RIGHTS OF CUSTODY: RESULTS MAY VARY

DAVID E. BRADEN*

Cite as: David E. Braden, *Rights of Custody: Results May Vary*, 12 SEVENTH CIRCUIT REV. 266 (2016), *at* http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v12-1/braden.pdf.

INTRODUCTION

Justice Sandra Day O'Conner wrote in *Troxel v. Granville*, "The demographic changes of the past century make it difficult to speak of an average American family."[1] When assessing societal trends for cohabiting couples[2] and their families, Justice O'Connor's statement rings true.

While the number of adults getting married in the U.S. has been falling, the number of couples living in cohabiting relationships is on the rise.[3] Since 1990, the number of households led by persons in cohabiting relationships has nearly doubled from 3.1 million (3.4%) in

* J.D. candidate, May 2017, Chicago-Kent College of Law, Illinois Institute of Technology; A.M., 2008, School of Social Service Administration, University of Chicago. The author would like to thank Matthew Kita for his suggestions and editorial assistance and Meaghan Sweeney, Emily P. Linehan, and Professor Hal Morris for their early feedback on this Comment.

[1] Troxel v. Granville, 530 U.S. 57, 63 (2000).

[2] In this article, the term "cohabiting" refers to two unmarried persons who live together and likely engage in a sexual relationship. *E.g.*, *Cohabitation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[3] PAUL TAYLOR ET AL., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 21 (Pew Research Center 2010) (noting the percent of American adults who are married decreased from seventy-two percent in 1960 to fifty-two percent in 2008).

1990 to 6.2 million (5.5%) in 2008.[4] In 1990, over 2.1 million children aged seventeen and younger lived with two cohabiting parents. In 2008, this number more than doubled to over 4.5 million children—about 6% of all children in the United States.[5] "[T]wo of every five children in the United States will spend time in a cohabiting household before the age of sixteen."[6]

In 2015, about 40% of all births in the United States were to unmarried women[7]—up from just 5% in 1960.[8] The total number of births to unmarried women increased from 89,500 in 1940[9] to 1,601,527 in 2015.[10] Today, the majority of births to unmarried women are to women in cohabiting relationships.[11] The percent of births to cohabiting women increased from 41% in 2002 to 58% in 2010.[12] Nearly half of all births to unmarried, cohabiting women were intended pregnancies.[13]

The trend of fewer couples getting married but still having children poses interesting legal challenges. For example, The Hague Convention on the Civil Aspects of International Child Abduction

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[4] *Id.* at 112.

[5] CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW AND PUBLIC POLICY 159 (2010); TAYLOR ET AL., *supra* note 3, at 113.

[6] BOWMAN, *supra* note 5, at 159.

[7] Joyce A. Martin et al., Ctrs. for Disease Control and Prevention, *Births: Final Data for 2015*, 66 NAT'L VITAL STAT. REP., January 5, 2017, at 1, 8.

[8] PAUL TAYLOR ET AL., GENERATION GAP IN VALUES, BEHAVIORS: AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT 15 (Pew Research Center 2007).

[9] Sally C. Curtin et al., Ctrs. for Disease Control and Prevention, *Recent Declines in Nonmarital Childbearing in the United States*, NCHS DATA BRIEF, Aug. 2014, at 1, 2 (noting the number of births to unmarried mothers was 665,747 in 1980; 1,527,034 in 2005; and 1,726,566 in 2008). The report also notes that the nonmarital birth rate has been on the decline for the past five years. *Id.*

[10] Martin et al., *supra* note 7, at 8.

[11] TAYLOR ET AL., *supra* note 3, at 67.

[12] Curtin et al., *supra* note 9, at 4.

[13] *Id.*

(Hague Convention or Convention) protects parents with primary custody rights from parental abduction or retention of their children in another country.[14] Under the Hague Convention, courts apply the domestic laws of the child's country of *habitual residence*—a term described in greater detail below—immediately before the alleged abduction or retention to determine whether one parent has violated the other's rights of custody.[15] However, when unmarried couples have children, they do not always obtain court orders identifying each parent's custody or visitation rights; they instead prefer to follow informal parenting arrangements.[16]

In light of demographic trends towards fewer marriages, should jurisdictions like Illinois adopt child custody and paternity rules that endow rights of custody to both parents at birth or upon acknowledgement of the child? Two recent Seventh Circuit cases applying The Hague Convention demonstrate what is at stake.

In *Garcia v. Pinelo*, Raul Salazar Garcia (Salazar) and Emely Galvan Pinelo (Galvan) never married nor lived together.[17] But they did have a son together, D.S., in Mexico in 2002.[18] In 2013, Galvan married another man, Rogelio Hernandez, and they decided to move to the United States.[19] Salazar agreed for D.S. to accompany Galvan to Illinois for one year.[20] After one year, when Galvan refused to return D.S. to Mexico, Salazar filed his petition under the Hague Convention to return his son to Mexico.[21] In *Garcia*, the child's habitual residence was Mexico. Applying Mexican domestic law, the Northern District of

[14] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (1980) [hereinafter Hague Convention].

[15] *Id.*

[16] *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 355–56 (2011).

[17] Garcia v. Pinelo, 808 F.3d 1158, 1159 (7th Cir. 2015).

[18] *Id.*

[19] *Id.* at 1160.

[20] *Id.*

[21] *Id.*

Illinois found that Salazar had a right of custody under the Hague Convention and the Mexican law convention of *patria potestad* (parental authority).[22] Consequently, Galvan violated Salazar's parental rights by retaining D.S. in Illinois.[23] The Seventh Circuit affirmed this decision.[24]

In *Martinez v. Cahue*, Jaded Ruvalcaba Martinez and Peter Cahue had a son, A.M., in Illinois in 2006.[25] Martinez and Cahue never married.[26] After their relationship ended, Martinez—who was a Mexican citizen—moved to Mexico with A.M. in 2013.[27] In 2014, after Martinez sent A.M. to Illinois to spend his summer break with Cahue, Cahue refused to return A.M. to Mexico.[28] Consequently, Martinez filed emergency proceedings in the Northern District of Illinois under the Hague Convention to return her son to Mexico.[29] The Northern District of Illinois found that because the parents did not have a shared intent for A.M. to relocate to Mexico, A.M.'s habitual residence under the Hague Convention remained Illinois and therefore A.M. should remain in Illinois.[30] However, the Seventh Circuit reversed the Northern District of Illinois.[31] The Seventh Circuit found that before Martinez moved to Mexico, she had sole custody of A.M.

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[22] *Id.* at 1159. In Latin, *patria potestas* means "power of the father." Patricia Begné, *Parental Authority and Child Custody in Mexico*, 38 FAM. L. QTRLY 527, 527 (Bruce McCann, trans., 2005). Today, in Mexico, the *patria potestas* convention, known in Spanish as *patria potestad*, references "parental authority." *Id.* This paper will primarily refer to the parental authority convention by its Latin spelling, *patria potestas*, since that is how the Seventh Circuit typically references the convention.

[23] *Garcia*, 808 F.3d at 1159.

[24] *Id.*

[25] Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).

[26] *Id.* at 986.

[27] *Id.* at 987.

[28] *Id.* at 988.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 991–92.

under Illinois law and that Cahue had no right of custody to prevent Martinez from moving to Mexico.[32]

As described above, the domestic relations laws of one country over another can be outcome determinative. In *Garcia*, the Seventh Circuit found that Mexican law provides a right of custody to both parents known as *patria potestas* (parental authority) from the child's birthdate or acknowledgment of paternity.[33] In contrast, the Seventh Circuit found in *Martinez* that Illinois law presumes a mother has sole custody of a child born to unmarried parents in the absence of a court order. Unlike the Mexican laws of parental authority, Illinois law does not imbue an unmarried parent—even those who have acknowledged paternity—with custody rights.[34]

In an era where fewer people are getting married but still having children, should jurisdictions like Illinois adopt child custody and paternity rules that endow rights of custody to both parents at birth or upon acknowledgement of the child? In order to protect children's best interests and to preserve the status quo before an alleged wrongful retention or abduction, Illinois should not adopt a rule like parental authority laws. Illinois's presumption requires a court to consider children's best interests before awarding custody and visitation rights while parental authority laws automatically confers decision-making authority to parents. Children's best interests are better served when a court protects stability and the status quo in children's lives rather than enabling a parent to assert parental rights for the first time under a Hague Convention petition.

