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Uprooting Children in the Name of Equity

Merle H. Weiner*

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Uprooting Children in the Name of Equity

Merle H. Weiner

Abstract

This Article ultimately recommends that courts should reign in, if not abandon, the doctrine of equitable estoppel as it is used in Hague child abduction cases. This Article supports its thesis in four parts. Part I describes the equitable estoppel argument as it has emerged within the Hague Convention framework. Part II then examines the Convention's legislative history and argues that the doctrine is incompatible with that history. Part III analyzes the principle policy basis offered in support of the doctrine: the deterrence of concealment. Part IV focuses on the best way to address concealment within the confines of the Convention structure.

UPROOTING CHILDREN IN THE NAME OF EQUITY

*Merle H. Weiner**

INTRODUCTION

Since 2000, there has been a surge in the number of court opinions addressing the question whether equitable estoppel can be successfully invoked in child abduction cases arising under the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Abduction Convention” or “Convention”).¹ Attention to this issue is not surprising. Although the doctrine was initially rejected in a few cases between 1997 and 1998,² the potential for the concept to defeat one of the defenses to an action initiated under the Hague Abduction Convention has led petitioning parties to raise the argument repeatedly. The argument eventually succeeded in 2002,³ and since then a growing number of courts have accepted and applied the doctrine of equitable estoppel in international child abduction cases.⁴

* Philip H. Knight Professor of Law, University of Oregon School of Law. I appreciate the helpful comments of Michael Moffitt and Linda Silberman and the efforts of my research assistants Snehata Karki, Andrew Bednarek, Valerie Kamps, Brigitte Menard, Nathan Piers VanderPloeg, Mary Margaret Montgomery, and Jen Costa.

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

2. See *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998) (passing on the issue); *In re Robinson*, 983 F. Supp. 1339, 1345 n.10 (D. Colo. 1997) (rejecting the doctrine in dicta); *Wojcik v. Wojcik*, 959 F. Supp. 413, 420–21 (E.D. Mich. 1997) (determining the doctrine to be inapplicable to the facts of the case).

3. See *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348–50 (S.D. Fla. 2002); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362 (M.D. Fla. 2002).

4. See, e.g., *In re B del C.S.B.*, 559 F.3d 999, 1014–15 (9th Cir. 2009); *Duarte v. Bardales*, 526 F.3d 563, 569–71 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723–24 (11th Cir. 2004); *Dietz v. Dietz*, No. 6:07-CV-1398, 2008 U.S. Dist. LEXIS 70208, at *18 (W.D. La. Sept. 17, 2008), *aff'd*, No. 08-31003, 2009 U.S. App. LEXIS 23200 (5th Cir. Oct. 20, 2009); *Arguelles v. Vasquez (In re Hague Child Abduction)*, No. 08-2030-CM, 2008 U.S. WL 913325, at *9–10 (D. Kan. Mar. 17, 2008); *Ibarra v. Quintanilla Garcia*, 476 F. Supp. 2d 630, 636 (D. Ariz. 2007); *Wasniewski v. Grzelak-Johannsen*, No. 06-cv-2548, 2007 WL 2071957, at *5–7 (N.D. Ohio July 13, 2007); *Jimenez v. Lozano*, No. CO5-5736, 2007 WL 527499, at *9 (W.D. Wash. Feb. 14, 2007); *Van Driessche v. Ohio*

However, not all courts accept the doctrine,⁵ and a showdown is imminent between those courts that embrace the doctrine and those that reject it. The former see it as essential to discouraging the secreting of abducted children. The latter believe the doctrine undermines children's need for stability. Because only four federal appellate courts have addressed the issue to date,⁶ and since one of the decisions is nonbinding,⁷ the time is ripe for a scholarly evaluation of the issue and the merits of each side's position.

This Article undertakes such an evaluation. It ultimately recommends that courts reign in, if not abandon, the doctrine of equitable estoppel as it is used in Hague child abduction cases. The doctrine raises administrative concerns, is inconsistent with the Convention's legislative history, and is unnecessary. It also renders irrelevant certain evidence that courts should be considering when they decide whether to return abducted children. Courts would be in a better position to advance the

Esezeoboh, 466 F. Supp. 2d 828, 848–54 (S.D. Tex. 2006); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1312–13 (S.D. Fla. 2004); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004); *Belay v. Getachew*, 272 F. Supp. 2d 553, 564 n.5 (D. Md. 2003); *Bocquet*, 225 F. Supp. 2d at 1348–50; *Mendez Lynch*, 220 F. Supp. 2d at 1362–63; *Perez v. Garcia*, 198 P.3d 539, 544–45 (Wash. Ct. App. 2009).

5. A number of courts either reject the doctrine's applicability to Hague cases or reject the application of the doctrine given the facts of the case. *See, e.g.*, *Katona v. Kovacs*, 148 Fed. App'x 158, 161 (4th Cir. 2005) (rejecting the district court's attempt to apply the doctrine to reduce the time frame in which a parent must file the petition); *Nunez v. Ramirez*, No. 07-01205, 2008 WL 898658, at *6–7 (D. Ariz. Mar. 28, 2008) (reasoning that "tolling" uproots settled children, contrary to the purpose of the well-settled defense); *Matovski v. Matovski*, No. 06-cv-4259, 2007 WL 2600862, at *11–12 (S.D.N.Y. Aug. 31, 2007) (rejecting the doctrine on the basis that the one-year period under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention" or "Convention") is not a limitations period that can be subject to tolling and because relief under the well-settled defense is discretionary); *Anderson v. Acree*, 250 F. Supp. 2d 872, 874–76 (S.D. Ohio 2002) (criticizing the doctrine and rejecting its application to the facts of the case); *see also* *Moreno v. Martin*, No. 08-22432-CIV, 2008 WL 4716958, at *20 n.21 (S.D. Fla. Oct. 23, 2008) (declining to apply equitable principles to the facts of the case); *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1259 (M.D. Fla. 2008) (same); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1151–52 (E.D. Wash. 2007) (same); *Robinson*, 983 F. Supp. at 1345 & n.10 (same); *Wojcik*, 959 F. Supp. at 413 (same); *Terron v. Ruff*, No. 48683-7-I, 2003 WL 1521967, *5 (Wash. Ct. App. Mar. 24, 2003) (same).

