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Equitable Tolling Denied: Uniform Standard Breaks Abuser's Control Within Domestic Violence

EQUITABLE TOLLING DENIED: UNIFORM STANDARD BREAKS ABUSER'S CONTROL WITHIN DOMESTIC VIOLENCE

Laura E. Petkovich

I. Introduction

The Office of Children's Issues is one of the fastest growing offices in the U.S. State Department, largely due to the rising rate of international abductions involving children with American parents.¹ The National Center for Missing and Exploited Children reported that in 2010, nearly 2,000 parental abductions occurred in which a parent took the child or children out of the United States.² While not all of these abductions were motivated by a need to escape from an abusive home situation, such motivations are a common occurrence in today's society as the majority of international parental child abductors is custodial mothers who claim to be fleeing from violent partners.³

*Lozano v. Alvarez*⁴ is a case in which a mother left the father of her child in the

United Kingdom and brought her child to the United States, specifically New York, to escape the physical, emotional, and verbal abuse that she endured during the relationship.⁵ The United States Supreme Court evaluated the case under the Hague Convention on the Civil Aspects of International Child Abduction (Convention) and established the application and interpretation of the exceptions explicitly set forth within the Convention, particularly the "well-settled" exception.⁶ In so doing, the Court correctly took an important step and created much needed uniformity by establishing that equitable tolling may not apply to the "well-settled" exception of the Hague Convention.⁷ This ruling in *Lozano* will prevent abusers from using child custody to control their victims and effectively continue the abuse in those abductions motivated by domestic abuse.

This Note will first look at the facts and holding of *Lozano* and how prior courts rationalized their findings based on the same facts. It will then look at the laws regarding international child abduction, specifically the

“well-settled” exception, and how several circuits have considered the application of equitable tolling under such circumstances. I will next examine the analysis of the Supreme Court. Finally, this Note will explain why uniformity on the issue of equitable tolling was necessary throughout the United States and examine the positive impact that the ruling will likely have on protecting victims of domestic violence.

II. Facts and Holdings

Manuel Jose Lozano (Petitioner) and Diana Lucia Montoya Alvarez (Respondent) were born in Colombia. They entered into a relationship in early 2004 while each resided in London, United Kingdom.⁸ Although the pair was never married, Petitioner moved into Respondent’s flat approximately three months after they started dating, and they had a child together on October 21, 2005.⁹ Respondent alleged that the mistreatment against her began one month after they moved in together.¹⁰ She claimed that

Petitioner continually asserted control over her and criticized her on a regular basis.¹¹ Respondent described a pattern of physical abuse that occurred throughout their relationship.¹² For example, she testified in court that Petitioner “tried to kick her in the stomach while she was pregnant, pulled her out of bed one night when she received a wrong number phone call and called her a prostitute, and raped her four times.”¹³ Respondent also testified to severe verbal and emotional abuse, including Petitioner regularly telling her that she was stupid and worthless, telling her to kill herself, and threatening to take her child away from her.¹⁴

On November 19, 2008, Respondent went to the police station and filed a report stating that Petitioner had regularly abused her.¹⁵ The police sent Respondent and the child to a domestic violence shelter, where they resided until July 3, 2009.¹⁶ Respondent reported that at that point a shelter was not a healthy environment in which to raise a child.¹⁷ Unable to obtain alternative housing, Respondent and the child left the United Kingdom and moved to the United States,

where Respondent had family.¹⁸ They have resided in New York since July 8, 2009.¹⁹

After Respondent left Petitioner on November 19, 2008, Petitioner attempted to locate his child within the United Kingdom; however, he was unable to do so.²⁰ Petitioner eventually determined his child did not reside in the U.K., so he filed a form on March 15, 2010, with the proper Central Authority for England and Wales to have the child returned to the United Kingdom.²¹ He officially filed for Return of Child in the United States pursuant to the Hague Convention on November 10, 2010.²²

The primary issue addressed by the United States Supreme Court, after two appeals, was whether the 1-year period for guaranteed return of an abducted child under the Hague Convention could be equitably tolled.²³ The Court questioned whether that year began when Petitioner realized his child no longer resided within the United Kingdom or whether it began on the date that he last saw his child. If the period were to be equitably tolled, then the “well-settled” defense would no longer be an option and

the child would automatically return to the United Kingdom.²⁴

The United States District Court for the Southern District of New York first addressed the question of whether Respondent’s removal of the child was wrongful.²⁵ For removal to be wrongful, Petitioner must establish that when the child was removed, Petitioner was actively exercising his custodial rights or would have been had the child not been removed.²⁶ The district court ruled that Petitioner had clearly met these requirements for establishing a prima facie case for wrongful retention.²⁷ Therefore, the court would order the return of the child to the United Kingdom, unless Respondent was able to establish that one of the exceptions to the return rule applied.²⁸ Respondent argued that two defenses applied here—the grave risk exception and the “well-settled” defense. The question of the “well-settled” defense remained the primary focus in the cases.²⁹

