60-61.

59. See *id.* at 81-82.

60. See *id.*

61. See Martha A. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 734-735 (1988); Lee E. Teitelbaum, *Divorce, Custody, Gender and the Limits of the Law: On Dividing the Child*, 92 MICH. L. REV. 1808 (1994) (reviewing MACCOBY & MNOOKIN, *DIVIDING THE CHILD SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992)).

62. See Scott Altman, *Should Child Custody Rules Be Fair?* 35 U. LOUISVILLE J. FAM. L. 325 (1996) (arguing that adult claims to fairness in custody decision should often yield to child welfare because children are vulnerable).

63. See Mandy S. Cohen, *A Toss of the Dice . . . The Gamble of Post-Divorce Relocation Laws*, 18 HOFSTRA L. REV. 127 (1989) (noting that although all states look to the “best interests of the child” standard, different states use different presumptions and analytical approaches to relocation).

64. See *id.*; Ziegler v. Ziegler, 691 P.2d 773 (Idaho Ct. App. 1985); Ann M. Driscoll, Note, *In Search of a Standard: Resolving the Relocation Problem in New York*, 26 HOFSTRA L. REV. 175, 191 (1997).

65. See Margaret Martin Barry, *The District of Columbia’s Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767 (1997) (identifying theoretical and practical problems with joint custody laws).



recreational activities such as sports, music and dance.<sup>66</sup> An award of joint custody does not mean that the parents will have an equal amount of time with the child.<sup>67</sup>

Courts use the terms "joint legal custody," which requires joint decision-making, and "primary physical custody," which refers to the child's primary residence to describe their intention with regard to which party has decision-making authority and which party may have the child live with him/her as primary residence.<sup>68</sup> If the parties are awarded joint legal custody, one parent cannot leave the state without the other parent's consent, because the parties are required to agree on the child's residence. Thus, a parent in a joint custody arrangement who leaves the country with the child and does so without the other spouse's consent should trigger the application of the Hague Convention on Child Abduction. A parent who has sole legal custody who leaves the country without the other party's consent will not trigger the Hague Convention with regard to obtaining the return of the child unless the court has issued an order preventing the child from being removed from the jurisdiction. However, the parent with visitation may attempt to invoke the provisions of the Hague Convention in an attempt to enforce their right to see the child.

Family law matters, including child custody, are generally matters for state courts, and thus, there is no national uniformity. State courts are experiencing a nationwide trend toward increased specialization, so that specialized family courts are increasingly deciding these issues. While the federal courts have declined to exercise jurisdiction over most family law matters,<sup>69</sup> the provisions of ICARA specifically provide a federal court option for litigation of cases under the Hague Convention.<sup>70</sup>

Despite the increased awards of joint custody, the vast majority of children live primarily with their mothers after divorce.<sup>71</sup> And, approximately 90% of single parent households are headed by women.<sup>72</sup> The litigation of child custody has become somewhat of a battleground, with a substantial push by fathers' rights groups to gain more parental rights over their children after divorce.<sup>73</sup>

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66. See, e.g., N.M. STAT. ANN. § 40-4-9.1J (1999). Compare *Lombardo v. Lombardo*, 507 N.W.2d 788, 792 (Mich. Ct. App. 1993) (holding that trial court erred in finding that the parent who is primary physical custodian has the authority to decide educational issue in view of an existing joint custody order), with *Brzozowski v. Brzozowski*, 625 A.2d 597, 600 (N.J. Super. 1993) (refusing, despite an existing joint custody order, to interfere with the decision-making of the residential parent and denying the father's application to prevent elective surgery).

67. See N.M. STAT. ANN. § 40-4-9.1(3).

68. See *Jaramillo v. Jaramillo*, 113 N.M. 57, 62, 66, 823 P.2d 299, 304, 308 (1991) (stating that joint custody situation requires parties' agreement or court approval before a child can be relocated).

69. See *Thompson v. Thompson*, 484 U.S. 174 (1988) (holding that Congress did not intend to create an implied federal cause of action when it enacted the Parental Kidnapping Prevention Act); *Ankenbrandt v. Richard*, 504 U.S. 689, 690 (1982) (retaining the domestic relations exception to federal diversity jurisdiction for matters of divorce, alimony or child custody).

70. See 42 U.S.C. § 11603.

71. See Marygold Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 25 U. ILL. L. REV. 773, 779 (1997) (discussing study which shows that despite the increased of joint legal custody, the actual amount of a child's time spent with mothers is substantially greater than the time spent with fathers).