6. *In re B. del C.S.B.*, 559 F.3d at 1014–15 (permitting equitable estoppel); *Dietz*, 2009 U.S. App. LEXIS 23200 (same); *Duarte*, 526 F.3d at 563 (same); *Katona*, 148 Fed. App'x at 158 (rejecting equitable relief on the facts); *Furnes*, 362 F.3d at 702 (permitting equitable estoppel).

7. *Katona*, 148 Fed. App'x at 158.

welfare of abducted children if they rejected arguments based on equitable estoppel and instead examined whether a child is “settled” for purposes of the “well-settled” defense (the defense to which the equitable estoppel doctrine is relevant).

This Article supports its thesis in four parts. Part I describes the equitable estoppel argument as it has emerged within the Convention framework. It details the contours of the doctrine and highlights its various iterations. This Part suggests that the variation in the requirements of the doctrine causes doctrinal confusion and gives judges a level of discretion that is inconsistent with the Convention’s “well-settled” defense and with general concepts of justice.

Part II then examines the Convention’s legislative history and argues that the doctrine is incompatible with that history. This Part also examines whether there are other sources of authority justifying the adoption of equitable estoppel—for example, executive branch documents and foreign case law—and concludes that these sources do not provide a sufficient justification for the doctrine either.

Part III analyzes the principle policy basis offered in support of the doctrine: the deterrence of concealment. Part III suggests that courts need not rely upon the Hague Convention to discourage concealment because there are other legal mechanisms, such as criminal sanctions or tort actions, that discourage concealment. Equitable estoppel itself is likely to have minimal, if any, deterrent effect on other abductors’ concealment because it is found only in case law and is applied inconsistently by courts. Part III then argues that the Convention itself already addresses concealment, principally through the determination of whether the child is “settled” for purposes of the well-settled defense. It also suggests that some petitioners may be able to institute a suit under the Hague Convention even when the location of their child is unknown, thereby rendering the equitable estoppel doctrine unnecessary. Finally, this Part argues that deterring concealment (and abduction for that matter) is not the only policy objective animating the Convention, and that deterrence should sometimes take a back seat to other values, especially when the emphasis on deterrence interferes with the proper interpretation of the Convention.

Part IV focuses on the best way to address concealment within the confines of the Convention structure. Having already established that U.S. treaty partners address concealment through an interpretation of “settled” and through an importation of discretion to return a child even if “settled,” this Part evaluates these alternatives. It concludes that courts should address concealment in their assessment of whether the child is “settled.” This approach would best reflect the intent of the Convention’s framers, would maximize the effectiveness of judicial review, and would lead to the most optimal outcomes for abducted children.

I. *THE RELEVANCE OF EQUITABLE PRINCIPLES TO THE HAGUE ABDUCTION CONVENTION*

A. *The Well-Settled Defense and the One-Year Clock*

A bit of contextualization helps illustrate the potential significance that the doctrine of equitable estoppel affords to a petitioner who seeks the return of his or her abducted child pursuant to the Hague Abduction Convention. The Hague Abduction Convention, a private international law treaty, is implemented in the United States through the International Child Abduction Remedies Act (“ICARA”).⁸ The Convention requires the return of abducted children to the place where they were habitually resident immediately before their wrongful removal or retention.⁹ The Convention’s remedy of “return” seeks to reestablish the *status quo ante* and thereby deter international child abduction.¹⁰ The remedy, however, is subject to a few limited defenses.

8. Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601–11).

9. See Hague Abduction Convention, *supra* note 1, pmbl.

10. See, e.g., *In re Application of Adan*, 437 F.3d 381, 395 (3d Cir. 2006); *Shealy v. Shealy*, 295 F.3d 1117, 1121 (10th Cir. 2002); *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001); *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000); *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999); *Lops v. Lops*, 140 F.3d 927, 936 (11th Cir. 1998); *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993); see also Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986) (indicating that “the Hague Convention seeks restoration of the factual status quo ante” and is also “premised upon the notion that

The defense most relevant to this Article permits a court to refrain from returning the child if more than one year has passed between the time of the wrongful abduction or retention and the commencement of proceedings and “it is demonstrated that the child is now settled in its new environment.”¹¹ This defense, sometimes referred to as the “well-settled” defense or the article 12(2) defense, is one of the most successful for Hague Convention respondents, whether in the United States or abroad.¹²

Because the respondent can successfully invoke the well-settled defense only if one year has passed between the wrongful removal or retention and the commencement of proceedings,¹³ petitioners have tried various strategies to shorten the accumulation of time and thereby deny the availability of the defense. For example, some petitioners have argued that the commencement of proceedings occurs when a petition is filed with the Central Authority, an institution required in each contracting state by article 6 of the Convention, rather than a court. Most courts find this argument unpersuasive.¹⁴ Other petitioners have argued, more successfully, that the one-year clock only starts to run when the abductor crosses an international border and not when the abductor first absconds with the child.¹⁵ Courts have also accepted the argument that the

the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute”.

11. *Id.* art. 12; see 42 U.S.C. § 11603(e)(2)(B) (2006) (codifying “preponderance of evidence” as the burden of proof required to establish an article 12 defense).