The district court held that the one-year period could not be extended by equitable tolling, at least not in this case.³⁰ The court first determined that the one-year period was not a statute of limitations.³¹ It

then determined that while Petitioner took reasonable steps to locate his child, he considered that the child might be in the United States and still waited eight months to file a petition there.³² Hence, unlike other cases where equitable tolling was permitted, the court determined that Respondent did not conceal the child to a degree that would trigger equitable tolling.³³ After considering the totality of the circumstances and the child's stability in New York, the court denied return of the child.³⁴

Petitioner filed an appeal with the Second Circuit, particularly focusing on the "well-settled" defense.³⁵ He raised three objections to the district court's analysis regarding this issue.³⁶ First, Petitioner argued that Respondent should never have been permitted to raise the "well-settled" defense because the one-year period that Article 12 stipulates must pass before such a defense can be raised should have been equitably tolled.³⁷ Thus, he argued that the one-year period should not start until such time "as he could have reasonably located his child."³⁸

Petitioner's remaining objections were based on whether the child was "well-settled" in the United States and whether Respondent proved this fact by the necessary preponderance of the evidence.³⁹

While analyzing equitable tolling under the Hague Convention, the Second Circuit followed the well-established premise that, while interpreting a treaty, the court must begin by looking at the treaty text, and then the context in which the written words are used.⁴⁰ The court also considered that it should look beyond the written words and to the history of the treaty, the terms of the negotiations, and the practical construction adopted by the signatory parties to determine the meaning of a treaty provision.⁴¹ The Second Circuit ultimately affirmed the district court's ruling, holding that, "while an abducting parent's conduct may be taken into account when deciding whether a child is settled in his or her new environment, the one-year period set out in Article 12 is not subject to equitable tolling."⁴² The court

found that permitting such a delayed consideration of the child’s interests would undermine the purpose of the Hague Convention.⁴³

Petitioner filed an appeal with the Supreme Court claiming again that equitable tolling is applicable under the Hague Convention’s one-year period and should be applied in his case.⁴⁴ The Supreme Court set an absolute standard that equitable tolling will never be considered with regard to the Hague Convention in future international parental abduction cases.⁴⁵

III. Background

On October 25, 1980, the United States drafted an international treaty—the Hague Convention—to address the problem of international child abduction by a parent.⁴⁶ The Hague Convention was ratified by the United States on April 29, 1988, when Congress enacted a federal law—International Child Abduction Remedies Act (ICARA)—that established procedures for implementing the Convention in the United States.⁴⁷ This

section will first address the purposes for implementing the Hague Convention in the United States and the affirmative defenses available under the Convention. It will then specifically focus on equitable tolling of the “well-settled” exception, and consider how courts within the United States have interpreted this issue.

A. The Hague Convention

President Ronald Reagan described the goals of the Hague Convention to the United States Senate as follows:

“The Convention is designed promptly to restore the factual situation that existed prior to the child’s removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from abduction . . . as a resort to the Convention is to affect [sic] the child’s swift return to his or her circumstances before the abduction . . . In most cases this will mean return to the country of the child’s habitual residence where any dispute about custody rights can be heard and settled.”⁴⁸

The Convention is rooted in the fundamental idea that abduction, even by a parent, harms a

child or children involved.⁴⁹ Such harms may result from uprooting the child from familiar surroundings and breaking the bond with the abandoned parent, and they may manifest themselves in severe psychological and emotional problems.⁵⁰ The Hague Convention was enacted so that children could be returned to their habitual residences before extensive harm is caused by the removal.⁵¹ In addition to protecting the children, the Convention also ensures that parents do not manipulate jurisdictional differences by moving to a nation where that parent would be more likely to benefit, in the custodial sense, than he or she would in the state of habitual residence.⁵² By preventing this possibility of unjust enrichment, the Convention is expected to deter future parental abductions.

Thus, the Convention establishes that if the abduction of a child is wrongful and has occurred within one year of filing a Hague petition for return,⁵³ that child must be automatically returned to his or her county of habitual residence so that any

custody dispute might be litigated in that country under its laws.⁵⁴ The general return rule ensures that these purposes are met and thus, that the best interests of children in the matter are protected. The rule will apply unless the abductor is able to demonstrate that one of the stated exceptions applies.

B. Affirmative Defenses Under The Hague Convention

Courts have recognized that the general presumption of the Convention—that abduction is always irreparably harmful to children—may be outweighed by other interests.⁵⁵ The Convention establishes affirmative defenses, within Article 12 and Article 13, for circumstances in which the original purpose behind the Convention is outweighed by another matter of more importance.