This Comment will proceed as follows. Part I describes the provisions of The Hague Convention as well as compares the development of custody rights in Illinois and Mexico. Part II reviews the factual and procedural context of *Garcia v. Pinelo* and Part III does the same for *Martinez v. Cahue*. Part IV argues that Illinois's presumption that an unmarried mother has sole legal custody of her

[32] *Id.*
[33] *See* Garcia v. Pinelo, 808 F.3d 1158, 1166 (7th Cir. 2015).
[34] *Martinez*, 826 F.3d at 991.

children in the absence of a court order is a better right of custody rule than the parental authority laws.

I. BACKGROUND

With rapid globalization in the late twentieth century, more people have begun marrying people from other countries.[35] One of the challenges of increasingly open borders and easier means of travel is international parental child abduction.[36] In order to create streamlined processes for returning children wrongfully removed or retained from their proper home country, more than twenty-three countries gathered in The Hague to create and adopt the Hague Convention on the Civil Aspects of International Child Abduction (the Convention).[37] As of March 8, 2017, ninety-seven countries have either ratified or are in the process of being accepted as members to the Convention.[38] The following sections will describe the provisions of the Convention as well as differences between the development of child custody laws in the United States and Mexico.

A. The Hague Convention

In 1981, the United States signed The Hague Convention and later implemented it in 1988 when Congress adopted the International Child

[35] *E.g.*, Kristy Horvath and Margaret Ryznar, *Protecting the Parent-Child Relationship*, 47 GEO. WASH. INT'L L. REV. 303, 303 (2015); Stephen I. Winter, Note, *Home is Where the Heart Is: Determining "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 33 J.L. & POL'Y. 351, 351–52 (2010).

[36] Winter, *supra* note 35, at 351.

[37] Hague Convention, *supra* note 14.

[38] Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (last updated March 8, 2017).

Abduction Remedies Act (ICARA).[39] ICARA "entitles a person whose child has been abducted to the United States to petition in federal court for the return of the child."[40]

"[The Convention] is fundamentally 'an anti-abduction treaty.'"[41] Its stated purpose is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to guarantee that the "rights of custody and of access" are respected across states that have adopted the convention.[42]

Several public policies undergird the Convention. First, protecting the interests of children permeates the convention.[43] Within the goal of protecting children's interests is the presumption that stability is important to child development.[44] When children are wrongfully moved from one country to another, they are torn from close-knit family members and friends, school settings, and religious institutions.[45] The Convention is designed to return children to a status quo where parents can then contest custody rights.[46]

Second, the Convention deters parents from international forum shopping. In other words, the Convention discourages parents from abducting their children and taking them to a country where the parents believe the country's courts will be more sympathetic to

[39] International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 22 U.S.C. §§ 9001–9011 (2012)).

[40] Koch v. Koch, 450 F.3d 703, 711 (7th Cir. 2006) (citing 42 U.S.C. § 11603(b), transferred to 42 U.S.C. § 9003(b) (2012)).

[41] Martinez v. Cahue, 826 F.3d 983, 989 (7th Cir. 2016) (quoting Garcia v. Pinelo, 808 F.3d 1158, 1162 (7th Cir. 2015)).

[42] Hague Convention, *supra* note 14, at art. 3, 1343 U.N.T.S. at 98–99.

[43] *Id.* at Preamble, 1343 U.N.T.S. at 98.

[44] Elisa Perez-Vera, *Explanatory Report*, ¶ 24, 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 431–32 (1982) [hereafter Perez-Vera Report].

[45] *Id.* ¶ 24, 3. *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986).

[46] International Child Abduction Remedies Act, 22 U.S.C. §§ 9001(b)(4) (2012).

granting custody or decision-making rights over the children.[47] Since states that have adopted the Convention agree to respect the "rights of custody and of access" of other member states, parents should have less incentive to engage in international tactical gamesmanship over their children.[48]

The Convention applies only to member countries and to children who have been wrongfully removed or retained in member countries.[49] Pursuant to Article 3 of the Convention, children are wrongfully removed when:

> 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.[50]

In other words, a child is wrongfully removed or retained where the parent who abducts or retains the child violates the "rights of custody" of the other parent who actively asserted his or her rights as a parent.

"Rights of custody" is a term of art in the Convention that is not directly synonymous with child custody jurisprudence in the United States.[51] The Convention defines rights of custody as "rights relating

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[47] Winter, *supra* note 35, at 353–54.

[48] *Id.*

[49] 51 Fed. Reg. at 10,504–505.

[50] Hague Convention, *supra* note 14, at art. 3, 1343 U.N.T.S. at 98–99 (emphasis added).

[51] 51 Fed. Reg. at 10,506-07; *see also* Melissa S. Wills, Note, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted*

to the care of the person of the child and, in particular, the right to determine the child's place of residence."[52]

The Convention also defines "right[s] of access" as "includ[ing] the right to take the child for a limited period of time to a place other than the child's habitual residence."[53] The important distinction between rights of custody and rights of access is that the Convention only offers a return order for a breach of rights of custody.[54] In other words, if a parent only has rights of access, he does not have a return order remedy under the Convention; he can only request that a Contracting State protect and enforce his rights of access.[55]

Courts deciding Convention cases are not to consider the merits of underlying custody issues between the parties.[56] Instead, courts are to focus on deciding where the child should be returned so that the courts in that jurisdiction can resolve the merits of any underlying custody disputes.[57]

As such, courts do not enforce custody orders under the Convention.[58] The Convention's rationale for not enforcing custody orders is so that persons who wrongfully remove or retain a child cannot "insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's order."[59] The Convention reduces a parent's incentives to abduct his children by requiring courts to apply the domestic laws of the child's country of

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Children, and the Underlying Objectives of the Hague Convention, 25 REV. LITIG. 423, 441 (2006).

[52] Hague Convention, *supra* note 14, at art. 5, 1343 U.N.T.S. at 99.

[53] *Id.*

[54] *Id.* at art. 3 & 8, 1343 U.N.T.S. at 98–100.

[55] *Id.* at art. 21, 1343 U.N.T.S. at 102.

[56] *Id.* at art. 19, 1343 U.N.T.S. at 101.

[57] Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986); Perez-Vera Report, *supra* note 44, ¶ 19, 3.

[58] 51 Fed. Reg. at 10,504–505.

[59] *Id.*

habitual residence immediately before the alleged abduction or retention to determine whether one parent has violated the other's rights of custody.[60]

The Convention does not define the term "habitual resident."[61] The Convention drafters did not want to bind courts to narrow legal definitions of nationality or domicile in order to give courts greater flexibility and thereby increase their ability to achieve the best interests of children.[62]

The determination of a child's habitual residence is often outcome determinative.[63] For example, if the court finds that the child is presently located in her state of habitual residence, then her presence in the country is not wrongful.[64] However, if the court finds that the child is not presently located in her country of habitual residence, then her presence in the country is likely wrongful unless the petitioning parent did not exercise his or her rights of custody.[65]

In determining the location of the child's habitual residence, the Seventh Circuit looks to whether parental intent to abandon the child's previous habitual residence exists and whether the child has acclimatized to her new state of residence.[66] Courts like the Seventh Circuit reason that children, particularly in cases involving young children, are not competent to make decisions about where they should live.[67] Instead, courts should determine whether there was a settled parental intent to change the child's habitual residence.[68] The Seventh

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[60] Hague Convention, *supra* note 14, at art. 3, 1343 U.N.T.S. at 98-99.

[61] *See* Mozes v. Mozes, 239 F.3d 1067, 1071 (9th Cir. 2001); Perez-Vera Report, *supra* note 44, ¶¶ 66, 83 ("The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it.").

[62] *E.g.*, *Mozes*, 239 F.3d at 1071–72.