12. See Nigel Lowe et al., Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 43–44, Preliminary Doc. No. 3, Part I (Oct. 2006), available at http://www.hcch.net/upload/wop/abd_pd03e2006.pdf.

13. See Hague Abduction Convention, *supra* note 1, art. 12.

14. See *Belay v. Getachew*, 272 F. Supp. 2d 553, 561 (D. Md. 2003) (collecting cases); *Wojcik v. Wojcik*, 959 F. Supp. 413, 418–20 (E.D. Mich. 1997); see also, e.g., *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (citing *Wojcik* as correct interpretation); *Grijalva v. Escayola*, No. 06-cv-569, 2006 WL 3827539, at *4 (M.D. Fl. Dec. 28, 2006) (same). But see *In re A.V.P.G.*, 251 S.W.3d 117, 124–25 (Tex. Ct. App. 2008) (holding, with little reasoning, that the well-settled defense did not apply because petitioner filed a request for return with the National Center for Missing and Exploited Children (“NCMEC”), and NCMEC is an “administrative body” for purposes of stopping the one-year clock).

15. See PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 39 (1999) (citing *In re H (Minors)* (Abduction: Custody Rights), [1991] 2 A.C. 476 (H.L.) (appeals taken from Eng.)); see also *Basil v.*

clock only starts to run when the abductor enters a country that is subject to the Hague Abduction Convention.¹⁶ These issues all relate to the availability of the well-settled defense by addressing the accumulation of time between the abduction and the commencement of proceedings.

Petitioners have raised yet another argument about the accumulation of time in their efforts to stop the application of the well-settled defense. That argument—and the focus of this Article—relies upon the doctrine of equitable estoppel. In its simplest form, the argument is as follows: if the petitioner was unable, after a diligent effort, to locate the child and commence suit within one year from the time of the child's abduction, then the one-year clock should not start ticking until the petitioner knew where the child was located.

This equitable estoppel argument should be distinguished from an equitable tolling argument, which respondents to Hague Convention proceedings have also successfully made.¹⁷ Whereas “equitable estoppel” tends to refer to a situation in which the respondent takes active steps to prevent the petitioner from instituting suit,¹⁸ for example, by concealing the child's

Ibis Aida de Teresa Sosa, No. 07-cv-918, 2007 WL 2264599, at *10 (M.D. Fla. Aug. 6, 2007) (noting in passing that child removal occurred, for purposes of the Convention, when an international border was crossed, which was five days after the mother left with the children).

16. *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002) (finding that equitable tolling applied to time period in which child was in Algeria, a nonsignatory to the Hague Convention, despite not being hidden there).

17. *See, e.g., Gonzalez v. Nazor-Lurashi*, No. 04-1276, 2004 WL 1202729 (D. P.R. May 20, 2004).

18. The requirements for a successful equitable estoppel argument were aptly summarized by the Seventh Circuit, albeit in another context:

Equitable estoppel—sometimes referred to as fraudulent concealment—“comes into play if the defendant takes active steps to prevent the plaintiff from suing in time,” *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450–51 (7th Cir.1990), “such as by hiding evidence or promising not to plead the statute of limitations,” *Speer v. Rand McNally & Co.*, 123 F.3d 658, 663 (7th Cir.1997). [T]his doctrine contemplates that “the plaintiff has discovered, or . . . should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time.” [*Cada*,] 920 F.2d at 451. The “granting of equitable estoppel should be premised on a defendant's improper conduct as well as a plaintiff's actual and reasonable reliance thereon.” *Wheeldon v. Monon Corp.*, 946 F.2d 533, 537 (7th Cir.1991).

whereabouts, “equitable tolling” refers to a situation in which the petitioner’s failure to institute proceedings in a timely manner is attributable to another factor.¹⁹ For example, equitable tolling might apply if a court clerk gives the petitioner incorrect information.²⁰

Unfortunately, courts that discuss equitable principles are not consistent in their use of the terms, and many courts adjudicating Hague petitions, like courts in other areas,²¹ use

Hentosh v. Herman M. Finch Univ. of Health Sci., 167 F.3d 1170, 1174 (7th Cir. 1999) (second omission in original) (citations omitted); *see also* *Campau v. Orchard Hills Psychiatric Ctr.*, 946 F. Supp. 507, 512 n.8 (E.D. Mich. 1996) (“Equitable estoppel arises when ‘the defendant takes active steps . . . above and beyond the wrongdoing upon which plaintiff’s claim is founded to prevent the plaintiff from suing in time.’” (omission in original) (citation omitted) (quoting *Cada*, 920 F.2d at 451)).

19. Equitable tolling applies in “extraordinary circumstances beyond the plaintiff’s control” that prohibit a timely filing. *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003); *Boyd v. McWilliams*, No. CV-06-803, 2007 WL 1670155, at *1 (D. Ariz. June 8, 2007) (citing similar language); *see also* *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998) (“The doctrine of equitable tolling preserves plaintiff’s claims when strict application of the statute of limitations would be inequitable.”). A litigant seeking equitable tolling must meet two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

20. Case law regularly differentiates between equitable estoppel and equitable tolling in other contexts. *See, e.g.*, *Chung v. U.S. Dept. of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003) (“There is a difference in effect as well: Equitable estoppel takes the statute of limitations out of play for as long as is necessary to prevent the defendant from benefiting from his misconduct, whilst equitable tolling—as a method for adjusting the rights of two ‘innocent parties’—merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a ‘reasonable time’ in which to file suit.” (citation omitted) (citing *Cada*, 920 F.2d at 452)); *Hentosh*, 167 F.3d at 1174 (“Unlike the doctrine of equitable estoppel, the applicability of equitable tolling does not turn on any effort by the defendant to prevent the plaintiff from filing suit.”); *Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997) (“Equitable estoppel does require an allegation of misconduct on the part of the party against whom it is made, but equitable tolling does not require any misconduct on the part of the defendant.”); *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996) (“Equitable tolling does not require any misconduct on the part of the defendant. On the other hand, the doctrine of equitable estoppel focuses on the defendant’s conduct.” (citing *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328 (8th Cir. 1995))); *Felty v. Graves-Humphreys, Co.*, 785 F.2d 516, 519 (4th Cir. 1986) (“Equitable tolling focuses on the plaintiff’s excusable ignorance of the employer’s discriminatory act. Equitable estoppel, in contrast, examines the defendant’s conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights.” (footnote omitted) (citation omitted)).