Within Article 13,⁵⁶ the Convention establishes that the child shall not be automatically returned if it is found that either the petitioner seeking return was not exercising custody rights at the time the child was removed, or the abductor had consent of the petitioner to remove the

child.⁵⁷ Also, under the grave risk exception, a court may determine that the child shall not be returned to the habitual residence if it is determined that 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.”⁵⁸ Such a determination requires the abducting parent to prove a high standard of *grave* harm, not merely serious circumstances.

The final exception to the general rule, and the primary focus in *Lozano v. Montoya Alvarez*, falls under Article 12 of The Hague Convention. After the one-year period of guaranteed return has expired, a court has discretion to evaluate the current environment of the child. If the parent is able to show that the child has become “well-settled” in his or her new environment, then the court may deny the return.⁵⁹ The rationale is that it would do the child more harm to remove him or her from the current environment of stability than that which

would be gained by returning the child to the previous residence. The burden of establishing that the child is “well-settled” rests with the abducting parent, however, and requires substantial testimony. It is under this exception that the current equitable tolling issue lies, because petitioners prefer that the courts not even have discretion to evaluate the new environment. These petitioners prefer that the one-year return policy automatically apply.

C. *Equitable Tolling*

When arguing against a “well-settled” defense, petitioners commonly seek the tolling of the one-year period stated within the Convention.⁶⁰ When considered in the context of federal statutes, equitable tolling pauses the running of a statute of limitations when a litigant has pursued his rights diligently, but has been prevented from bringing a timely action by some extraordinary circumstance.⁶¹

The question of whether equitable tolling would also apply to a treaty such as the Hague Convention has been inconsistently

interpreted from jurisdiction to jurisdiction, as is established in *Matovski v. Matovski*⁶² and *Duarte v. Bardales*.⁶³

1. Argument that Equitable Tolling Does Not Apply to the Hague Convention

In *Matovski*, the petitioner was an Australian national and the respondent was an American who moved to Australia.⁶⁴ The couple resided in Australia, where they were married and had three children together.⁶⁵ The respondent testified that, since the date of their marriage on April 8, 1994, she suffered severe domestic violence at the hands of the petitioner.⁶⁶ Such abuse encompassed being punched, slapped or struck with household objects on more than fifty occasions, much of which was credible and corroborated by police reports.⁶⁷ The respondent took her children to the United States in January 1997 and remained there for four months to escape the abuse; however, the petitioner persuaded her to return to Australia with the children.⁶⁸ The respondent did not leave with the children for good until May 28, 2005, when police were dispatched to the marital home following a domestic disturbance call.⁶⁹ The

petitioner did not file a petition pursuant to the Hague Convention until June 6, 2006, more than one year after the children were removed the second and final time.⁷⁰ The New York District Court and the respondent admitted that a *prima facie* case for wrongful removal was established; however, the respondent argued that the “well-settled” exception should apply because more than a year had passed.⁷¹

In response to the respondent’s argument, the petitioner argued that the one-year period did not commence until June 7, 2006, the date on which he allegedly received a phone call from the respondent and was informed that she intended to remain in New York with the children.⁷² The court ultimately concluded that equitable tolling did not apply to the “well-settled” exception.⁷³ The court analyzed why some other courts have found otherwise and determined that the other courts have likened the Convention with federal statutes of limitations, which can be tolled.⁷⁴ Other courts had been persuaded by a fear that not

permitting equitable tolling would incentivize abducting parents to conceal their whereabouts for a year.⁷⁵ The District Court in New York was not persuaded by those arguments and concerns.⁷⁶ The Ninth Circuit Court of Appeals, however, was persuaded by those concerns only one year after *Matovski*, as was demonstrated in *Duarte*.⁷⁷

2. Argument that Equitable Tolling Does Apply to the Hague Convention

Duarte not only demonstrated a case in which equitable tolling was applied to the Hague Convention, but it also demonstrated an unusual situation because the father abducted the children and domestic violence did not appear to play a role.⁷⁸ In the case, a mother, who lived in Mexico, petitioned for the return of her children under the Hague Convention after the father of her four children took the two youngest children to California without the mother's knowledge or

permission.⁷⁹ The children were taken to the United States on July 8, 2003, and the mother filed the Hague Petition in Mexico in September 2003.⁸⁰ However, the mother did not file a petition for the return of her children in the United States District Court for the Southern District of California until January 23, 2006.⁸¹

At the district level, the mother failed to appear before the court for a scheduled hearing; therefore, the court denied her Hague Petition.⁸² On appeal, the Ninth Circuit, in evaluating the merits of the mother's petition, also addressed the question of whether equitable tolling could be applied. The court ultimately ruled that the one-year period within the Convention could be equitably tolled "when circumstances suggest that the abducting parent took steps to conceal the whereabouts of the child from the parent seeking return and such concealment delayed the filing of the petition for return."⁸³

Matovski and *Duarte* demonstrate

that courts in the United States did not know how to evaluate equitable tolling of the “well-settled” exception or which circumstances should even be considered in that evaluation. The United States Supreme Court settled those questions in *Lozano v. Montoya Alvarez*.