[63] *E.g.*, Martinez v. Cahue, 826 F.3d 983, 988 (7th Cir. 2016).

[64] *E.g.*, *Id.*

[65] *E.g.*, *Id.*

[66] Koch v. Koch, 450 F.3d 703, 713 (7th Cir. 2006) (citing *Mozes*, 239 F.3d 1067).

[67] *Mozes*, 239 F.3d at 1076.

[68] *Id.*

Circuit has noted that "[t]he intention or purpose which has to be taken into account is that of the *person or persons* entitled to fix the place of the child's residence."[69] In this manner, the court must consider whether the intentions of one or both parents regarding where a child will live are legally relevant. Such intent does not have to be preserved in writing but can be inferred under the circumstances of each case.[70] For example, courts can consider whether a family moved together from one country to another, if the one parent unilaterally moved with the child, if the move was for a defined period or indefinite, etc.[71]

The Seventh Circuit also considers the child's acclimatization to her new environment.[72] Factors indicating a child's depth of acclimatization to a new environment include establishing friendships, relationships with extended family, "success in school, and participating in community and religious activities."[73] However, the Seventh Circuit has found that "in the absence of settled parental intent, courts should be slow to infer from [the child's] contacts [with a new state] that an earlier habitual residence has been abandoned."[74]

B. U.S. v. Mexico: Comparing Custody Laws

In general, child custody is comprised of two components: legal and physical custody.[75] Legal custody is one or both parents' ability to make significant decisions on behalf of the child, such as decisions

[69] *Martinez*, 826 F.3d at 990 (quoting Redmond v. Redmond, 724 F.3d 729, 747 (7th Cir. 2013)) (emphasis in original).

[70] *Koch*, 450 F.3d at 713 (7th Cir. 2006) (citing *Mozes*, 239 F.3d at 1075–76).

[71] *Id.*

[72] *Id.*

[73] *Martinez*, 826 F.3d at 992.

[74] *Koch*, 450 F.3d at 713 (quoting *Mozes*, 239 F.3d at 1079).

[75] Horvath & Ryznar, *supra* note 35, at 305.

regarding education, healthcare, and religious upbringing.[76] Physical custody centers on with which parent the child will live.[77]

As discussed above, The Hague Convention secures the prompt return of children wrongfully removed or retained in a Contracting state.[78] Courts determine whether a child was wrongfully removed by determining whether the parent who removed the child violated the petitioning parent's "rights of custody" under the laws of the child's state of habitual residence.[79] Article III of the Convention provides in pertinent part:

> [R]ights of custody [. . .] 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.[80]

Because rights of custody may arise from three sources (by operation of law, by judicial or administrative decision, or by effective agreement), understanding the differences in custody laws between Contracting states is crucial. The following sections will briefly describe differences in how the United States and Mexico approach custody law.

1. United States

In the United States, child custody law derives from both statutes and judicially created common law.[81] Historically in the United States, fathers received custody of their children as they were viewed as

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[76] *Id.*

[77] *Id.*

[78] Hague Convention, *supra* note 14, at art. 3, 1343 U.N.T.S. at 98-99.

[79] *Id.*

[80] *Id.*

[81] Antoinette Sedillo López, *International Law: U.S./Mexico Cross-Border Child Abduction—The Need for Cooperation*, 29 N.M. L. REV. 289, 294 (1999).

assets to the father's estate.[82] By the mid-nineteenth century, societal attitudes began to shift and the "tender years" doctrine emerged where legislatures passed laws to award mothers custody of children if the children were not yet old enough to work.[83]

Over time, states abandoned "tender years" statutes in favor of those prescribing what is now commonly known as the "best interests of the child" standard.[84] The purpose of the child's best interests standard is to foster individualized determinations on a case-by-case basis that consider which or both parents would advance the child's needs if he or she or both were given authority to make significant decisions for the child.[85]

In the United States, the best interests of the child standard originated in the English common law as an extension of *parens patriae* (parent of the country),[86] a common law doctrine, in part, empowering the State "to substitute its authority for that of natural parents over their children."[87] Custody statutes advancing the best interests of the child standard often enumerate factors a judge should consider in determining how to allocate custody to one or both parents.[88] For example, Section 602.5(c) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) identifies fifteen best interest factors courts should consider, including "the child's adjustment to his

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[82] HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 127 (1988). *See also* Horvath & Ryznar, *supra* note 35, at 305–06.

[83] JACOB, *supra* note 82, at 128–29. *See also* Horvath & Ryznar, *supra* note 35, at 305–07.

[84] *E.g.*, JACOB, *supra* note 82, at 130–31 (1988).

[85] Horvath & Ryznar, *supra* note 35, at 309–10.

[86] Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis U. L.J. 113, 120-21 (2009).

[87] Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 195 (1978).

[88] *E.g.*, Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/602.5(c)(1)–(15) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.).

or her home, school, and community"; "the level of each parent's participation in past significant decision-making with respect to the child"; and "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child."[89]

In Illinois, for children of unmarried parents, the Illinois Parentage Act of 2015 (Parentage Act) defers to the IMDMA regarding custody and visitation proceedings.[90] Section 802(a) of the Parentage Act provides in pertinent part, "In determining the allocation of parental responsibilities, relocation, parenting time, parenting time interference, support for a non-minor disabled child, educational expenses for a non-minor child, and related post-judgment issues, the court shall apply the relevant standards of the [IMDMA]."[91]

Under the Parentage Act, unmarried parents can ask the Court to adjudicate their custody rights in a judgment.[92] However, if unmarried parents have not adjudicated their rights through the courts, then Illinois law presumes, in the absence of a court order, that unmarried mothers have sole legal custody of their children.[93]

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[89] *E.g.*, *Id.* §§ 5/602.5(c)(2), (5), & (11) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.).

[90] Illinois Parentage Act of 2015, 750 ILL. COMP. STAT. ANN. 46/802(a) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.).

[91] *Id.* Note: Public Acts 99-85 and 99-769 replaced the terms "custody" with "allocation of parental responsibilities," "visitation" with "parenting time," and "removal" with "relocation" in the Illinois Parentage Act of 2015 to conform with the Illinois General Assembly's elimination of "custody" from the IMDMA in favor of "allocation of parental responsibilities." Act of July 21, 2015, sec. 802, 2015 Ill. Laws Pub. Act 99-85 (eff. Jan. 1, 2016); Act of Aug. 12, 2016, sec. 802, 2015 Ill. Laws Pub. Act 99-769 (eff. Jan. 1, 2017).

[92] *Id. See, e.g.*, *In re S.L.*, 765 N.E.2d 82, 85 (Ill. App. Ct. 2002) (holding that an unmarried father who established a father-child relationship could seek custody under the IMDMA and was entitled to a hearing to determine the child's best interests).

[93] 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.) ("It is presumed that, *when the parties have never been married to each other, the mother has legal custody of the child unless a valid*

Additionally, in the United States, unmarried couples cannot rely on private contracts or agreements related to child custody. In most American jurisdictions, private contracts between parents regarding child custody or support are void against public policy.[94] The reason courts refuse to enforce contracts regarding child custody and support is because such contracts may discourage parents from pursuing litigation in their children's best interests.[95]

2. Mexico

Unlike the U.S. which follows the English common law tradition, Mexico follows the Roman civil law tradition of codified laws.[96] One such Roman civil law tradition followed in Mexico is *patria potestas* (Latin: power of the father) or, in Spanish, *patria potestad*.[97] Historically, *patria potestas* gave fathers absolute power over their children and that power endured for life.[98] Today, *patria potestas*—parental authority—has been defined as "the duty and the right of

court order states otherwise. If an adjudication of paternity has been completed and the father has been assigned support obligations or visitation rights, such a paternity order should, for the purposes of this Section, be considered a valid court order granting custody to the mother.") (emphasis added); Illinois Parentage Act of 2015, § 802(c) ("In the absence of an explicit order or judgment for the allocation of parental responsibilities [formerly custody], the establishment of a child support obligation or the allocation of parenting time to one parent shall be construed as an order or judgment allocating all parental responsibilities to the other parent. *If the parentage order of judgment contains no such provisions, all parental responsibilities shall be presumed to be allocated to the mother*; however, the presumption shall not apply if the child has resided primarily with the other parent for at least 6 months prior to the date that the mother seeks to enforce the order or judgment of parentage.") (emphasis added).