21. *See* *Browning*, 120 F.3d at 226 (noting that litigants often confuse the doctrines of equitable tolling and equitable estoppel); *McAllister v. Fed. Deposit Ins. Corp.*, 87 F.3d 762, 767 n.4 (5th Cir. 1996) (“Several courts, including the Supreme Court in *Irwin*, have used the terms ‘equitable tolling’ and ‘equitable estoppel’ interchangeably.” (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1991))); *Heins v. Potter*, 271 F.

“equitable tolling” to describe situations in which the defendant’s bad acts inhibit the plaintiff’s ability to file suit.²² Because equitable estoppel and equitable tolling are based on quite different policy considerations, this Article endeavors to distinguish between the two. Consequently, this Article uses “equitable estoppel” to denote a situation in which the respondent conceals, or at least fails to reveal, the child’s location after the abduction. If a court is imprecise and uses the term equitable tolling to describe such a situation, quotation marks are placed around the term tolling.

B. *The Necessary Elements for Equitable Estoppel*

As already mentioned, courts are divided on whether they accept the doctrine of equitable estoppel in Hague child abduction cases.²³ Yet even those courts that accept the doctrine vary in their description of the doctrine’s essential elements.

A deceptive act (usually concealment) is typically necessary to trigger the doctrine,²⁴ much like equitable estoppel generally.²⁵ But the type of bad act that is sufficient spans a wide spectrum. At one end, some courts require “intentional and

Supp. 2d 545 (S.D.N.Y. 2003) (describing the terminology as “confusing” (citations omitted)); *Campau*, 946 F. Supp. at 512 n.8 (“Equitable estoppel, also known as fraudulent concealment, is not limited to the limitations context and is frequently mislabeled ‘equitable tolling.’” (citing *Allen v. Diebold, Inc.*, 807 F. Supp. 1308, 1314 (N.D. Ohio 1992), *aff’d*, 33 F.3d 674 (6th Cir. 1994))). *See, e.g.*, *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994) (“[T]here are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.” (citation omitted) (citing *Sch. Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 19–20 (3d Cir. 1981))).

22. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002); *Jimenez v. Lozano*, No. CO5-5736, 2007 WL 527499, at *9 (W.D. Wash. Feb. 14, 2007).

23. *See supra* notes 2–7 and accompanying text.

24. *See, e.g., In re B. del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) (requiring as the first essential element of equitable estoppel that “the abducting parent concealed the child”); *Furnes v. Reeves*, 362 F.3d 706, 723 (11th Cir. 2004) (applying the concept of “equitable tolling” in cases “where the parent removing the child has secreted the child from the parent seeking return”).

25. *See supra* note 18 and accompanying text.

significant steps to conceal [the child] for more than one year.”²⁶ At the other end, some courts permit the doctrine to be triggered by an abductor’s failure to inform the left-behind parent of the child’s location, even if the abductor has not tried to hide the child’s location from the other parent,²⁷ and even though silence is usually not sufficient to support an equitable estoppel claim in other contexts.²⁸ In several of these “omission” cases, the left-behind parent knows the country in which the child is located, but lacks more specific information.²⁹ In others,

26. *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 848, 854 (S.D. Tex. 2006) (using term “equitable tolling”); *see also Furnes*, 362 F.3d at 723 (“We agree that equitable tolling may apply to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return.”); *Lops v. Lops*, 140 F.3d 927, 933, 946 (11th Cir. 1998) (applying the “tolling” doctrine “if it is shown or demonstrated clearly enough that the action of an alleged wrongdoer concealed the existence of the very act which initiates the running of the important time period,” but not deciding whether doctrine applied in Hague proceeding because children were not well settled given efforts to conceal them); *Belay v. Getachew*, 272 F. Supp. 553, 564 (D. Md. 2003) (determining the estoppel doctrine applies if “the defendant engages in intentional misconduct to cause the plaintiff to miss the filing the deadline” (citing *C.M. English v. Pabst Brewery Co.*, 828 F.2d 1047 (4th Cir. 1987))); *Mendez Lynch*, 220 F. Supp. 2d at 1363 (finding that the mother took “intentional and significant steps to hide and conceal her and the children’s whereabouts from Petitioner”); *Perez v. Garcia*, 198 P.3d 539, 544–45 (Wash. Ct. App. 2009) (using term “equitable tolling”).

27. *See Arguelles v. Vasquez (In re Hague Child Abduction)*, No. 08-2030-CM, 2008 U.S. WL 913325, at *10 (D. Kan. Mar. 17, 2008) (applying the doctrine of “equitable tolling” even though mother enrolled the child in public school under the child’s legal name and the mother never changed her name); *Van Driessche*, 466 F. Supp. 2d at 850–52 (“[A]lthough Smith did not actively conceal her whereabouts, she did not reveal to Van Driessche that she and Melissa were living in Houston.”) (allowing “equitable tolling” up to the point at which the father should have known location of child, but granting mother’s well-settled defense because she did not actively conceal the child, but rather failed to tell the father where she was living, and criminal proceedings could theoretically be initiated against her in the child’s habitual residence); *cf. Wojcik v. Wojcik*, 959 F. Supp. 413, 420–21 (E.D. Mich. 1997) (rejecting “equitable tolling” in the case because the mother called the father on the first day of the wrongful retention and informed him where she was staying and the telephone number).