72. See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 439 n.36 (1990).

73. See Cynthia McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 893 (1998); Susan Beth Jacobs, *The Hidden Gender Bias Behind "the*

### B. "Custody" Law in Mexico: Patria Potestad

In Mexico, the judicial and legal conception of parents' responsibility for caring for their children is a bit different. Deriving from the Roman law and the civil law is the concept of *patria potestad*, which is the parents' responsibility to care for the child, reside with the child, and provide for the child's necessities, including food, education and development.<sup>74</sup> The *patria potestad* gives a right to correct the child,<sup>75</sup> the right to control and manage any property or rights the child may have<sup>76</sup> and the right to the child's assistance. By law, the right to *patria potestad* belongs to both parents,<sup>77</sup> but the exercise of the right, by necessity, normally involves one decision-maker.<sup>78</sup> Concurrence or agreement is not required. Historically, the father had superior rights of the *patria potestad*, but today it is a joint responsibility.<sup>79</sup> If the parents are deceased or unavailable, the paternal grandparents may exercise the *patria potestad*.<sup>80</sup> If the paternal grandparents are unavailable, the maternal grandparents, may exercise the *patria potestad*.<sup>81</sup> In the event of a conflict over the exercise of the *patria potestad*, the parties may go to a judge who will decide which of the parties may make the decision.

The right to have the child reside with the parent is either *tacita* that is understood as a matter of law or fact, or *expresa* which is expressly stated by a judge. An example of custody that is *tacita* is simply the fact that the children live with a particular parent without any kind of court order. An illegitimate child who lives with his mother is an example of a custody situation that is *tacita*. A custody order is *expresa* if a judge has suspended the *patria potestad*.<sup>82</sup> A judge will decide custody if requested, but it may not be automatically ordered after a divorce.<sup>83</sup>

A divorce does not suspend the right of *patria potestad*. Mexican scholars have proposed joint custody models, *patria potestad alternada* and *guarda conjunta* or *compartida*.<sup>84</sup> These proposed models provide for alternative residence with the child and divide up decision-making authority.<sup>85</sup>

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*Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 853 (1997).

74. See SARAH MONTERO DUHALT, DERECHO DE FAMILIA 342 (1992). For a review of Puerto Rican children's law, see Ana Mercedes & Trigo Castillo, *Un Analisis Critica Sobre la Ley de Proteccion de Menores y Los Enmiendas de 1993 y 1995*, 36 REVISTA DE DERECHO PUERTO RIQUEÑO 105 (1997).

75. See *id.* at 347. Código Civil para el Distrito Federal [C.C.D.F.], título octavo, capítulo 1 (Mex.) [hereinafter C.C.D.F.].

76. See *id.* at 349.

77. See DUHALT, *supra* note 74, at 345; C.C.D.F. art. 396.

78. See *id.*

79. See DUHALT, *supra* note 74, at 340-341.

80. See *id.* at 345; C.C.D.F., capítulo II, art. 444; C.C.D.F., art. 283.

81. See C.C.D.F. art. 283.

82. See Boletín Oficial de Navarra Numero 26, Fecha 02/03/1998-188 Edicto available at <<http://www.cfnavarra.es/bon/983/98302188.htm>>. Historically, divorce suspended the *patria potestad*, but due to other reforms of 1983, that is no longer the case. See DUHALT, *supra* note 74, at 353.

83. See Topico, Patria Potestad, *Pruebas Para La Perdida de la, Jurisprudencia de la Corte Suprema de Mexico-en Salas*, available in LEXIS, *Jurisprudencia de la Corte Suprema de Mexico-Mexican caselaw*; Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. INT'L L.J. 1 (1999) (discussing other aspects of Mexican family law).

84. See Lisandro Cruz Ponce, *patria potestad y Guarda Alternada y Conjunta y Compartida*, in DERECHOS DE LA NINEZ 63 (Instituto de Investigaciones Juridicas UNAM 1990).

