

**Better Together:
Using the UCCJEA and the
Abduction Convention in Concert**

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Two non-exclusive routes for recovering children abducted to the USA

The Hague Convention on the Civil Aspects of International Child Abduction. Drafted to protect children from harmful effects of wrongful international removal or retention, and to establish procedures to ensure prompt return to their country of habitual residence.

The Uniform Child Custody Jurisdiction and Enforcement Act of 1997 (UCCJEA). Drafted to avoid jurisdictional competition and conflict in interstate child custody cases that have harmful effects on children. Foreign countries are treated as “states” under certain conditions.

Both are intended to prevent forum shopping.

Hague Abduction Convention

Hague Abduction Convention

Overview

The Hague Convention on the Civil Aspects of International Child Abduction (Concluded 25 October 1980)

Agreement among treaty partners to address and remedy international parental abductions

Goals:

Secure prompt return of abducted children to the habitual residence

Discourage parents from abducting children in order to find a “friendly forum” for child custody

Hague Abduction Convention

US Federal Implementing Legislation

International Child Abduction Remedies Act (ICARA)

22 USCS 9001 et. seq.

Hague Abduction Convention

Caveat

- ⊘ The Hague Convention **does not permit** a “best interests” analysis for child custody

Hague Abduction Convention

Incoming/Outgoing Hague Cases

Incoming

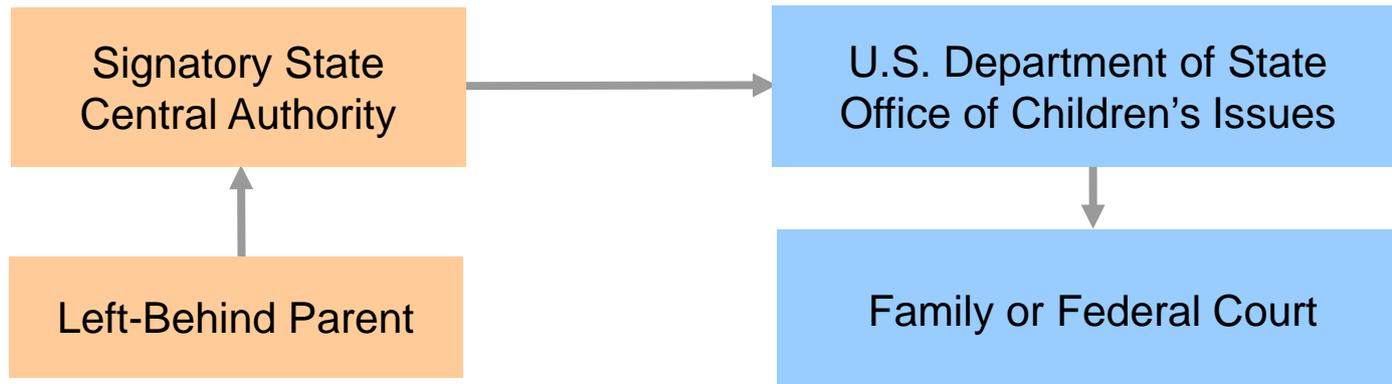
A person has wrongfully removed or retained a child from a signatory state to the US

Outgoing

A person has wrongfully removed or retained a child from the US to another signatory state