IV. Instant Decision

The United States Supreme Court analyzed the prior conflicting rulings on the applicability of equitable tolling under the Hague Convention.⁸⁴ The Court sought to establish consistency among courts in different jurisdictions on the issue.⁸⁵

Prior to considering whether equitable tolling might be applied to an international treaty, the Court looked to equitable tolling of federal statutes of limitations.⁸⁶ The Court determined that because these statutes of limitations were expressly set by Congress, the applicability of equitable tolling is fundamentally a question of statutory intent.⁸⁷ Thus, with regard to federal statutes, equitable

tolling is presumed to apply to statutes of limitations unless such tolling would be inconsistent with the intent expressed by the statute’s text.⁸⁸ The Supreme Court, however, recognized that the Hague Convention is a treaty and not a federal statute; thus, the matters of interpretation and comparison might differ. The Court specifically looked to whether there was a presumption of equitable tolling and whether a statute of limitations existed at all.⁸⁹

The Court found no shared presumption of equitable tolling with regards to treaties.⁹⁰ The basis behind the presumption with federal statutes of limitations was that “equitable tolling [was] part of the established backdrop of American law.”⁹¹ The problem with carrying this presumption over to international treaties is that the prime nature of a treaty is that it is a contract between multiple nations.⁹² Thus, in interpreting whether such a presumption would exist, the Court must consider whether it would be an expectation that is shared by all of the contracting parties.⁹³ The expectation

was not shared by multiple countries; therefore, such a presumption does not exist under the Hague Convention.⁹⁴

The Court also determined that the Convention did not contain an expressed statute of limitations; thus, the lack of presumption did not actually matter.⁹⁵ The Court evaluated the one-year period expressly stated within Article 12 of the Convention by considering the general purpose of a statute of limitations.⁹⁶ Mainly, a statute of limitation establishes a period of time during which a claimant must bring an action.⁹⁷ Failure to do so during that time would cause the claimant to lose an opportunity for remedy.⁹⁸ Under the Hague Convention, however, expiration of the one-year period did not eliminate remedy.⁹⁹ Rather, once the one-year period expired, the assigned court was still obligated to return the child to the habitual country, *unless* sufficient evidence proves that the child was “well-settled” within his or her new environment.¹⁰⁰

Thus, unlike general statutes of limitations, a remedy still existed after the

one-year period expired.¹⁰¹

After establishing that the Convention could not be analogized with statutes of limitations and their regular practice of equitable tolling, the Court considered Petitioner’s argument that equitable tolling is consistent with the purpose of the Convention because it was necessary to deter child abductions. The Court responded that the goal was not absolute, especially when other available practices could help to achieve those objective.¹⁰² The Court also stated that it was “unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty.”¹⁰³

After its analysis, the Supreme Court established that equitable tolling could not be applied to The Hague Convention.

COMMENT

Not all international parental child kidnappings are motivated by domestic violence at the hands of the abandoned partner; however, the percentage is significant.¹⁰⁴ Because such a large fraction of

child abductions is motivated by a dangerous home situation, it is important that uniformity exists among the Courts such that victims are not forced to endure continued abuse. The Supreme Court set an important precedent with its ruling in *Lozano v. Montoya Alvarez* by establishing that equitable tolling may never be applied to the “well-settled” exception under the Hague Convention. In so doing, the Court eliminated further inconsistent rulings on this issue and ensured that the Hague Convention would be uniformly implemented as procedurally intended by ICARA. The uniformity of the courts on this issue will prevent further domestic abuse by stopping abusive control over child custody, which effectively prevents mothers from leaving abusive relationships to ensure the safety of their children.

A. Inconsistencies Regarding the Applicability of Equitable Tolling

Because the Hague Convention does not expressly address the issue of equitable

tolling within its text; courts throughout the United States have considered the issue inconsistently. The District Court for the Southern District of New York, the same court that initially heard the current case, ruled that equitable tolling could not apply to the Hague Convention.¹⁰⁵ However, the Ninth Circuit in *Duarte v. Bardales* found the opposite to be true.¹⁰⁶ While the New York case involved domestic abuse and the other did not, the respective courts did not consider that element in their analyses. Rather, the primary rationale for permitting equitable tolling in the Ninth Circuit was that abductors should not be permitted to sneak around and hide their identities so that they may be unjustly enriched. The Ninth Circuit did not consider the fact that some abductors need to conceal their locations in order to escape abuse.