85. See *id.*

The conventions with regard to residence are that if fathers want the children to reside with them, generally boys will live with the father and girls will live with their mother.<sup>86</sup> At the age of 14, a child may decide which parent the child wishes to live with.<sup>87</sup> In the vast majority of cases, children live with their mothers after divorce.<sup>88</sup>

#### IV. PROBLEMS WITH HAGUE CASES BETWEEN U.S. AND MEXICAN LITIGANTS

A major problem is confusion about the meaning of custody orders and unfamiliarity with the law and legal system<sup>89</sup> in each country. For example, imagine a case in which the mother is a United States permanent resident living in Tucson, Arizona married to a Mexican national. She gets a divorce in Arizona. The Arizona court grants the mother sole custody and allows reasonable visitation to the father. The father returns to his home in Nogales and by coincidence, he runs into his daughter who tells him that she is visiting with her maternal aunt in Nogales. The father goes to a Mexican family law court claiming that he has a superior right to *patria potestad* because he is the father. The Mexican court agrees and issues an order confirming the authority of *patria potestad* over his daughter. The father takes the daughter to his home in Nogales and he does not return the child to Tucson as previously scheduled.

The mother, who is still in the United States, discovers the fact that the daughter is now living with the father and seeks assistance in obtaining her return under the Hague Convention. She files a petition with the State Department which forwards it to the Mexican authorities who help file a petition with the family court in Nogales. The Spanish translation of the United States Court order awarding her sole custody and awarding reasonable visitation with the father is attached to the petition. The translation uses the terms *custodia* and *derecho de visitar*, both of those terms have very little meaning in Mexican family law. The father presents his Mexican court order affirming his right of *patria potestad*. The Mexican court concludes that while the U.S. judgment gave the mother possession of the child, the legal right of *patria potestad* gives the father the right to care for and control the child and dismisses the petition.<sup>90</sup> The mother's custody rights, which were obtained first and should have prevailed, were not understood and not enforced under the Hague Convention. The failure of understanding of each country's laws with

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86. See Jirón, *supra* note 31.

87. See *id.*

88. See *id.* at 63-64; interviews with Patricia Begne, Professor, Universidad de Guanajuato, Guanajuato, Mexico (June 1994, June 1996, June 1998).

89. The civil law tradition largely operates without juries. Although a body of case law is developing in Mexico, it is typical that a judge will look primarily to the civil code and applicable treaties. Mexican judges are not as powerful in Mexico as judges are in the United States. They do not have the power to declare statutes unconstitutional. If a litigant has a claim based on a violation of a constitutional right, the litigant may bring an *amparo* proceeding, which is an appeal to the federal tribunals. If the court finds that the rights of the litigant were violated, the ruling is only binding on the litigants before the court. See Sedillo López, *supra* note 51, at 361. See generally Butte, *Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere*, in *THE ROLE OF JUDICIAL DECISIONS DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 311 (Joseph Dainow ed., 1974).

90. This a variation of a story told by Professor Villalobos Jiron at the Border States Judicial Conference, *supra* note 31.

respect to custody rights causes the problem. A greater understanding of U.S. custody law would help the Mexican judge make a decision more consistent with the goals of the Hague Convention.

Additionally, in a legal proceeding in Mexico, it might be possible for a litigant to raise a constitutional claim such as a violation of search and seizure laws in obtaining the child, or a violation of parental rights in the exercise of the judges order.<sup>91</sup> An *amparo* proceeding will be directed to a federal tribunal and may take some time to resolve.<sup>92</sup> If the delay takes over a year, the family law court may believe that it has discretion to deny the petition under the authority of the Hague convention if the child has "settled" in Mexico, thus frustrating the goal of the convention for speedy return of the child.

Similar scenarios are possible in the United States. For example, after a divorce in Mexico, the *patria potestad* will not be extinguished and thus, a child should not be removed from Mexico without consent, no matter with which parent the child resides. However, a Mexican divorce order may not clearly state a custody right or right to physical possession of the child. If a father takes a child to the United States, and the mother brings a Hague action to obtain the return of the child, the father may state that since he has the legal right of *patria potestad* and the obligation to support the child, he has legal custody of the child. The mother, not having a court order awarding her "custody" may have some difficulty demonstrating that the removal of the child was in violation of a custody right. She will have to find a way to teach a common law trained judge on the meaning and legal effect of the *patria potestad*. While this is not insurmountable, the time and the expense of such an exercise may put it out of reach for the average Mexican citizen, particularly since the United States took a reservation of the Convention concerning the obligation to provide legal services in Hague cases.<sup>93</sup>

Another potential problem under the Convention is that citizens in the United States expect the same level of resources expended to find children that exists in the

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91. See Bruce Zagaris, *The Amparo Process in Mexico*, 6 U.S.-MEX. L.J. 61 (1998); Carl E. Schwarz, *Rights and Remedies in the Federal District Courts of Mexico and the United States*, 4 HASTINGS CONST. L.Q. 67 (1977).