Hague Abduction Convention

Incoming Hague Case to Central Authority



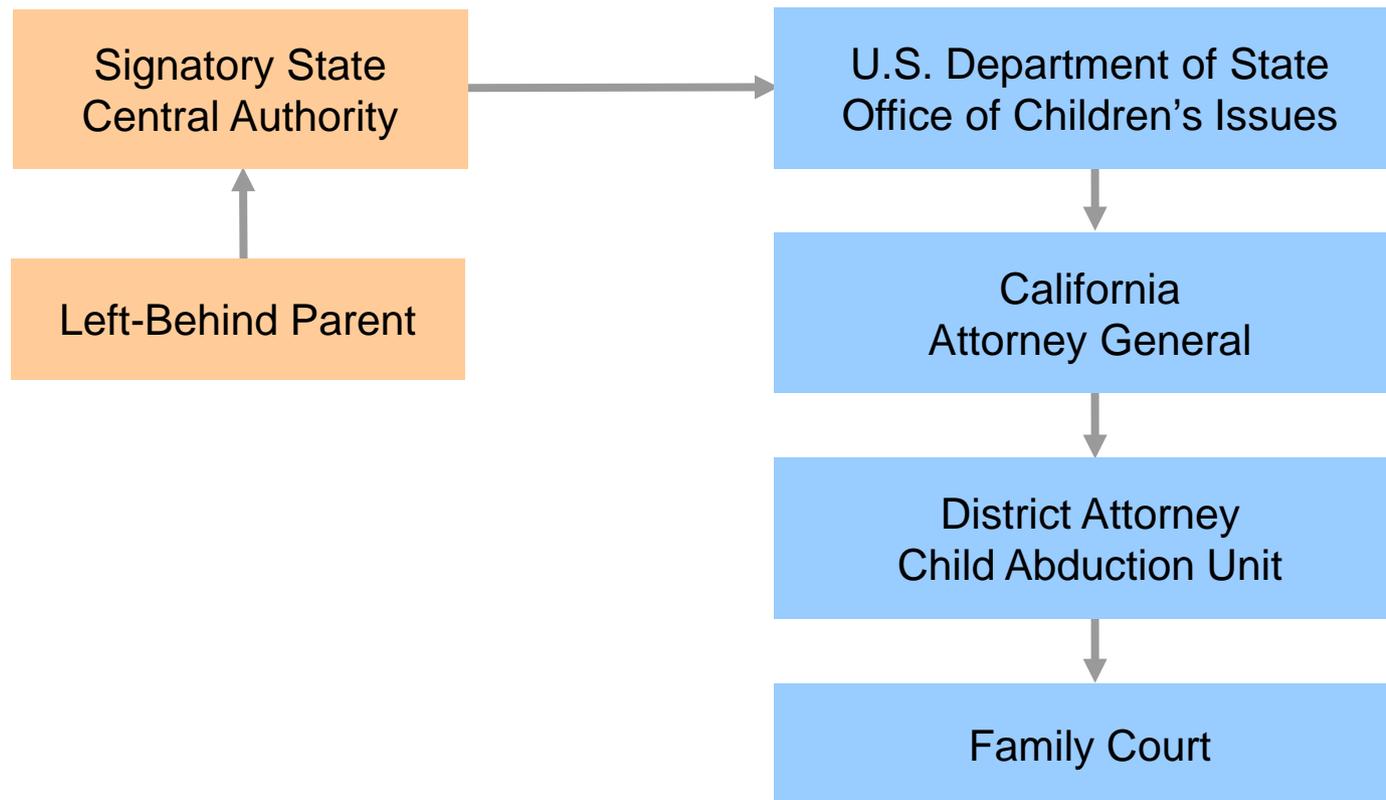
Hague Abduction Convention

Incoming Hague Case Direct Filing Example



Hague Abduction Convention

Incoming Hague Case to California via Central Authority



Hague Abduction Convention

Elements for Prima Facie Case for Return of Child

Child was habitually resident in the left-behind country at the time of the wrongful removal or retention

Removal or retention was in the custody rights of the left-behind parent

Left-behind parent was exercising his or her custody rights at the time of the removal or retention

Child was under the age of 16

(Note: If the child turns 16 while the Hague case is still pending, the petition is dismissed)

Petitioner's burden of proof is preponderance of the evidence

– 22 USCS 9003(e)

Hague Abduction Convention

Custody v. Visitation

Rights of custody:

Care of the child and, in particular, the right to determine the child's place of residence

Rights of access:

Right to take a child for a limited period of time to a place other than the child's habitual residence