[94] *E.g.*, *In re* Marriage of Linta, 2014 IL App (2d) 130862, ¶ 14, 18 N.E.3d 566, 570; Hurlbut v. Scarbrough, 957 P.2d 839, 842 (Wyo. 1998).

[95] *E.g.*, *In re* Marriage of Best, 901 N.E.2d 967, 970 (Ill. App. Ct. 2009).

[96] Sedillo López, *supra* note 81, at 297.

[97] Begné, *supra* note 22, at 527.

[98] *Id.* at 529.

parents to provide assistance and protection to the persons and the property of their children to the degree necessary to fulfill their children's needs."[99] Parental authority gives both parents the right to care and control their children and their children's property.[100] Included within the right to control their children is the right to decide where the children live.[101]

In Mexico, divorce of married parents or separation of unmarried parents does *not* automatically destroy parental authority rights.[102] Consequently, a Mexican parent should not remove his or her child without the other parent's consent because both parents will maintain parental authority over their child absent a court order saying otherwise.[103] This contrasts with the presumption in some American states that in the absence of a contravening court order, an unmarried mother has sole custody of her children.[104] No such presumption of custody rights exists for unmarried fathers or partners of natural mothers.

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[99] *Id.* at 528 (citing IGNACIO GALINDO GARFIAS, DERECHO CIVIL MEXICANO 656 (1999)).

[100] Código Civil Federal [CC], art. 413, Diario Oficial de la Federación [DOF] 14-05-1928, últimas reformas DOF 24-12-2013 (Mex.) ("La patria potestad se ejerce sobre la persona y los bienes de los hijos. Su ejercicio queda sujeto en cuanto a la guarda y educación de los menores, a las modalidades que le impriman las resoluciones que se dicten, de acuerdo con la Ley sobre Previsión Social de la Delincuencia Infantil en el Distrito Federal."). *See* Sedillo López, *supra* note 81, at 297.

[101] Sedillo López, *supra* note 81, at 297.

[102] Código Civil Federal [CC], art. 416 ("En caso de separación de quienes ejercen la patria potestad, ambos deberán continuar con el cumplimiento de sus deberes y podrán convenir los términos de su ejercicio, particularmente en lo relativo a la guarda y custodia de los menores."); *See* Sedillo López, *supra* note 81, at 297.

[103] Sedillo López, *supra* note 81, at 299.

[104] *E.g.*, 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 46/802(c) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.).

II. GARCIA V. PINELO

A. The Facts

Raul Salazar Garcia (Salazar) and Emely Galvan Pinelo (Galvan) dated briefly in 2001.[105] They never married and they never lived together.[106] Both are Mexican citizens, and, in 2002, both lived in Mexico.[107]

During their brief relationship, Galvan and Salazar had a son, D.S., who was born in Monterrey, Nuevo León, Mexico in 2002.[108] In 2006, a Nuevo León court "entered a custody order recognizing Galvan and Salazar as D.S.'s parents."[109] Galvan was awarded physical custody of D.S. and Salazar was awarded weekly visitation, which he regularly exercised.[110]

In 2013, Galvan married Rogelio Hernandez, an American citizen.[111] In July 2013, Salazar and Galvan met to discuss Galvan's desire to move to the United States.[112] They both agreed that Galvan would move to Chicago, Illinois with D.S. for one school year.[113]

In August 2013, Galvan and D.S. moved to Chicago and enrolled D.S., now 11 years old, in school.[114] Salazar remained in touch with D.S. regularly through Skype and D.S. traveled to Mexico for winter break.[115] During this time, D.S. told his father that he would like to

[105] Garcia v. Pinelo, 808 F.3d 1158, 1159 (7th Cir. 2015).
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1160.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

return to Mexico while simultaneously telling his mother he would like to remain in Illinois.[116]

In July 2014, Salazar traveled to Chicago to take D.S. back to Mexico.[117] Galvan refused to allow D.S. to return to Mexico with Salazar.[118] Consequently, Salazar returned alone to Mexico where he filed his petition under the Convention with the Mexican Central Authority.[119] On December 2, 2014, the U.S. Department of State filed Salazar's petition in the Northern District of Illinois.[120]

B. District Court Opinion

The Northern District of Illinois appointed D.S. a guardian *ad litem*.[121] In April 2015, D.S., now age 13, informed his guardian that he would prefer to remain in Chicago.[122] During an *in camera* hearing, D.S. informed the judge that he wanted to remain in Chicago to finish eighth grade and beyond that if he could attend a good high school in Chicago.[123] If he could not attend a good high school in Chicago, then D.S. did not oppose returning to Mexico.[124]

In July 2015, the District Court found that Mexico was D.S.'s country of habitual residence.[125] The Court also found that Salazar had the "right of *patria potestas* over D.S.," which served as a right of custody for purposes of the Convention.[126] Consequently, the District Court found that Galvan wrongfully detained D.S. in Illinois and that

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 1160–61.
[124] *Id.* at 1161.
[125] *Id.*
[126] *Id.*

D.S. needed to be returned to Mexico unless D.S. met the "mature-child exception" of the Convention.[127] The District Court found that although D.S. objected to returning to Mexico and was old enough to do so, retaining D.S. in Illinois would undermine the purposes of the Convention.[128] The court reasoned that a primary purpose of the Convention is to deter parents from abducting their children to benefit from another jurisdiction's laws.[129] Permitting D.S. to remain in the United States would "set a precedent that allows a parent to prevent the return of a child by problems of his or her own making."[130]

C. Appeal to the Seventh Circuit

Galvan appealed from the judgment of the Northern District of Illinois to the Seventh Circuit.[131] The case was heard by a panel consisting of Chief Judge Wood and Judges Manion and Hamilton.[132] At issue for the court was (1) whether Salazar established his custody rights under the Convention and (2) whether the District Court exceeded its discretion when it refused to "allow D.S. to stay in the United States pursuant to the Convention's mature-child exception."[133] On appeal, the parties did not challenge the fact that Mexico is D.S.'s habitual residence.[134]

Writing a unanimous opinion, Chief Judge Wood found that Salazar did have an established right of custody under the Convention through the Mexican law of *patria potestas* (parental authority).[135]

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[127] *Id.*
[128] *Id.*
[129] *Id.* at 1168.
[130] *Id.* at 1168–69.
[131] *Id.* at 1161.
[132] *Id.* at 1159.
[133] *Id.*
[134] *Id.*
[135] *Id.*

Moreover, the Seventh Circuit found that the District Court did not exceed its discretion by ordering D.S. to return to Mexico.[136]

1. *Patria Potestas* (Parental Authority)

Chief Judge Wood recognized that the Seventh Circuit previously recognized *patria potestas* as a "right of custody" within the meaning of the Convention.[137] The Court found that pursuant to the Nuevo León laws, parental authority "attaches automatically at birth or acknowledgment."[138] Since Salazar was D.S.'s acknowledged father since 2006, the parental authority right attached.[139] The Court also found that although Galvan and Salazar entered into a custody agreement in 2006 the agreement did not destroy Salazar's right to parental authority under Nuevo León law.[140]

2. Mature-Child Exception

The Seventh Circuit lastly considered whether the District Court abused its discretion when it did not permit D.S. to remain in the United States.[141] The Convention's "mature-child" exception provides that a court "may [ ] 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

[136] *Id.*

[137] *Id.* at 1164 (citing Altamiranda Vale v. Avila, 538 F.3d 581, 587 (7th Cir. 2008)).

[138] *Id.* at 1166.

[139] *Id.*

[140] *Id.* Nuevo León Civil Code identifies events and conditions when the right of *patria potestas* (parental authority) will terminate, including death of the parent, child's emancipation by marriage, child abuse, etc. Código Civil para el Estado de Nuevo Leon, arts. 443–48, Periódico Oficial 11-05-2016 (Mex.).