28. *See, e.g., Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 666–67 (8th Cir. 1995) (observing that silence by itself is generally insufficient to give rise to equitable estoppel).

29. *See, e.g., Dietz v. Dietz*, No. 6:07-CV-1398, 2008 WL 4280030, at *18 (W.D. La. Sept. 17, 2008) (tolling the one-year period until the mother learned of the children’s specific location even though the mother knew the children were in the United States, and believed the children could be in any one of four states based on the father’s work and family connections), *aff’d*, No. 08-31003, 2009 U.S. App. LEXIS 23200 (5th Cir. Oct. 20, 2009); *In re Hague Child Abduction Application*, 2008 WL 913325, at *10 (“tolling” the one-year period where the father did not learn of the likely location of his child until a member of the mother’s family informed him, despite diligent search efforts);

the left-behind parent even knows the state and town in which the child resides, but merely lacks information about the child's specific address.³⁰ Some of these cases even involve left-behind parents who visited with their children in their new location,³¹ or who knew early on the town in which their children were living, but delayed an entire year to file the petition until after the children's exact street address was known.³²

Regardless of the level of "concealment" that triggers the doctrine, courts rarely assess whether the concealment was wrongful. Instead courts usually assume that concealment is wrongful without further inquiry. Yet it is incorrect to characterize all concealment as morally blameworthy, just as it is factually erroneous to characterize all abductions as harmful to children.³³

For example, a number of cases exist where the abductor claims to have fled for reasons of safety, and concealment might have been a reasonable response to legitimate safety concerns. A brief description of some of these cases illustrates that courts do

Giampaolo v. Ernetta, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004) (involving a father who knew the child was in the United States, but the mother refused to tell him the precise location of the child and the mother and child changed residences several times).

30. See *Jimenez v. Lozano*, No. CO5-5736, 2007 WL 527499, at *9 (W.D. Wash. Feb. 14, 2007) (applying the "tolling" principle during period when father was aware of child's city of residence but unaware of his precise location); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002) (deciding to "toll" the one-year window until the petitioning parent "confirmed [the child's] United States address"). *But see* *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1151-52 (E.D. Wash. 2007) (holding that the mother's failure to provide father with address upon request was not the same as "secreting away" the child and that "tolling" would therefore not be warranted); *Terron v. Ruff*, No. 48683-7-I, 2003 WL 1521967, at *15-18 (Wash. Ct. App. Mar. 24, 2003) (refusing to apply "equitable tolling" when the petitioner knew the state in which the child was located and there was no evidence that he was "hidden away to avoid discovery").

31. See *Bocquet*, 225 F. Supp. 2d at 1348 (applying "equitable tolling" even though petitioner visited child in Florida on several occasions during the period that was equitably "tolled").

32. *Jimenez*, 2007 U.S. Dist. LEXIS 10175, at *3-4, *9 (holding "equitable tolling" applied when the left-behind parent did not find out the exact street address for over one and a half years after the children's departure, even though the left-behind parent knew in which town the children lived within two months of their removal, the petition was filed one year after discovering the exact location, or two and one-half years after their removal, and there was no indication the abductor affirmatively hid the children's location, although she cut off communication).

33. See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 616-23 (2000).

not typically inquire into the legitimacy of the concealment in assessing the merits of an equitable estoppel argument. In *Belay v. Getachew*, for instance, the court applied equitable estoppel despite the fact that the mother left Sweden because of an alleged history of abuse.³⁴ The court summarily dismissed the contention that the mother's actions might have been justified because "looming over Respondent's decision was a history of abuse."³⁵ The court stated that "the Treaty makes no allowance for 'self-help.' It is the apparent intention of the Treaty to demand that parents rely upon the courts and the laws of the local country (in this case Sweden) to resolve any disputes between the parties."³⁶ Turning to the equitable estoppel argument, the court admitted that it had reservations about whether the respondent had the intent to avoid a Hague proceeding when she did not give the petitioner her contact information, but the court lacked guidance on the issue and concluded that concealment alone triggers equitable estoppel.³⁷

34. 272 F. Supp.2d 553. In *Belay*, the mother wrongfully retained the child in the United States in breach of the father's rights of custody. The mother moved into an apartment with her brother and lived there for three years with the child. *Id.* at 556. She never told the respondent the name of the city where she and the child were located or gave him any contact information. *Id.* The mother's domestic violence allegations arose in the context of the article 13(b) grave risk of harm defense. *Id.* at 560. The court acknowledged that the mother had presented evidence that she was the victim of spousal abuse, but rejected the article 13(b) defense because the abuse was directed at the mother, not the child, and because it "will never occur again" since the parents were now divorced. *Id.*

Similarly, in *Arguelles v. Vasquez* (*In re Hague Child Abduction*), No. 08-2030-CM, 2008 U.S. WL 913325 (D. Kan. Mar. 17, 2008), the abductor may have had good reasons for concealing her whereabouts. According to the respondent, the father threatened that he was "capable of killing" if the petitioner ever left him, frequently drank to excess, was verbally abusive in front of the child ("T.A.G."), and physically assaulted the respondent on one occasion. *Id.* at *2, *4. The court focused mainly on the relationship between the father and child:

The record has clearly established that Petitioner has never hit T.A.G. or physically harmed her in any way. Similarly, the record is also clear that Petitioner has never verbally abused T.A.G. In fact, Respondent's own family told police officers in Mexico that the child and Petitioner had a close and loving relationship. Indeed, the fact that Ms. Gaspar allowed Petitioner unsupervised lengthy visits with T.A.G., even after her own assault, speaks to her lack of concern that Petitioner would hurt T.A.G.