92. The United States Office of Children's Issues raised their unfamiliarity with the Mexican law as a problem in the efficient litigation of Hague Convention cases in Mexico. Specifically, a concern was raised about a potential delay in the process if one of the parties used the *amparo* process. *Amparo* is a legal proceeding in which a party may raise a constitutional claim against any state official. For example, an *amparo* claim may be made against a police officer who allegedly violates someone's constitutional rights in taking a child from the home. *Amparo* may also be claimed against a judge's order that allegedly violates a litigant's rights under the Mexican Constitution. Thus, it may look like an appeal of an erroneous order. However, since there is no United States equivalent to an *amparo* proceeding, the use of the proceeding is confusing to a United States trained lawyer. See RICHARD D. BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* (1971); Sedillo López, *supra* note 52; c.f. John E. Rogers & Adrian Z. Arriola, *Reforming the Lending Policy*, BUS. MEX., Jan.-Feb., 1995 (stating that the unique Mexican procedure of *amparo* used in a collection case "is brought solely as a delay tactic and in the hope that the creditor will give up in frustration over the legal costs and management time involved in the proceeding....").

93. See Hague Convention on Child Abduction, *supra* note 10, at art. XXVI Pursuant to the third paragraph of Article 26, the United States declares it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program. See Susan Mackie, *Procedural Problems in the Adjudication of International Parental Child Abduction Cases*, 10 TEMP. INT'L & COMP. L.J. 445 (1996).

United States.<sup>94</sup> Mexico does not have the same level of resources to assist in locating a child. To United States citizens, the Mexican authorities may seem to be recalcitrant, but the underlying problem is likely to be a lack of adequate resources and not a lack of desire to assist in locating a kidnapped child.

Mexican judges complain that the United States judges are extremely slow in deciding Hague petitions.<sup>95</sup> The Mexican judges at a border states judicial conference stated that they prioritize child abduction cases and in most cases will issue an order within a week.<sup>96</sup> They do not see the same urgency in the decisions of these cases in the United States.<sup>97</sup> Higher case loads and the necessity of United States judges to prepare detailed findings of fact and conclusions of law contributes to the delay in deciding Hague cases.

Finally, another potential problem is the perceived lack of protection of visitation rights in the convention.<sup>98</sup> While there is not yet case law between the United States and Mexico on the protection of visitation rights under the Convention, greater understanding of the goals of the convention and greater cooperation between courts of the United States and Mexico may result in cooperation in the protection of visitation rights.

## V. CONCLUSION

The major barrier to ineffective enforcement of the Hague Convention between the United States and Mexico is lack of familiarity with the other's laws and legal system. This article reviewed the provisions of Convention. The article then summarized the law of custody in the United States and the law of *patria potestad* in Mexico. The article has revealed potential problems with the enforcement of the Convention because of lack of familiarity with law and legal system on the other side of the border. While lack of resources may be a potential problem to effective enforcement of the Convention, a greater problem is lack of familiarity and cooperation. Cross border legal and judicial conferences such as the Border States Attorneys General Conference<sup>99</sup> and the Border States Judicial Conference<sup>100</sup> held in Albuquerque, will go a long way toward resolving these problems. This article is an additional step in the direction of increased cross border education and cooperation.

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94. See Lev, *supra* note 7.

95. Comments by the Mexican Judiciary at the United States/Mexico Judicial Exchange Program Border Conference in Albuquerque, New Mexico (March 19, 1999) (notes taken by Sedillo López) [hereinafter Border Conference].

96. See *id.*

97. See Border Conference, *supra* note 95.

98. See *Viragh v. Foldes*, 612 N.E.2d 241, 249 (Mass. 1993) (noting that mere visitation rights are not deserving of enforcement by ordering the child's return to Hungary, but visitation in the United States was ordered and child support was suspended to help defray the costs of visitation).

99. Antoinette Sedillo López, Cross Border Family Issues: Child Abduction, Child Support and Adoption, Presentation at XVII Annual Border States Attorneys General Conference, Albuquerque, New Mexico (April 17, 1998).

100. Antoinette Sedillo López, U.S./Mexico Cross Border Issue: Child Abduction—Comparing Child Custody Law, Presentation at U.S./Mexico Judicial Exchange Program Border Conference, Albuquerque, New Mexico (March 19, 1999).