[141] *Garcia*, 808 F.3d at 1167.

views."[142] The Seventh Circuit agreed with the District Court that both conditions of the mature-child exception were satisfied in this case, namely D.S. objected to returning to Mexico and he achieved an age and maturity where it was appropriate for the court to consider his views.[143] However, the Seventh Circuit affirmed the District Court's discretion *not* to apply the exception.[144] The court reasoned that the longer a child is wrongfully retained the more the child will acclimate to the new country.[145] This can provide perverse incentives for parents to cause delays in Convention proceedings, which would frustrate the Convention's purpose to "secure the *prompt* return of children wrongfully removed to or retained."[146]

Underscoring its desire not to undermine the Convention by permitting a child to stay in a country where he was wrongfully retained, the Seventh Circuit found that the District Court did not abuse its discretion in ordering D.S. to return to Mexico despite satisfying the Mature Child exception.[147]

In summary, the Seventh Circuit affirmed the judgment of the district court and the district court's order to return D.S. to Mexico.[148] Galvan did not request rehearing on this case or file a petition for writ of certiorari to the U.S. Supreme Court.

[142] Hague Convention, art. 13, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (1980).

[143] *Garcia*, 808 F.3d at 1167.

[144] *Id.*

[145] *Id.* at 1169.

[146] *Id.*; Hague Convention, art. 1.

[147] *Garcia*, 808 F.3d at 1169.

[148] *Id.*

III. MARTINEZ V. CAHUE

A. The Facts

Jaded Mahelet Ruvalcaba Martinez (Martinez) and Peter Valdez Cahue (Cahue) were in a relationship together, on and off, for nearly ten years.[149] They never married and did not frequently live together.[150] In 2006, Martinez gave birth to a son, A.M., in a suburb near Chicago, Illinois.[151] Cahue voluntarily acknowledged paternity of A.M., and A.M. lived with Martinez from birth.[152] In 2010, Martinez and Cahue signed a private, written custody agreement that provided Cahue liberal parenting time and that Cahue would "NOT fight custody in court for [A.M.]."[153] However, neither Martinez nor Cahue attempted to "memorialize this arrangement in a court order."[154]

In 2013, Martinez decided to relocate with the parties' son to Mexico, where she was a citizen.[155] In Mexico, Martinez found employment and enrolled A.M. in private school.[156] A.M. excelled in soccer, "spoke Spanish fluently, attended church regularly, and spent time with extended family."[157]

While Martinez and A.M. were in Mexico, Cahue consulted an attorney about his rights under The Hague Convention.[158] However, Cahue never filed a petition under the Convention.[159]

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[149] Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).
[150] *Id.* at 986.
[151] *Id.* at 987.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

On October 16, 2013, Martinez "filed a petition against Cahue for child support and an order of protection" in Mexico.[160] However, Martinez withdrew her petition before the Mexican court ruled on it.[161] Shortly thereafter, Martinez and Cahue agreed to a visitation plan where Cahue would have parenting time with A.M. during his school vacations in December 2013, April 2014, and July 2014.[162]

In December 2013, A.M. did not visit Cahue as planned.[163] Consequently, Cahue began corresponding with the U.S. Department of State.[164] He was again informed of his rights under The Hague Convention and provided with "a blank petition for relief."[165] However, Cahue never filed the petition.[166]

Cahue's parenting time with A.M. did proceed as planned in April 2014.[167] However, in July 2014, Cahue only purchased a one-way ticket for A.M., and Martinez refused to send A.M. to Illinois without a round-trip ticket.[168] Cahue complied and Martinez sent A.M. to Illinois for the month of July.[169]

On August 16, 2014, Martinez went to the airport in Mexico to pick up A.M., but he never arrived.[170] Martinez called Cahue, who claimed he had forgotten about the flight.[171] Later, Cahue stopped returning Martinez's calls.[172] On August 21, Cahue "contacted the

[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 987–88.
[166] *Id.* at 988.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*

State Department and asked it to put A.M.'s passport "on hold" so that A.M. could not leave the United States."[173]

On August 25, 2014, Martinez traveled to Illinois to retrieve her son.[174] She took A.M. from Cahue and returned to her parents' home in Illinois.[175] In the Illinois circuit court, Cahue filed a petition for custody and an emergency motion to prevent Martinez from relocating with A.M. to Mexico.[176] The Illinois circuit court granted Cahue's emergency motion and police seized A.M. from Martinez.[177] Martinez retained counsel and filed a response to Cahue's custody petition.[178] After a hearing on September 17, 2014, the Illinois court continued Cahue's physical possession of A.M. and "ordered the surrender of A.M.'s U.S. and Mexican passports."[179]

Martinez returned to Mexico.[180] "On February 6, 2015, she filed her petition under the Convention with the Mexican Central Authority."[181] "The U.S. State Department received the petition on March 13, 2015."[182]

B. District Court Opinion

"[O]n December 15, 2015, after she discovered that Cahue had obtained a new U.S. passport for A.M., Martinez commenced emergency proceedings in the district court and filed her verified

[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*

petition in the Northern District of Illinois for A.M.'s return to Mexico."[183]

The Northern District of Illinois held an evidentiary hearing on the matter.[184] The District Court found "that there was sufficient evidence that A.M. had acclimated to Mexico during the year he lived there with this mother."[185] However, the District Court also found that the parties did not share an intent for A.M. to relocate to Mexico.[186] Without "shared parental intent," the District Court held that A.M.'s habitual residence was Illinois, that Cahue's retention of A.M. in Illinois was therefore lawful, and dismissed Martinez's petition.[187]

C. Appeal to the Seventh Circuit

Martinez appealed from the judgment of the Northern District of Illinois to the Seventh Circuit.[188] The case was heard by a panel consisting of Chief Judge Wood and Judges Bauer and Flaum.[189] At issue for the court was (1) whether the district court properly identified A.M.'s habitual residence and, if not, (2) whether the parties had any defenses.[190] Chief Judge Wood, writing a unanimous opinion, found that Martinez had sole custody over A.M. under Illinois law and held that Mexico was A.M.'s habitual residence.[191] Finding that Cahue's retention of A.M. was wrongful under the Convention, the Seventh Circuit reversed the district court, ordering A.M. to be returned to Martinez in Mexico.[192]

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[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 986.
[190] *Id.* at 989–90.
[191] *Id.* at 994.
[192] *Id.*

1. Habitual Residence

Chief Judge Wood began her opinion underscoring the purpose of the Convention as "an anti-abduction treaty."[193] Chief Judge Wood next identified that the habitual residence determination is a mixed question of law and fact and that the standard of review of the district court's determination is *de novo*.[194] She noted that *de novo* review is essential both because the habitual residence determination is often outcome determinative for Convention cases[195] and "to assure both the national and the international uniformity that the Convention was designed to achieve."[196] The Seventh Circuit reviewed findings of historical fact with deference.[197]

Next, Chief Judge Wood assessed the two primary factors for determining habitual residence: (1) parental intent and (2) child's acclimatization to the proposed home jurisdiction.[198] She noted that the Seventh Circuit has tended to privilege parental intent but emphasized the fact-specific nature of the inquiry.[199]

Regarding parental intent, the Seventh Circuit found that the district court wrongly considered Cahue's intent for A.M. to remain in Illinois.[200] Chief Judge Wood noted that "[t]he intention or purpose which has to be taken into account is that of the *person or persons* entitled to fix the place of the child's residence."[201] The Seventh Circuit found that Cahue *never* asserted his custody rights under the

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[193] *Id.* at 989. *See supra* Section The Hague Convention.

[194] *Martinez*, 826 F.3d at 989.

[195] *Id.* at 988 ("[I]f a child is currently located in her habitual residence, her presence in the country (whether by removal or retention) is not wrongful.").

[196] *Id.* at 989.

[197] *Id.*

[198] *Id.* at 990.

[199] *Id.*

[200] *Id.* at 992.