This lack of uniformity on the equitable tolling issue was problematic. First, ICARA, which implements the procedures for incorporating the Hague Convention within

United States federal law, expressly states that a “uniform international interpretation of the Convention” is needed.¹⁰⁷ Congress explicitly required uniform application. Thus, Congress also likely intended courts to interpret the application of equitable tolling uniformly, though the issue is not within the text of the Convention. That should set the standard among jurisdictions. Second, one of the purposes behind the Hague Convention was to prevent one parent from advancing her or his position in a custody dispute by moving or jurisdiction shopping. The interpretation of equitable tolling determines whether the return of a child to the habitual residence is absolute. The jurisdiction shopping that the Hague Convention was enacted to prevent will likely continue unless a uniform standard is set.

The Supreme Court ensured that the original purpose of the Convention remained intact and prevented abandoned abusers from easy manipulation of the Convention to maintain their control and

abuse over their victims by creating a uniform standard amongst jurisdictions in the United States.

B. Detrimental Consequences Avoided

One implicit objective of the Hague Convention was to ensure that the best interests of abducted children are protected.¹⁰⁸ This was the rationale behind the general rule of return and the narrowly tailored exceptions which, for the most part, require a significant degree of evidence to access. However, given the large fraction of abduction cases that are motivated by domestic violence, it was important for the Court to consider the impact of the general rule on such victims of domestic abuse and whether the exception incorporated into the text sufficiently protected them.¹⁰⁹

The most commonly argued exception, and one that is intended to protect such domestic abuse victims, is the grave risk exception, under Article 13(b) of the Convention.¹¹⁰ This gives courts discretion to refuse the return of a child where there is a “grave risk of harm that return . . . would expose the child to physical or psychological

harm or otherwise place the child in an intolerable situation.”¹¹¹ The drafters relied on this exception to protect domestic abuse situations, but it is insufficient because it requires a clear and convincing burden of proof.¹¹² A clear danger to the child must be established, and courts have ruled that abuse against a mother does not meet the standard.¹¹³ While evaluating whether this exception applies, courts do not commonly consider the psychological effect that abuse between parents often has on a child.¹¹⁴ Also, courts do not consider that the culture of abuse is concealment and non-reporting such that little substantial evidence of the abuse exists.¹¹⁵

Domestic abuse is commonly characterized by physical and sexual abuse that is clear on the surface, or verbal abuse that can be heard, but the real central force of domestic abuse is the control an abuser has over his or her victim.¹¹⁶ Abusers use this psychological dominance to manipulate and instill fear in their victims, commonly stating that something bad will occur if the victim

ever leaves the dangerous situation.¹¹⁷ Thus, domestic abuse curtails the victim’s freedom. “In order to determine how free someone is, the significant question concerns not the range of options that the person has, but rather the extent to which, and the way in which, the person’s range of options tracks their interests . . . What freedom requires is protection against arbitrary control over options rather than against non-arbitrary control over options.”¹¹⁸

The petitioner maintains control over the other parent by removing options if a petitioner under the Hague Convention is permitted to manipulate the system with equitable tolling. Returning the child to the habitual residence leaves the victimized parent with the options of either staying in the new residence without his or her child, or following the child back to the environment where the abuse occurred. It is unlikely that a parent would remain

in the new residence without his or her child, especially because the child would now be exposed to the abuser without protection from the other parent. Therefore, no range of options exists.

Use of equitable tolling to manipulate the system would have removed the freedom of victims of domestic violence and perpetuated their abusers' control over them. The Supreme Court, in their ruling, provided these victims of domestic abuse with protection.

V. Conclusion

International parental child kidnapping is a growing concern in today's society, especially considering that international marriages are on the rise.¹¹⁹ The Hague Convention was enacted because the prior system in place did not provide much protection for the best interests of the children involved.¹²⁰ This international treaty was rooted in the general assumption that abduction harms children.¹²¹ However, given

that the majority of international parental kidnappings is motivated by women claiming escape from violent homes, and that abusive homes are harmful to children, this presumption is not entirely accurate.

Courts have generally sought to apply the Convention and exceptions stated therein to meet the best interests of the child or children involved. However, some courts have permitted petitioners to manipulate the system with application of equitable tolling to the "well-settled" exception. If tolling applied universally, it would achieve the same effect as an absolute return policy—harm the children and the abuse victims involved. By permitting these petitioners to manipulate the system, these courts prolonged domestic abuse endured by the abductors, by encouraging the control by the abuser.

The Court in *Lozano* settled the question correctly stating that equitable tolling may not be applied to the Hague Convention "well-settled" one-year exception. The Supreme Court stopped the abusive manipulation of child custody and addressed

domestic abuse to advance the best interests of the children.