– Article 5, Hague Convention

Hague Abduction Convention

Habitually Resident

Court can consider multiple factors to determine “habitual residence”

Split among Circuits regarding definition

Ninth Circuit:

Parents’ shared intent with evidence that prior habitual residence has been abandoned

– *Mozes v. Mozes* 239 F.3d 1067 (9th Cir. 2001)

Hague Abduction Convention

Custody Rights

May arise by:

- Operation of law
- Judicial or administrative decision
- Agreement having legal effect

Court can take judicial notice of the laws of the habitual residence relating to custody and visitation

– Articles 3 & 14, Hague Convention

Hague Abduction Convention

Removal or Retention

The Hague Convention covers both wrongful removal and wrongful retention

– *Baxter v. Baxter* 423 F.3d 363 (3rd Cir. 2005)

Removal is the taking of a child in from his or her habitual residence

Retention is the refusal of the taking parent to return the child to his or her habitual residence

Hague Abduction Convention

Wrongful Removal or Retention

Wrongful:

If, *in breach of rights of custody* attributed to a person, institution or any other body, either jointly or alone, under the laws of the habitual residence

and

If, at the time of the removal/retention, those *rights were actually exercised*, either jointly or alone, or would have been but for the removal or retention

– Article 3, Hague Convention

Hague Abduction Convention

Date of Wrongful Retention

Wrongful retention occurs on “[the date which] the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child’s stay in a place other than that of its habitual residence”

– *Elisa Perez-Vera Explanatory Report: Hague Conference on Private International Law; Tavaras v. Morales* 2014 WL 2038318 (2014)

Hague Abduction Convention

Exercise of Custody Rights is Broadly Defined

“If a person has valid custody rights to a child under the law of the country of the child’s habitual residence, that person cannot fail to ‘exercise’ those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.”

– *Friedrich v. Friedrich (II)* 78 F.3d 1060 (6th Cir. 1996)

Hague Abduction Convention

Timing is Important

If the petition is *filed within one year* of the wrongful taking or retention and the prima facie case is proven, then *the court shall* order the return of the child, forthwith

But affirmative defenses may apply

If the petition is *filed after one year* of the wrongful taking or retention, *the court may* order the return of the child, unless it is demonstrated that the child is “well-settled.”

– Article 12, Hague Convention

Hague Abduction Convention

Affirmative Defenses

Narrowly construed
– 22 USCS 9003(e)

Even if the defenses apply, discretion still rests with the court to return the child
– Article 18, Hague Convention

Five Defenses:

- Well-Settled – Article 12
- Consent or Acquiescence – Article 13
- Grave Risk – Article 13
- Mature Child – Article 13
- Public Policy – Article 20

Not a Legitimate Defense:

- Best Interests

Hague Abduction Convention

Well-Settled

Prohibited from consideration if the petition is filed *less than one year* from the wrongful removal or retention

If prima facie case is proven and the petition is filed within one year from the taking, the child *must be returned*, regardless of how acclimated

Preponderance of the evidence

– Articles 3 and 12, Hague Convention

Hague Abduction Convention

Consent or Acquiescence

[The left-behind parent]... “had consented to or subsequently acquiesced in the removal or retention...”

Consent (informal)

Permission prior to the alleged removal/retention

Acquiescence (formal)

Permission after the alleged removal/retention

Preponderance of the evidence

– Article 13, Hague Convention

Hague Abduction Convention

Mature Child

“The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views...the [court] shall take into account the...social background of the child provided by the Central Authority/competent authority of the HR...”

Preponderance of the evidence

– Article 13, Hague Convention

Hague Abduction Convention

Public Policy

“The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms”

Clear and convincing evidence

– Article 20, Hague Convention

Hague Abduction Convention

Grave Risk

A court is not bound to return a child if

“...b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”

The gravity of risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes

– *Van De Sande v. Van De Sande* 431 F.3d 567, 570 (7th Cir. 2005)

Split among the courts regarding immediacy of harm **must** be more than minimal: “grave,” “severe” and not merely “serious”

Clear and convincing evidence

– Article 13, Hague Convention

Whirlwind Overview of UCCJEA Registration

UCCJEA

Custody orders from other states can be registered for enforcement in California

UCCJEA Section 305

Certified copy of the custody order required

Custody orders from foreign countries can be registered for enforcement

Foreign countries shall be treated as if they were states of the United States.