Id. at *14.

35. *Id.* at 564.

36. *Id.*

37. *Id.* Outside the Hague context, the respondent's mental state is relevant to the permissibility of equitable estoppel. *See* 4 AM. JUR. *Trials* § 30 (2009) ("It is a general

A similar result was evident in *Bocquet v. Ouzid*, in which the court applied equitable estoppel even though the father “testified that he kept his location secret because he feared Ms. Bocquet, who had previously threatened to buy a gun and to have a friend of Ms. Bocquet’s find him.”³⁸ The mother “admitted she had made a threat to shoot” the father.³⁹ The court took care to note that even though “Mr. Ouzid may have believed he had reason to [conceal the location of his child],” it nevertheless “does not change the fact that Ms. Bocquet was deprived of her valid custody rights for over twenty-two months by the very behavior the Convention seeks to prevent—‘self-help’ or ‘the law of grab and run.’”⁴⁰

An extreme example of a court’s refusal to acknowledge that alleged domestic abuse might justify concealment is *Mendez Lynch v. Mendez Lynch*,⁴¹ a case that effectively penalized a mother for her time in a domestic violence shelter. In *Mendez Lynch*, the respondent alleged that the petitioner perpetrated various acts of domestic violence against her.⁴² Part of the time during which

rule, however, that the defendant must have committed the pertinent acts with the intention of inducing the plaintiff not to sue . . .”); *see also* *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995) (stating that equitable estoppel will not operate unless the failure to file was “the consequence of either a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.”); *Hoffman-Dombrowski v. Arlington Int’l Racecourse Inc.*, 11 F. Supp. 2d 1006, 1011 (N.D. Ill. 1998) (remarking of equitable estoppel in the context of the statute of limitations for a Title VII claim that “[t]he defendant’s conduct must be aimed at accomplishing a delay in filing.”).

38. 225 F. Supp. 2d 1337, 1342 (S.D. Fla. 2002).

39. *Id.* The mother testified that she made this threat after the father “had threatened to jump off a roof with [the child] and make them both ‘ghosts.’” *Id.* at 1343 n.4.

40. *Id.* at 1348 (citing *Miller v. Miller*, 240 F.3d 392, 401 n.13 (4th Cir. 2001)). *Bocquet’s* language on equitable estoppel was *obiter* because the court found that the child was not well settled in the United States, having led a “mostly nomadic” life. *Id.* at 1349. Yet the case is frequently cited by others. *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004); *Arguelles v. Vasquez (In re Hague Child Abduction)*, No. 08-2030-CM, 2008 U.S. WL 913325, at *9 n.38 (D. Kan. Mar. 17, 2008). The application of the equitable estoppel doctrine in *Bocquet* is problematic, both in terms of what activity it required to start the clock, *see supra* notes 30–32 and accompanying text, and its failure to take into account the reason for the father’s refusal to reveal his exact whereabouts.

41. 220 F. Supp. 2d 1347 (M.D. Fla. 2002).

42. *Id.* at 1355 (“Respondent testified that Petitioner slammed a door into her, held her down, spit on her, placed his hands around her neck, pushed and ‘smacked’ her, and threw things at her.”). The petitioner denied that there was ever an incident involving physical contact. *Id.*

equitable estoppel operated was while the mother was at a domestic violence shelter.⁴³ The court mentioned rather disapprovingly that the mother had stated her address was “confidential” in her application for a domestic violence restraining order and her divorce petition,⁴⁴ even though revealing one’s address when in shelter is often prohibited by law or the shelter for reasons of safety.⁴⁵

Sometimes equitable estoppel is applied even without a “bad act” of the variety mentioned above. Several of these cases seem to rest on the premise that relying on informal negotiations to resolve the situation should not disadvantage a left-behind parent. In one case, for example, the court thought that the one-year clock should be “tolled” until a date set by the U.S. State Department for reaching an amicable settlement.⁴⁶ Similarly, another court determined that the parties’ informal arrangements for the child to finish school in a particular place delayed the onset of the one-year clock.⁴⁷ Dicta in other cases goes so far as to suggest that the “bad act” may merely be the abduction itself.⁴⁸ Yet the cases cited here are not typical, and the remainder of the Article assumes that some level of concealment is required to invoke equitable estoppel.

43. *Id.* at 1354.

44. *Id.* at 1355.

45. The policy of confidentiality for purposes of domestic abuse victims is clearly supported by numerous laws at the state and federal levels. There are provisions to help victims of domestic violence keep their addresses confidential, including exemptions from public records acts, and provisions to keep shelter addresses confidential. *See, e.g.*, 42 U.S.C. § 10402(a)(2)(E) (2006) (requiring assurance from the governor of a state receiving federal funds that procedures exist to ensure that a shelter’s address will not be disclosed absent permission from the individuals running the shelter); FLA. STAT. § 39.908 (2009) (“Information about the location of domestic violence centers and facilities is confidential and exempt from the provisions of s. 119.07(1).”). *See generally* Kristen M. Driskell, Note, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 HASTINGS WOMEN’S L.J. 129, 131 n.11, 133–48 (2009) (outlining statutory schemes that protect domestic abuse victims).

46. *See Mendez-Lynch*, 220 F. Supp. 2d at 1363.

47. *In re Ahumada Cabrera*, 323 F. Supp. 2d 1309, 1312 (S.D. Fla. 2004) (among other reasons).