¹ See Jaime Crawford, ‘*A Very Disturbing Trend*’: *Parents Kidnap Their Children, Flee Country*, CNN JUSTICE (March 3, 2016, 9:30 AM), <http://www.cnn.com/2011/CRIME/05/25/us.parental.abductions/> (discussing the issue of international parental child abduction, which is particularly centralized with regard to the United States, as more children are abducted into or out of the United States than any other party to the Hague Convention on the Civil Aspects of International Child Abduction); see generally Nigel Lowe, “*Abductors Keepers*: *Is the International Law on Child Abduction Working?*” CHATHAM HOUSE (March 1, 2016, 9:30 AM), <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/310113summary.pdf>.

² Crawford, *supra* note 1.

³ Noah L. Browne, Note, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193, 1195 (2011).

⁴ *Lozano v. Montoya*, 134 S. Ct. 1224 (2014).

⁵ *Id.* at 1229–30.

⁶ *Id.* at 1236.

⁷ *Id.*

⁸ *In re Lozano*, 809 F.Supp.2d 197, 203 (S.D.N.Y. 2011).

⁹ *Id.* at 203–04, 206–07.

¹⁰ *Id.* at 204.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *In re Lozano*, 809 F.Supp.2d 197, 204 (S.D.N.Y. 2011) (noting petitioner denied all allegations regarding any abusive conduct on his part).

¹⁵ *Id.* at 205, 209 (claiming that respondent reported problems to the police on prior occasions, but police decline to become involved because they determined this to be a custody issue).

¹⁶ *Id.* at 209.

¹⁷ *Id.*

¹⁸ See *id.* at 209–10.

¹⁹ *In re Lozano*, 809 F.Supp.2d 197, 204 (S.D.N.Y. 2011).

²⁰ *Id.* at 209.

²¹ *Id.* (stating Articles 6 through 8 of the Hague Convention require that each contracting nation designate at least one Central Authority to perform the duties set forth within the Convention. These international Central Authorities work together to find the abducted children. A parent filing a Hague Petition for return may “apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.” 28. *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Oct. 25, 1980),

<https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> (citing Article 8).

²² *In re Lozano*, 809 F.Supp.2d 197, 202 (S.D.N.Y. 2011).

²³ See generally Crawford, *supra* note 1.

²⁴ See *infra* Part III.

²⁵ See *In re Lozano*, 809 F.Supp.2d 197, 203 (S.D.N.Y. 2011); See also *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT'L LAW, Art. 3 (Oct. 25, 1980) (stating that “[t]he removal or the retention of a child is to be considered wrongful where—a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention”).

²⁶ See *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT'L LAW, Art. 3 (Oct. 25, 1980), <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

²⁷ See *In re Lozano*, 809 F.Supp.2d 197, 220 (S.D.N.Y. 2011).

²⁸ See 28. *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT'L LAW (Oct. 25, 1980), <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> (citing Article 12).

²⁹ See *In re Lozano*, 809 F.Supp.2d 197, 220 (S.D.N.Y. 2011) (determining that there was insufficient evidence to meet the clear and convincing standard that returning to the United Kingdom would pose a grave risk of harm to the child.); See also *id.* at 225 (recognizing that this standard is very high in that the person opposing the child's return must establish that the risk to the child is not only serious, but grave) (internal citations omitted); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (holding that the grave risk exception is narrow and should only apply either: (1) when return would place the child in imminent danger, such as returning the child to a war-zone, place of famine, or site of disease; or (2) in cases of serious abuse or neglect when courts in the home country would be incapable or unwilling to adequately protect the child)

³⁰ See *In re Lozano*, 809 F.Supp.2d, at 228—29.

³¹ *Id.* at 229—30.

³² *Id.*

³³ *Id.* at 230.

³⁴ *Id.* at 230—34 (showing that the court considered records from the child's therapist and school, all of which stated that the child was progressing socially and academically).

³⁵ *Lozano v. Alvarez*, 697 F.3d 41, 48 (2d Cir. 2012).

³⁶ *Id.* at 49.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 50 (citing *Swarna v. AlAwadi*, 622 F.3d 123, 132 (2d Cir. 2010)).

⁴¹ *Id.*; *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900).

⁴² *Id.* at 51.

⁴³ *Id.* at 54.

⁴⁴ *See Lozano v. Montoya*, 134 S. Ct. 1224 (2014).

⁴⁵ *Id.* at 1236.

⁴⁶ ROBIN E. CLARK ET. AL., *THE ENCYCLOPEDIA OF CHILD ABUSE* (3d ed. 2007).