A foreign country's child custody order shall be recognized and enforced, provided:

- The order was made under factual circumstances in substantial conformity with the UCCJEA jurisdictional standards
- The child custody law of the foreign country does not violate fundamental principles of human rights

– UCCJEA Section 303

Service of the registration request

The court clerk in the county of registration serves the registration request by mail. The responding party has 20 days to respond or the order becomes enforceable as a local court order.

UCCJEA

Red Herring Warning

Personal jurisdiction over the parties is not required for a child custody order to be valid in the US.

Grounds for objections to registration

- Lack of notice
- Lack of opportunity to be heard
- The order has been vacated, stayed, or modified by a court having jurisdiction to do so

– UCCJEA Section 305

UCCJEA

Requirement for substantial conformity with the jurisdictional standards

Notice and opportunity to be heard

– *In re Marriage of Malak* (1986) 182 Cal.App.3d 1018, 227 Cal.Rptr. 841 (UCCJA case)

Jurisdictional requirements re home state or substantial connection

Enforcement of foreign child custody orders: human rights violations exceptions

When the child custody laws of a foreign country violate fundamental principles of human rights, courts in the USA need not enforce child custody orders from that country.

This defense is frequently called the “escape clause” and is found in UCCJEA Section 105(c):

“A court of this state **need not apply** this part if the child custody law of a foreign country violates fundamental principles of human rights.”

Interpretation of the “escape clause”

“The court’s scrutiny should be on the child custody laws of the foreign country and not on other aspects of the other legal system.”

– Official UCCJEA Comment to Section 105

Revision of the “escape clause”

New York, Connecticut, New Jersey have modified the so called escape clause:

New York provides a defense to enforcement by registration if the custody laws of the other country as written or as **applied** violate fundamental principles of human rights. (N.Y. Dom. Rel. Law § 75-d(c))

Japan, for example, almost always fails to enforce visitation rights and is famous for not awarding custody to a non-Japanese parent.

UCCJEA

Violation of state's public policy as possible defense to registration and enforcement

In an unpublished Washington case the court relied on a “strong public policy” to refuse to enforce a foreign country's custody order.

– *In re Marriage of Donboli*, 128 Wash. App 1039, 2005 WL 1772328 (Div. 1 2005)

Petition for enforcement of registered order

- Requirements for the petition are in UCCJEA §305
- An order for immediate custody of the child is possible per Family Code UCCJEA §308
- An order for issuance of a warrant to take physical custody of the child is possible per UCCJEA §311

Hypothetical Examples

Hypothetical Examples

The Tale of Fred and Mary

Fred and Mary, a married couple with two daughters, Jill, age 15, and Susie, age 13, live in Birmingham, England. Fred is a UK subject, and Mary, a stay at home mother, is a US citizen. The girls are dual nationals and have lived all of their lives in England.

At Christmas time 2015, the couple takes the children to visit Mary's family in California. Fred flies back to England on December 26 and goes go back to work on December 28. Mary and children have return tickets for January 4. On January 3 Mary emails Fred that she and the children will not be returning to England.

Hypothetical Examples

Hague Convention Return

- Fred has a *prima facie* Hague return case
- He has a right of custody under British law
- Both children are currently under sixteen
- Mary has wrongfully retained the children in the US
- If he files in January 2016 there will be no well-settled defense

Hypothetical Examples

Potential problems with a Hague Convention return

- Jill is going to be sixteen shortly
- What if he tells Mary that he does not want to fight her for the children?
- What if Susie wants to stay?