48. In *Wasniewski v. Grzelak-Johannsen*, the court said, “The passage of time should not give advantage to the abductor who conceals the child or violates a court’s order.” No. 06-cv-2548, 2007 WL 2071957, at *7 (N.D. Ohio July 13, 2007). However, the court justified the application of equitable estoppel solely on the respondent’s hiding of the child and not merely on the respondent’s violation of a court order. *Id.*

Another point of departure among courts that accept equitable estoppel in Hague abduction cases is whether the petitioner is required to diligently search for the child as a precondition to the doctrine's successful invocation. Some courts make this an explicit requirement,⁴⁹ but others never mention it at all. For those courts that require diligence, the obligation presumably stems from the equitable principle that a petitioner must not have slept on his or her rights in order to be worthy of equitable relief.⁵⁰ The requirement presumably also advances the policy of expediting the initiation of suits; it provides an incentive to the petitioner to search for the child, and not just wait for the respondent to emerge. Earlier litigation permits a more prompt return of an abducted child, a Convention objective,⁵¹ and also allows the judiciary to resolve the controversy on the freshest evidence possible.

No court has articulated what constitutes due diligence in this context. Although one might imagine it should include requiring the petitioner to contact the respondent's relatives, coworkers, neighbors, and employers to discern the respondent's location,⁵² or, at a minimum, to contact persons who might know

49. *See, e.g.*, *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006) (determining that a petitioner's efforts to locate the child are a consideration in the equitable calculus (citing *Furnes v. Reeves*, 362 F.3d 706, 708–09 (11th Cir. 2004)); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004) (discussing and finding sufficient the various efforts employed by the petitioner to locate his child prior to filing); *Terron v. Ruff*, No. 48683-7-I, 2003 WL 1521967, *17–18 (Wash. Ct. App. 2003) (refusing to apply equitable “tolling” because the petitioner failed to present evidence “that he diligently involved the services of governmental agencies in an attempt to locate [his child]”).

50. *See, e.g.*, *Belay v. Getachew*, 272 F. Supp. 2d 553, 564–65 (D. Md. 2003) (noting that the case was not one “where a parent has ‘slept’ on his rights, allowing time to pass without actively seeking the child”); *see also Sullivan v. Portland & K.R. Co.*, 94 U.S. 806, 811–12 (1876) (“A court of equity . . . has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing.” (quoting *Smith v. Clay*, (1767) 27 Eng. Rep. 419 (Ch.))); *Williams v. Int’l Ass’n of Machinists and Aerospace Workers*, 484 F. Supp. 917, 920 (S.D. Fla. 1978) (“[E]quity aids only the vigilant. Equity discourages delay in the enforcement of rights, as nothing but good conscience, good faith, and diligence justify its action. It will not restore opportunities or renew possibilities that have been lost by neglect, ignorance, or even want of means.” (quoting 12 FLA. JUR. *Equity* § 66)).

51. *See Hague Abduction Convention, supra* note 1, art. 1.

52. There are some requirements that have emerged in other contexts. *See Fleming v. State*, 524 So. 2d 1146, 1147 (Fla. Dist. Ct. App. 1988) (holding that the three-year

the child's whereabouts and are listed on the form filed by the petitioner with the Central Authority,⁵³ no court has articulated what "due diligence" actually requires.

Without a set of objective criteria for determining due diligence, a court's assessment of the matter is highly subjective.⁵⁴ For example, in one Hague case, the court found that a petitioner's failure to do more than contact the local police was insufficient to justify the application of equitable estoppel.⁵⁵ The nature and history of the parties' relationship meant that the petitioner should have known that the respondent would probably relocate to the United States,⁵⁶ and that he should have made a more "concerted personal effort to find her."⁵⁷ However, in another case, the court determined that the petitioner acted with due diligence even though he had a plane ticket indicating

statute of limitations barred prosecution for escape from prison because state gave no evidence to prove that the four-year delay in serving appellant was reasonable, nor any evidence that it had made a diligent search, or any search at all, to locate appellant); *In re Adoption of Leslie P.*, 604 N.W.2d 853, 857-58 (Neb. Ct. App. 2000) (commenting on the failure to contact various relatives in a case involving whether to permit substituted service); see also DAN E. MCCONAUGHEY, *GEORGIA DIVORCE, ALIMONY & CHILD CUSTODY* § 2827:29 (2009-2010 ed.) (indicating that "[d]ue diligence," for purposes of an affidavit for service by publication in Georgia, "means pursuing every reasonable available channel of information such as the following: 1. Contacting neighbors at defendant's last known address to obtain forwarding address. 2. Contacting last known employer for forwarding address for [U.S. Internal Revenue Service] W-2 forms. 3. Contacting family members of the defendant to obtain an address. 4. Contacting friends of the defendant to obtain an address. 5. Contacting the post office for forwarding address.").

53. The model form recommended at the time the Hague Abduction Convention was promulgated asked specific information about the "place where the child is thought to be," including "[o]ther persons who might be able to supply additional information relating to the whereabouts of the child." S. EXEC. REP. No. 99-25, Annex at 2 (1986).

54. This is also true outside the Hague context. See, e.g., *Dunahugh v. Envtl. Sys. Co.*, 2 F.3d 817 (8th Cir. 1993) (deciding that the plaintiff could not use a state statute permitting "tolling" of a breach of contract claim because his company had significant contact with the defendant and even spoke with him on several occasions during the period in which the defendant was claimed to be missing); *People v. Landy*, 510 N.Y.S.2d 190, 191 (N.Y. App. Div. 1986) (affirming the dismissal of an indictment for bail jumping since the five-year statute of limitations could not be tolled; efforts to locate the defendant lasted only six months, although efforts included the police visiting the defendant's apparent residence, making several telephone calls to his mother and former employers, asking the post office for a current address, and investigating whether he held any licenses).

55. See *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 850-51 (S.D. Tex. 2006).

56. *Id.* at 851.