⁴⁷ International Child Abduction Remedies Act, 42 U.S.C. § 11601(b)(3)(B) (codified in 22 U.S.C. § 9001(b)(3)(B))(2014) (establishing that “(b)(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States . . . (3) In enacting this chapter the Congress recognizes – (A) the international character of the Convention; and (B) the need for uniform international interpretation of the Convention”) [hereinafter ICARA]. *See also* JAMES D. GARBOLINO, *LITIGATING INTERNATIONAL CHILD CUSTODY CASES UNDER THE HAGUE CONVENTION*, 14 (3d ed. 2000).

⁴⁸ Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved*, *IND. J. GLOBAL LEGAL STUD.* (1995) (citing Letter of Transmittal from President Ronald Reagan (Oct. 30, 1985), 51 Fed. Reg. 10,495 (1986)).

⁴⁹ *See* Browne, *supra* note 3, at 1195. ICARA §§ 2(a)(3)-(4) (recognizing that international cooperation is necessary to deter international child abduction and that the Convention provides a framework for swift return).

⁵⁰ *Report on Compliance with The Hague Convention on the Civil Aspects of International Child Abduction*, DEPT OF STATE (2007), http://travel.state.gov/content/dam/childabduction/child_abduction_Compliance_Report.pdf.

⁵¹ Browne, *supra* note 3, at 1197–98 (prior to the enactment of the Convention, foreign countries involved in international abductions generally required lengthy proceedings before a child may be returned to the habitual residence. Often, this lengthy hearing would only cause further harm to the child as it would prevent his or her return to the prior environment he or she was accustomed to). The Convention applies to wrongful removals and retentions only when both countries involved are contracting parties to it. *See Gonzales v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002).

⁵² *Gonzales v. Gutierrez*, 311 F.3d 942, 950 (9th Cir. 2002); *see also* ELISA PEREZ-VERA, *TRANSLATION OF THE PERMANENT BUREAU 16–17* (1981); Rana Holz, Note, *International Parental Child Abduction*, 2003 FLA. B.J. 87, 90 (2003).

⁵³ *In re Lozano*, 809 F.Supp.2d 197, 220 (S.D.N.Y. 2011) (establishing a prima facie case for wrongful removal).

⁵⁴ 28. *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Oct. 25, 1980), <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> (citing Article 3).

⁵⁵ *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228–29 (2014) (citing *Abbott v. Abbott*, 130 S. Ct. 1983, 1995 (2010)).

⁵⁶ Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposed its return establishes that—a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or 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 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. 28. *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Oct. 25, 1980), <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> (citing Article 13).

⁵⁷ *Id.*

⁵⁸ *Id.* (citing Article 13(b)).

⁵⁹ *Id.* (citing Article 12).

⁶⁰ See Crawford *supra* note 1; *Matovski v. Matovski*, 2007 WL 2600862, 11 (S.D.N.Y. 2007); *Duarte* 526 F.3D 563, 567–68 (9th Cir. 2008); *Yaman v. Yaman*, 730 F.3d 1, 12 (1st Cir. 2013); see generally *Fuernes v. Reeves*, 362 F.3d 702 (2004). The benefit of establishing that the period between the wrongful removal and the filing of the petition has

been paused is that it permits the petitioner to say that he or she filed the petition within the one-year period set forth in the Convention. Under Article 12 of the Convention, if the petition is filed within one year of the wrongful kidnapping, the child is automatically returned to his or her habitual nation. This ensures that the court has no discretion to even consider that it would be in the best interests of the child to remain in his or her current residence.

⁶¹ See Crawford, *supra* note 1, at 1231–32.

⁶² *Matovski*, No. 06 Civ. 04259, slip op. (S.D.N.Y. 2007).

⁶³ *Duarte*, 526 F.3d at 563.

⁶⁴ *Matovski*, No. 06 Civ. 04259, at *1.

⁶⁵ *Id.*

⁶⁶ *Id.* at *1–2.

⁶⁷ *Id.* at *2.

⁶⁸ *Matovski*, No. 06 Civ. 04259, at *1.

⁶⁹ *Id.* at *3–4 (describing that the police were dispatched to the house on January 3, 2005; that between that date and the date of removal, petitioner was charged with assault and ordered by the court to not “assault, molest, harass, threaten or otherwise interfere” with Respondent and that a hearing on the allegations of assault and abuse was scheduled for June 2005).

⁷⁰ *Id.* at *1, *13.

⁷¹ *Id.* at *10 (noting that the Respondent makes other arguments before the Court; however, this report considers only those relevant to the settled exception and equitable tolling).

⁷² *Id.* at *10.

⁷³ *Id.* at *11.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 12.

⁷⁷ *See generally* *Duarte*, 526 F.3d at 563.

⁷⁸ *Id.* at 565, 570.