Hypothetical Examples

What if Mary alleges domestic violence by Fred?

Mary's allegations are that five years ago she called the police to report Fred had attacked her and she had the marks to prove it. The girls were not home during the incident. The police arrested Fred, but he was never charged.

Hypothetical Examples

With England there is no Article 20 concern

The laws of England protect human rights and fundamental freedoms

Hypothetical Examples

Instead of bringing a Hague Petition Fred decides to get a custody order in England

- How long will it take to get a custody order?
- Can he get an order that Mary bring the children back to England?
- Does it matter that the children are not in England?
- Fred should be able to register a custody order in his favor in California
- This might be faster than a Hague Convention return

Hypothetical Examples

Assume that Fred and Mary have been living in Afghanistan rather England

Fred cannot get the children returned to Afghanistan under the Hague Abduction Convention because the country is not a signatory to the Convention.

Most likely, Fred will not be able to enforce an Afghan court order giving him custody of the children because Afghanistan's child custody laws require physical custody of child to be transferred to the father automatically at age 7 for boys and age 9 for girls, a violation of fundamental principles of human rights.

Grave Risk Defense

Grave Risk Defense

Concerns about the grave risk defense (Section 13B of the Convention)

Various individuals and groups have raised their concerns that the grave risk defense is not protecting victims of domestic violence fleeing for their lives.

Under the grave risk defense the court may, but is not required, to refuse to return the child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

Under ICARA the grave risk defense must be proved by “clear and convincing evidence.”

Grave Risk Defense

Some of the proposed changes to ICARA to change the grave risk defense

Lowering the burden of proof with respect to a claim of domestic violence

Legislating that domestic violence against his or her parent equals domestic violence against the child

Removing the court's discretion to return the child upon a 13B finding

Providing that a finding of domestic violence equals an automatic defense to a return of the child

Grave Risk Defense

Arguments against changing ICARA

Legislation making a finding of domestic violence an *automatic* defense to a return amounts to a unilateral change to an international treaty and interferes with the functioning of the treaty.

International uniformity in the interpretation of the Convention are keystones to the functioning of the treaty, as drafted.

Changes to the Convention are properly addressed by the Hague Conference, not the US Congress.

Lessons Going Forward

Lessons Going Forward

Stay of Child Custody Decisions

When a child has been abducted to or wrongfully retained in the US, pursuant to Article 16 of the Abduction Convention upon notice the US courts are stayed from making child custody decisions until it has been determined that the child is not going to be returned under the Convention or an application under the Convention has not been filed within a reasonable time.

Lessons Going Forward

Return order not a child custody decision

An order under the Abduction Convention is not a determination on the merits of any custody issue.

– Article 19, Hague Abduction Convention

Lessons Going Forward

Under the Hague Convention child may be ordered returned at any time

Article 18 of the Hague Abduction Convention specifically provides the Convention does not limit the power of the courts to order the return of the child at any time.

Lessons Going Forward

Under ICARA the remedies under the Hague Abduction Convention are not exclusive

22 USC §9003 h) provides as follows:

Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

Lessons Going Forward

A Hague Convention petition and a UCCJEA registration may be done simultaneously

Under the UCCJEA, the Abduction Convention and ICARA the remedies for a return are cumulative. A proceeding under the Abduction Convention and a registration of a child custody order from the appropriate foreign country may done at the same time.