[201] *Id.* at 990 (quoting Redmond v. Redmond, 724 F.3d 729, 747 (7th Cir. 2013)) (emphasis in original).

Convention.[202] Although Martinez and Cahue had written visitation agreements, neither Cahue nor Martinez ever entered them with a court.[203] The court refused to enforce the agreements as against public policy.[204] "In the absence of a court order, Illinois law presumes the mother of a child [of unmarried parents] has sole custody."[205] As such, "Cahue had no custody rights under Illinois law."[206]

The Seventh Circuit also found that a noncustodial parent like Cahue "has no right to determine the child's location; he or she has only the right to ask a court to supervise."[207] At no point did Cahue invoke the Court's powers to determine whether it was in A.M.'s best interests to relocate to Mexico.[208] The Seventh Circuit reasoned that because Martinez had sole custody of A.M. under Illinois law and under the Convention, only her intent—to relocate to Mexico—mattered.[209]

Regarding the child's acclimatization factor, the Seventh Circuit noted that the district court found "A.M. had acclimatized to Mexico" with "all of the indicia of habitual residence, including friends, extended family, success in school, and participating in community and religious activities."[210] The Seventh Circuit found the district court's findings were not clearly erroneous.[211] Thus the Seventh

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[202] *Martinez*, 826 F.3d at 990.

[203] *Id.* at 990–91.

[204] *Id.*

[205] *Id.* (citing 720 ILCS 5/10-5(a)(3)(2013) and 750 ILCS 45/14(a)(2) (2013)).

[206] *Martinez*, 826 F.3d at 991.

[207] *Id.* (citing 750 ILCS 5/609(a) (2013)). Section 609 of the IMDMA was repealed in 2015. Act of July 21, 2015, sec. 5-20, 2015 Ill. Laws Pub. Act 99-90 (eff. Jan. 1, 2016). However, a substantially similar provision exists in the new Section 609.2 of the IMDMA that replaces the term "removal" with "relocation." Act of July 21, 2015, sec. 5-15, § 609.2, 2015 Ill. Laws Pub. Act 99-90 (codified at 750 ILL. COMP. STAT. ANN. 5/609.2, eff. Jan. 1, 2016).

[208] *Martinez*, 826 F.3d at 991.

[209] *Id.* at 992.

[210] *Id.*

[211] *Id.*

Circuit held that because only Martinez's intent to relocate to Mexico was of legal significance in this matter and because A.M. had already acclimatized to Mexico, Mexico was A.M.'s habitual residence.[212]

2. Defenses and Aims of the Convention

The Seventh Circuit noted that because the district court found Illinois to be A.M.'s habitual residence, the district court did not consider the "wrongfulness of Cahue's 2014 retention of A.M., or any possible defenses that Cahue might have raised."[213] The Seventh Circuit decided not to remand the case since the case was sufficiently briefed and time-sensitive.[214]

The Seventh Circuit first considered whether Cahue violated Martinez's rights of custody under Mexican law.[215] Noting that "Cahue admit[ted] that he retained A.M. in Illinois without Martinez's consent," the Seventh Circuit found that Cahue indeed violated Martinez's custody rights.[216]

Next, the Seventh Circuit considered whether any defenses Cahue raised applied to his wrongful actions: (1) whether Martinez acquiesced to his retention of A.M. or (2) whether "A.M. is now so settled in his new environment that he should not be returned" to Mexico.[217] First, the Seventh Circuit found that Martinez never acquiesced to Cahue's retention of A.M. in Illinois because she continuously exercised her custody rights by trying to remain in contact with A.M. and to regain physical possession of A.M.[218]

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[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.* at 992–93.
[216] *Id.* at 993.
[217] *Id.* (internal quotations omitted).
[218] *Id.*

Second, the Seventh Circuit refused to apply the "settled-child" defense for public policy reasons.[219] The Seventh Circuit found that Cahue had multiple opportunities to assert his parental rights but never did so before his wrongful retention of A.M.[220] Instead, Cahue engaged in "self-help" by retaining A.M. in Illinois without permission and filing a custody petition in Illinois.[221] The Seventh Circuit noted that "[t]he Convention achieves its aims both by returning children in individual cases and by deterring future abductions or wrongful retentions."[222] The Seventh Circuit found that returning A.M. to Cahue would "be quite damaging to the deterrent effect of the Convention."[223]

In summary, the Seventh Circuit reversed the judgment of the district court and ordered A.M. to be returned to Martinez in Mexico.[224] The Seventh Circuit denied rehearing and rehearing en banc on July 29, 2016.[225] On October 27, 2016, Cahue filed a petition for writ of certiorari to the U.S. Supreme Court. As of March 11, 2017, the petition for writ of certiorari remains pending and was distributed for conference on March 17, 2017.

[219] *Id.* at 993–94.

[220] *Id.* at 993.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 994.

[225] Martinez v. Cahue, 826 F.3d 983 (7th Cir. 2016), *petition for cert. filed* (U.S. Oct. 27, 2016) (No. 16-582).

IV. ANALYSIS

A. When Decision-making Parental Rights are Conferred

In both *Garcia* and *Martinez*, the natural fathers of the children at issue formally acknowledged their paternity.[226] This is important in both the United States and in Mexico. In both countries, a voluntary acknowledgement of paternity will confer rights and duties on the parent.[227]

However, in Mexico, *patria potestas* [parental authority] laws give parents who have voluntarily acknowledged paternity the right to exercise decision-making over the child's life.[228] In the United States, no such rights are automatically conferred to a parent who has voluntarily acknowledged paternity.[229] Instead, the voluntary acknowledgement of paternity serves as a basis from which a parent can *seek* the court's determination of custody issues.[230] In jurisdictions like Illinois, courts retain the power to make decisions about whether one or both parents shall have custody in order to protect children's

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[226] *Martinez*, 826 F.3d at 987; Garcia v. Pinelo, 808 F.3d 1158, 1160 (7th Cir. 2015).

[227] *E.g.*, Illinois Parentage Act of 2015, 750 ILL. COMP. STAT. ANN. 46/305(a) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.) ("[A] valid acknowledgment [. . .] is equivalent to an adjudication of the parentage of a child and confers upon the acknowledged father all of the rights and duties of a parent."); Código Civil Federal [CC], art. 412–14, Diario Oficial de la Federación [DOF] 14-05-1928, últimas reformas DOF 24-12-2013 (Mex.).

[228] Código Civil Federal [CC], art. 413; *see* Sedillo López, *supra* note 81, at 297.

[229] *See, e.g.*, CAL. FAM. CODE § 7573 (West, Westlaw through all 2016 Reg. Sess. Laws, Ch. 8 of 2015-16 2d Ex. Sess.) ("The voluntary declaration of paternity shall be recognized as a *basis for the establishment* of an order for child custody, visitation, or child support." (emphasis added)); Illinois Parentage Act of 2015, § 305(a)–(b).

[230] *See, e.g.*, CAL. FAM. CODE § 7573; Illinois Parentage Act of 2015, § 305(a)–(b).

best interests.[231] For example, Section 602.5(a) of the IMDMA provides in pertinent part, "*The court shall allocate* decision-making responsibilities *according to the child's best interests*. Nothing in this Act requires that each parent be allocated decision-making responsibilities."[232] In this manner, custody rights in the United States are not automatic—courts assign custody rights in the child's best interests.

Consequently, an unmarried parent who has voluntarily acknowledged paternity and whose child's country of habitual residence follows the parental authority laws, like Mexico, will likely have a right of custody on which to prevail in a Hague Convention petition because the parental authority laws instill both parents with rights to determine the child's place of residence.[233] In contrast, the unmarried parent who has voluntarily acknowledged paternity and whose child's state of habitual residence is a state like Illinois will not automatically have a right of custody under the Convention because states like Illinois do not automatically confer decision-making powers to such parents.[234]

These outcomes bore out in both *Garcia* and *Martinez*. In *Garcia*, the parties' child was born in Mexico.[235] The child's state of habitual residence was Mexico.[236] Under Mexican law, since Salazar voluntarily acknowledged D.S. as his son, Salazar's *patria potestas* rights attached.[237] Thus when Galvan refused to return D.S. to Mexico,

[231] *E.g.*, Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/102(7) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.).