⁷⁹ *Id.* at 565.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 570; *see also* *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) (summarizing that the child’s Norwegian father, Furnes, was granted custody of his daughter; however, the parents reached an agreement wherein they agreed to maintain “joint parental responsibility” under Norwegian law. Under Norwegian law, this title meant that both parents must consent to the child moving abroad. In May of 2011, the abducting parent proposed an amendment to their custody agreement, wherein the child would spend the summer with her in the United States, and would have additional time with Furnes in the spring and fall. The abducting parent did not return in the fall and never contacted Furnes. Furnes desperately searched for them in Oslo, Norway, even begging help of the abducting parent’s family, to no avail. He then looked in the United States. The Petition for Return of his child was filed in November of 2002, more than one year after the child was removed. The Court, however, held that equitable tolling applied because otherwise “a parent who

abducts and conceals children for more than one year will be rewarded for the misconduct”).

⁸⁴ *Lorenzo v. Montoya*, 134 S. Ct. 1224 (2014).

⁸⁵ *Id.* at 1231.

⁸⁶ *Id.* at 1231–32 (explaining that, generally, equitably tolling pauses the running of a statute of limitations when a party to the matter has made reasonable efforts to pursue his rights diligently; but extraordinary circumstances exist that prevent the party from bringing an action within the expressed statute of limitations).

⁸⁷ *Id.* at 1232; *see generally* *Irwin v. Dep’t. of Veterans Affairs*, 498 U.S. 89 (1990).

⁸⁸ *Lorenzo*, 134 S. Ct. at 1232; *Young v. United States*, 122 S. Ct. 1036, 1040 (2002) (“It is hornbook law that limitations periods are ‘customarily subject to “equitable tolling,”’ unless tolling would be ‘inconsistent with the text of the relevant statute.’”).

⁸⁹ *Id.* at 1232–33.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1234.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* In reference to Petitioner’s argument that the one-year period does not begin until the

abandoned parent discovers the location of the missing child, the Court looked to the plain text of Article 12 of the Convention, which expressly states that the one-year period commences on “the date of the wrongful removal or retention.”

²⁸ *Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Oct. 25, 1980),

<https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> (citing Article 12); see *Lozano*, 134 S. Ct. at 1235.

¹⁰² See *Lozano*, 134 S. Ct. at 1235.

¹⁰³ *Id.*

¹⁰⁴ See Browne, *supra* note 3, at 1194-95.

¹⁰⁵ *In re Lozano*, 809 F.Supp.2d 197, 230 (S.D.N.Y. 2011).

¹⁰⁶ *Duarte v. Bardales*, 526 F.3d 562, 570 (9th Cir. 2008).

¹⁰⁷ ICARA, 42 U.S.C. § 11601(b)(3)(B). (“(3) In enacting this chapter the Congress recognizes – (A) the international character of the Convention; and (B) the need for *uniform international interpretation* of the Convention”) (*emphasis added*).

¹⁰⁸ *28. Convention on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Oct. 25, 1980),

<https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> (citing Article 1) (stating that “The objective of the present Convention are—a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State”). Given the strong general presumption that abduction harms children, it

may be logically implied that the drafters of the Convention sought to ensure that interests of children are protected.

¹⁰⁹ With regards to the issue of domestic abuse and international abduction, it is a common argument that the grave risk exception exists to protect such circumstances.

¹¹⁰ Julia A. 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, 570 (1995).

¹¹¹ Hague Convention on the Civil Aspects of International Child Abduction, Article 13(b) (Oct. 25, 1980).

¹¹² See Todd, *supra* note 110, at 568.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ H. Lien Bragg, *Child Abuse and Neglect User Manual Series: Child Protection in Families Experiencing Domestic Violence*, DEP’T. OF HEALTH AND HUMAN SERV. 1, 17 (2003),

<https://www.childwelfare.gov/pubs/usermanuals/domesticviolence/domesticviolence.pdf>.

¹¹⁷ *Id.* at 15. (“Domestic violence is . . . the pervasive and methodical use of threats, intimidation, manipulation, and physical violence by someone who seeks power and control over their intimate partner.”); D. KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY 179 (Vicki Been et al. eds., 2012).

¹¹⁸ Victor Tadros, Note, *The Distinctiveness of Domestic Abuse: A Freedom Based Account*, 69 LA. L. REV. 989, 997 (2005).

¹¹⁹ See PAUL R. BEAUMONT ET AL., THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 3 (1999).

¹²⁰ Hague Convention, Oct. 25, 1980 (stating that the states involved were “Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, [and desired] to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access”). Given the introductory remarks of the Hague Convention drafters, it may be logically implied that they did not feel as if the prior system did not provide sufficient protection.

¹²¹ See Browne, *supra* note 3, at 1198.