Conclusions

Conclusions

Hague Convention Return versus UCCJEA Return via Registration

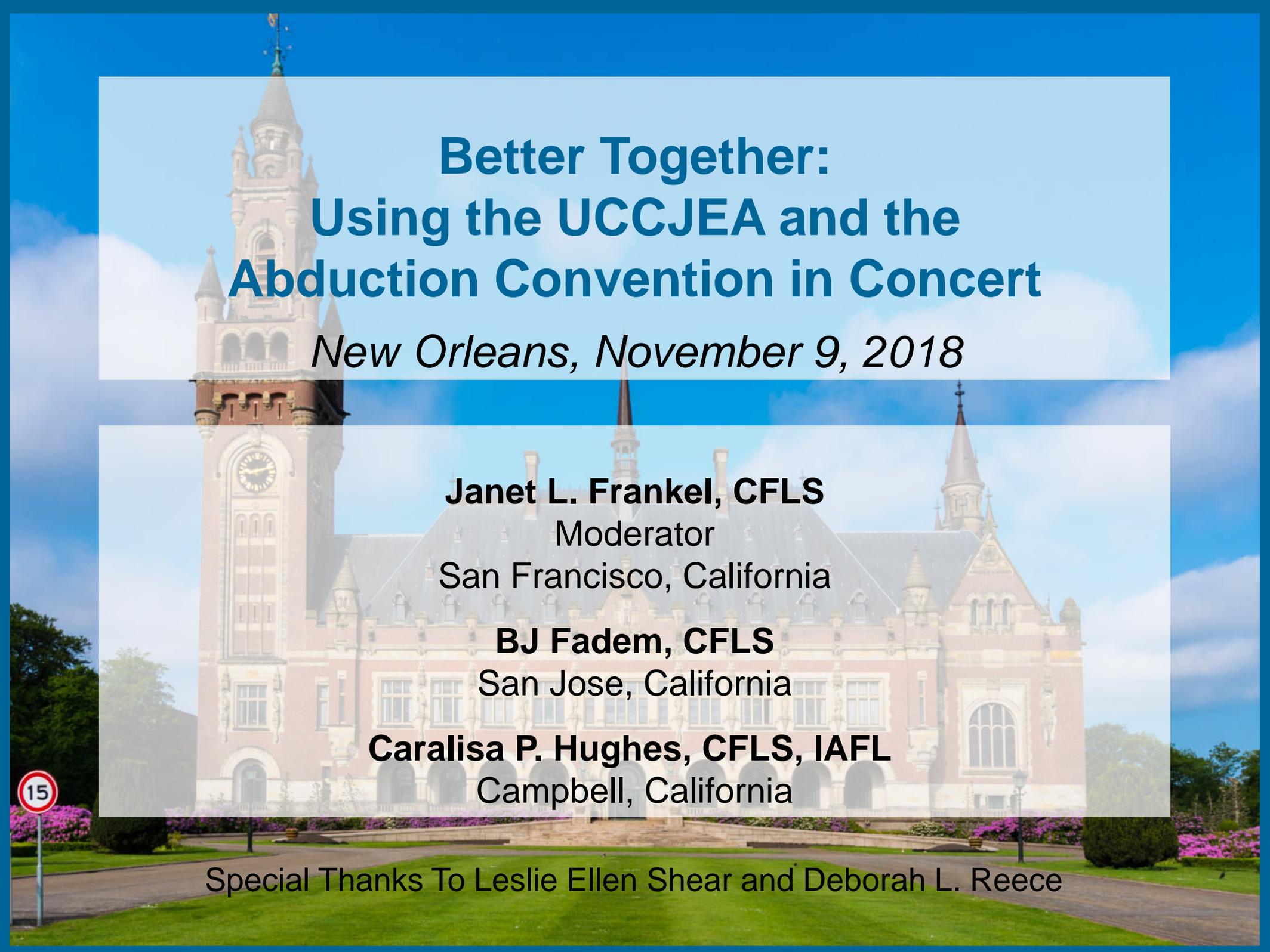
Advantages of UCCJEA Registration for left behind parent

- Generally is faster than a Hague proceeding
- Applies to more countries
- Can be used to return a 16 or 17 year old
- Few defenses so requires less court time if there is hearing

Advantages of the Hague Convention

- Does not require a custody order from the country of habitual residence
- In California the District Attorney files and serves the Petition
- Can be removed to federal court
- More defenses to return
- Return order can include undertakings made to protect the child upon the return

Remedies are cumulative not exclusive



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