[232] Illinois Marriage and Dissolution of Marriage Act, § 602.5(a) (emphasis added).

[233] Código Civil Federal [CC], art. 413; *see* Sedillo López, *supra* note 81, at 297.

[234] *See, e.g.*, Illinois Parentage Act of 2015, § 305(a)–(b).

[235] Garcia v. Pinelo, 808 F.3d 1158, 1160 (7th Cir. 2015).

[236] *Id.* at 1159.

[237] *Id.* at 1166.

she violated Salazar's right of custody under The Convention and parental authority laws to determine where D.S. should live.[238]

In contrast, in *Martinez*, the Seventh Circuit found that Cahue did not have any rights of custody under the Convention.[239] In *Martinez*, although the parties' child, A.M., was born in Illinois,[240] Martinez took A.M. to live in Mexico when he was seven years old.[241] After sending A.M. back to Illinois to visit his father for the summer, Cahue refused to return A.M. to Mexico.[242]

Although Martinez filed a petition under the Convention to return A.M. to Mexico, the Seventh Circuit first considered whether Martinez wrongfully removed A.M. from Illinois in the first place.[243] The Seventh Circuit likely made the right call to do so because the purpose of the Convention is to prevent parents from "obtain[ing] custody of children by virtue of their wrongful removal or retention."[244] Martinez should not prevail in her Convention petition if she removed A.M. wrongly first.

However, the Seventh Circuit found that Cahue took no action to assert his custody rights before he engaged in "self-help" to keep A.M. in Illinois.[245] As mentioned above, Cahue's voluntary acknowledgement of paternity only made him a parent; Illinois did not automatically confer custody rights to Cahue by virtue of his paternity acknowledgment.[246] Because Cahue did not assert his parental rights in court before he retained A.M. in Illinois, he triggered the default

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[238] *Id.* at 1159.

[239] Martinez v. Cahue, 826 F.3d 983, 991 (7th Cir. 2016).

[240] *Id.* at 987.

[241] *Id.*

[242] *Id.* at 988.

[243] *Id.* at 990.

[244] International Child Abduction Remedies Act, 22 U.S.C.A. § 9001(a)(2) (West, Westlaw through Pub. L. No. 114-327).

[245] *Martinez*, 826 F.3d at 990.

[246] *See* Illinois Parentage Act of 2015, 750 ILL. COMP. STAT. ANN. 46/305(a)–(b) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.).

custody laws in Illinois, which provide that "[i]n the absence of a court order, Illinois law presumes that the mother of a child [of unmarried parents] has sole custody."[247] Consequently, in the absence of a court order, Martinez had sole custody of A.M. and sole discretion as to where A.M. would live.[248] Thus, under the Convention, Martinez did not violate any of Cahue's rights of custody by removing A.M. to Mexico because Cahue did not have any under Illinois law to begin with.[249]

But what about the private custody agreement Martinez and Cahue signed in 2010 promising Cahue liberal parenting time?[250] Article III of the Convention provides in part that rights of custody may arise "by reason of an agreement having *legal effect* under the law of that State."[251] The commentaries to the Convention state that for private agreements to have legal effect they must not be prohibited by law.[252]

As discussed above in Part I.B.1., private contracts or agreements related to child custody are generally unenforceable as against public policy in the United States.[253] Only custody agreements supervised and approved by the court are permissible so that courts protect children's best interests through the supervisory process.[254] Cahue never attempted to memorialize his agreement with Martinez in a court order.[255] As such, the private agreement was void as against public

[247] *Martinez*, 826 F.3d at 990–91; Illinois Parentage Act of 2015, § 802(c).

[248] *Martinez*, 826 F.3d at 991.

[249] *Id.*

[250] *Id.* at 987.

[251] Hague Convention, art. 3, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (1980).

[252] Perez-Vera Report, *supra* note 44, ¶ 70.

[253] *E.g.*, *In re* Marriage of Linta, 2014 IL App (2d) 130862, ¶ 14, 18 N.E.3d 566, 570; Hurlbut v. Scarbrough, 957 P.2d 839, 842 (Wyo. 1998).

[254] *E.g.*, *In re* Marriage of Best, 901 N.E.2d 967, 970–71 (Ill. App. Ct. 2009).

[255] Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).

policy and did not serve as an example of Cahue asserting his parental rights.

What about the court order resulting from Cahue's petition for custody in Illinois?[256] This court order was filed *after* Cahue retained A.M. in Illinois without Martinez's permission.[257] Article 17 of the Convention provides in pertinent part:

> The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.[258]

The purpose of Article 17 is to "ensure, inter alia, that the Convention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention."[259] Cahue's court order in Illinois is exactly the type of order the Convention contemplates. Cahue knew he could get a favorable hearing in Illinois and so he engaged in self-help by retaining A.M. in Illinois and sought refuge in its court system. The Convention is designed to halt court orders that would give effect to Cahue's attempts to circumvent Martinez's parental rights. As such, the court orders issued in response to custody petitions *after* Cahue's retention of A.M. in Illinois cannot evince efforts to assert parental rights *before* A.M.'s retention in Illinois.

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[256] *Id.* at 988.

[257] *Id.*

[258] Hague Convention, art. 17, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (1980).

[259] Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986).

B. How Outcomes Would Have Been Different

1. Garcia v. Pinelo

In *Garcia*, the Seventh Circuit found that Salazar had a right of custody under the Convention because he had a parental authority right under Nuevo León state laws by voluntarily acknowledging paternity of D.S.[260] But what if Nuevo León, Mexico did not have parental authority laws and instead followed the laws of Illinois?

In that case, Salazar would not have a right of custody under the Convention. Even though the parties did have a custody order from the court,[261] Salazar still would not have a right of custody because Galvan was allocated physical custody of D.S. while Salazar was allocated weekly visitation.[262] Under the Convention, Salazar's court approved weekly visitation is not a right of custody—a right to determine the child's place of residence.[263] Instead, Salazar has a "right of access."[264]

Although Salazar would not have a right of custody to prevent Galvan from automatically retaining D.S. in the United States, Salazar would have rights arising out of the original court order allocating custody and visitation.[265] The parties' court order would enable Salazar to ask a court in either Illinois or Mexico to conduct a hearing to determine whether it is in D.S.'s best interests to remain in Illinois.[266] In this manner, because Galvan and Salazar had a

[260] Garcia v. Pinelo, 808 F.3d 1158, 1166 (7th Cir. 2015).

[261] *Id.* at 1160.

[262] *Id.*

[263] Hague Convention, art. 5(a), Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (1980).

[264] *Id.*

[265] *Id.* arts. 3 & 21.

[266] *Id.* art. 21; Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/413(b)(2) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 5/609.2(g) (West, Westlaw through Pub. Act 99-

preexisting, court-approved custody agreement, Galvan's ability to relocate is encumbered by Salazar's right to petition the court to make a best interest determination.

2. Martinez v. Cahue

The outcome would also be different in *Martinez* if Cahue could rely on parental authority laws. Unlike Salazar, Cahue did not have a court order allocating him any rights of custody or visitation.[267] Thus Cahue could not overcome the default custody presumption under Illinois law and the Seventh Circuit found that only Martinez's parental intent was relevant.[268]

However, in a scenario where Cahue has parental authority rights, the Seventh Circuit likely would find that it would have to consider both Martinez's and Cahue's intent. Because Cahue, like Salazar, voluntarily acknowledged paternity of his child, the right of parental authority would attach immediately. With the right of parental authority, Cahue would have a right of custody on which to rely in a Convention petition.

In this manner, when Martinez left Illinois to move to Mexico, he could have filed a Hague petition to return A.M. to Illinois because the parties lacked mutual intent for A.M. to relocate. Martinez would have an encumbered right of custody where she would be unable to relocate without a court determining whether relocation was in the child's best interests.

C. What's the Better Rule?

Mexico's parental authority rights and Illinois's presumption that an unmarried mother has sole legal custody of her children in the

937, 2016 Reg. Sess.); Código Civil Federal [CC], art. 416, Diario Oficial de la Federación [DOF] 14-05-1928, últimas reformas DOF 24-12-2013 (Mex.).

[267] Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).

[268] *Id.* at 991.

absence of a court order reflect different policy considerations. Ultimately, Illinois's presumption is the better rule because children's best interests are better protected.

Parental authority rights, as originally conceived and as they have evolved in jurisdictions like Mexico, stand for the proposition that parenthood is rooted in the natural order of the world.[269] As a natural consequence of the parent-child relationship, certain parental rights and powers automatically arise at a child's birth or a parent's voluntary acknowledgment of paternity.[270] In other words, both parents—regardless of marital status—have natural rights to make decisions about their children by virtue of the parent-child relationship.[271]

However, in jurisdictions like Illinois, no such natural rights exist for unmarried fathers or partners of unmarried mothers. The *parens patriae* doctrine subordinates the natural rights of parents so that the State—through the courts—can guarantee that parents pursue their children's best interests despite the parents' separated or divorced status.[272]

As discussed above, in the absence of a court order allocating parental responsibilities, Illinois law presumes unmarried mothers have sole legal custody of their children.[273] The historical and practical reason for this presumption is that maternity usually is not questioned since a biological mother is present at birth.[274]

Illinois's presumption that an unmarried mother retains sole legal custody of her children in the absence of a court order is predicated on the assumption that unmarried fathers are not involved in raising their

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[269] Begné, *supra* note 22, at 528.

[270] *Id.*

[271] *Id.* at 527.

[272] 46 AM. JUR. 2D *Juvenile Courts, Etc.* § 19 (2016).

[273] 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 46/802(c) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.).

[274] *See, e.g.*, CENT. MINN. LEGAL SERVS. UNMARRIED FATHERS' GUIDE TO PATERNITY, CUSTODY, PARENTING TIME AND CHILD SUPPORT IN MINNESOTA 5 (3d rev. ed. 2011).

children when the parents have not entered into a custody agreement. Presuming for a moment that this assumption is correct, enabling a parent to assert rights of custody for the first time in a Convention proceeding would undermine the stability of the children's status quo where their mother made significant parenting decisions alone.

However, the assumption that the absence of a court order signifies a lack of parental involvement may, in fact, not be true. As previously mentioned, many unmarried couples with children prefer to follow informal parenting arrangements without court orders.[275] Additionally, going to court is expensive and requiring unmarried parents to formalize their parenting arrangements in court may place a high burden on the most vulnerable unmarried parents.[276]

Despite these shortcomings, Illinois's presumption that an unmarried mother has sole legal custody of her children in the absence of a court order remains the better public policy. Allowing parents to assert rights of custody for the first time through parental authority rights enables such parents to circumvent children's best interests through gamesmanship.

For example, in *Martinez v. Cahue*, Peter Cahue consulted an attorney regarding his legal options.[277] Yet he never followed through with filing a petition to allocate parental responsibilities and parenting time.[278] He also researched his rights under The Hague Convention.[279] But knowing, in his own words, "[he] wouldn't have won," Cahue engaged in self-help by retaining A.M. in Illinois against Jaded Martinez's wishes and deploying the Illinois courts to secure favorable custody orders.[280] If Cahue had parental authority rights, he would be able to disturb the status quo without any court having previously

[275] *See* Maldonado, *supra* note 16, at 355–56.
[276] BOWMAN, *supra* note 5, at 222.
[277] Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).
[278] *Id.*
[279] *Id.*
[280] *Id.* at 993.

considered A.M.'s best interests. Such a result rewards custodial gamesmanship rather than protecting A.M.'s best interests.

A primary aim of the Convention is to deter parents from not only child abductions and wrongful retentions[281] but also adversarial gamesmanship involving children.[282] Such gamesmanship can take many forms, but courts are particularly concerned about deterring custodial parents from bargaining to retain legal and physical custody of their children by accepting reduced support payments.[283] In *Garska v. McCoy*, the Supreme Court of Appeals of West Virginia noted:

> [W]e are concerned to prevent the issue of custody from being used in an abusive way as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce proceeding. Where a custody fight emanates from this reprehensible motive the children inevitably become pawns to be sacrificed in what ultimately becomes a very cynical game.[284]

Because adversarial gamesmanship, e.g., accepting lower support payments to retain custody, would not be in the children's best interests, courts in jurisdictions like Illinois make best interest determinations in custody proceedings to make sure that the children—who often do not have a voice in the custody proceeding itself—are protected from the adversarial process.

Illinois's presumption is a better rule because it is narrow. The presumption only applies in the absence of a court order.[285] Where

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[281] Hague Convention, Preamble, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (1980).

[282] *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986).

[283] *E.g.*, Garska v. McCoy, 278 S.E.2d 357, 362 (W.Va 1981).

[284] *Id.* at 361.

[285] 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 46/802(c) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.).

unmarried parents have voluntarily acknowledged paternity and sought the court's relief to adjudicate each parent's custody rights, the presumption will not apply.[286] Under The Hague Convention, a parent with a court order predating the alleged wrongful abduction or retention will more easily be able to argue that rights of custody or access exist.[287] Moreover, even if a parent only has rights of access, the parent can still request under the Convention that Contracting States enforce and protect the rights of access.[288]

More importantly, if the parties obtain a custody judgment contemporaneously with a voluntary acknowledgment of paternity, then the parties will have gone through a process where the court has considered the child's best interests.[289] In contrast, an unmarried parent without a custody order who relies on parental authority laws as a right of custody under the Convention may not have had a court ever previously consider the child's best interests. This essentially means that such a parent could assert his rights for the first time in court by filing a petition under the Convention rather than when the parent voluntarily acknowledged paternity in the first place.

Whether a parent asserted parental rights before asserting rights of custody in a petition under the Convention matters because stability is important in children's lives.[290] Courts and practitioners agree that fostering stability in the midst of a family's breakup is in children's

[286] 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3); 750 ILL. COMP. STAT. ANN. 46/802(c).

[287] *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,506–07 (Mar. 26, 1986).

[288] Hague Convention, *supra* note 14, at art. 21, 1343 U.N.T.S. at 102.

[289] *E.g.*, Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/602.5 (West, Westlaw through Pub. Act 99-904, 2016 Reg. Sess.).

[290] *E.g.*, *In re* Marriage of Davis, 792 N.E.2d 391, 394 (Ill. App. Ct. 2003). *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05 cmt. i (AM. LAW INST. 2002) [hereinafter ALI Principles].

best interests.[291] Consequently, courts applying the best interests standard will often favor maintaining the status quo of custody arrangements in order to prevent disruption in children's lives.[292]

V. CONCLUSION

As this article goes to print, the U.S. Supreme Court will decide whether to grant Cahue's petition for writ of certiorari. Cahue's actions are exactly the kind that the Hague Convention is meant to deter—self help and litigious gamesmanship at the expense of a child's best interests. Illinois's presumption that an unmarried mother has sole custody of her children in the absence of a court order prevents parents like Cahue from using the Hague Convention and laws like it to their tactical advantage. Although social trends in the United States point to less formal relationships—e.g., avoidance of the institution of marriage—and informal parenting arrangements, such informal parenting arrangements do not protect children's best interests in the unhappy event the unmarried parents cannot agree as to how to raise their children. Requiring unmarried fathers or partners of unmarried mothers to obtain a court order to define their custodial rights adds formality to the family status that should help protect the children's interests. In all likelihood, the Supreme Court will deny Cahue's petition for writ of certiorari. But if it does grant certiorari, the Court should affirm the Seventh Circuit.

[291] *E.g.*, *Davis*, 792 N.E.2d at 394; *See* ALI PRINCIPLES, *supra* note 290, § 2.05 cmt. i.

[292] *E.g.*, *Davis*, 792 N.E.2d at 394 (citing *In re* Marriage of Nolte, 609 N.E.2d 381, 385 (Ill. App. Ct. 1993)); Sullivan v. Knick, 568 S.E.2d 430, 435 (Va. App. Ct. 2002).