57. *Id.*

the new location of the mother and child and did not travel there for four months, nor contact the National Center for Missing and Exploited Children (“NCMEC”) to see if it had information on the child’s whereabouts, which it did.⁵⁸ Another court commended a petitioner’s “ceaseless efforts” without specifying whether this type of action was required.⁵⁹

A court also has discretion to determine whether the petitioner waited too long to commence proceedings after the petitioner discovered the child’s whereabouts.⁶⁰ In some cases, courts have applied equitable estoppel even though the petitioner waited almost an entire year to file the petition.⁶¹ In one case, equitable estoppel was used to delay the start of the one-year clock for several days immediately after removal even

58. See *Belay v. Getachew*, 272 F. Supp. 2d 553, 564 (D. Md. 2003).

59. See *Furnes v. Reeves*, 362 F.3d 702, 708 (11th Cir. 2004). Specifically, the court took note of the following proactive measures:

He first tried calling and writing to Reeves at her home in Bergen He then contacted Reeves's landlord, who informed him that she had moved to Oslo. Furnes then contacted the local post office and was informed that Reeves's mail was being forwarded to her sister's address in Oslo. Later in the fall of 2001, Furnes made numerous telephone calls to Reeves's sister in Oslo, who promised to pass the messages on to Reeves. When Reeves failed to return any of the calls, Furnes contacted Reeves's sister's husband at his place of business and begged him to tell Plaintiff Furnes where Reeves was, but Reeves's sister's husband denied any knowledge of Reeves's whereabouts.

On March 25, 2002, Plaintiff Furnes filed a police report at the Bergen Police Station He was ultimately told by Norwegian authorities that Defendant Reeves probably was not in Oslo and that there was little else they could do to locate Reeves or Jessica. On March 27, 2002, Furnes filed a petition for the return of his daughter with the Norwegian Ministry of Justice, who helped Furnes in his attempts to locate his daughter. Plaintiff Furnes then began searching for Reeves and Jessica in the United States. In August 2002, Plaintiff Furnes traveled to Tampa, Florida and Atlanta, Georgia, where he had been informed that Reeves might be living, to search for Reeves and Jessica.

Id.

60. For both equitable tolling and equitable estoppel, the plaintiff must file within a reasonable time after learning the information necessary to file. See *Doe v. Blue Cross & Blue Shield United of Wisc.*, 112 F.2d 869 (7th Cir. 1997) (equitable estoppel); *Campau v. Orchard Hills Psychiatric Ctr.*, 946 F. Supp. 507, 512 n.8 (E.D. Mich. 1996) (equitable tolling).

61. See *Jimenez v. Lozano*, No. CO5-5736, 2007 WL 527499, at *9 (W.D. Wash. Feb. 14, 2007) (involving a petitioner who learned the exact location of the child on Nov. 11, 2004, and filed a petition on Nov. 10, 2005); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004) (indicating the petitioner learned the exact location of his child on June 18, 2003, and filed a petition on May 18, 2004).

though the petitioner then waited an entire year to file suit.⁶² Courts in these cases seem to ignore altogether the question of whether equitable estoppel is appropriate given the petitioner's delay. Courts apparently assume that a one-year period should be permitted after the child's whereabouts becomes known since petitioners typically have one year to commence proceedings and thereby avoid an article 12(2) defense. However, it is highly questionable whether a petitioner should necessarily enjoy a full year to commence a case, especially when there is no other obstacle to commencing it sooner, since the application of equitable estoppel undercuts the article 12(2) defense and a child's interest in stability.

While equitable estoppel commonly requires a consideration of the respondent's bad act and the petitioner's diligence, courts occasionally consider other factors. For example, one court considered whether equitable estoppel would undermine the well-settled defense in a case in which return of the child would not achieve the *status quo ante*,⁶³ a purpose of the Hague Abduction Convention's remedy of return. The court noted that the abductor would be prosecuted in the habitual residence and criminal proceedings might deprive the child of the abductor mother for up to five years.⁶⁴ As a result, the father was precluded from arguing that the mother was equitably estopped from asserting the well-settled defense.⁶⁵

The discussion so far has primarily focused on the doctrinal variations that add uncertainty to the outcome in any particular international child abduction case when equitable estoppel is an issue. Of course, there is another reason why the doctrine adds uncertainty to Hague adjudications. The application of equitable

62. See *Perez v. Garcia*, 198 P.3d 539, 544 (Wash. Ct. App. 2009) (using the principle of equitable "tolling" to benefit the petitioner through Oct. 1, 2005, even though removal occurred September 28, 2004, and the petition was filed September 28, 2005).

63. See *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 852 (S.D. Tex. 2006).

64. *Id.*

65. *Id.*; cf. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363–64 (M.D. Fla. 2002) (considering the promise of the father to dismiss any criminal proceeding pending in Argentina against the mother for concealment of the children). Other courts look at the possibility that the abductor will be criminally prosecuted and use it as a reason to deny that the child is well settled. See *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004).

estoppel often turns on highly contested factual allegations. The parties may dispute, for example, whether the respondent ever revealed the child's whereabouts.⁶⁶

The notable variations in the doctrine and its application suggest unpredictability in an area of law that otherwise prizes uniformity.⁶⁷ The variations may dissipate over time with appellate review; alternatively, the inconsistencies may remain as a necessary consequence of a flexible device. Regardless, equitable estoppel currently adds a layer of uncertainty into Hague Convention proceedings and will continue to do so for the foreseeable future.

C. *Justification for the Doctrine*

The argument for equitable estoppel is quite simple: The respondent's pernicious acts—such as hiding the child—should not undermine the Convention's remedy of return by increasing the likely success of a defense. Equitable estoppel is needed to prevent a respondent from benefiting from his or her own wrongdoing. This reasoning, or some variant of it, is the primary justification that courts offer in support of the doctrine.⁶⁸ As the U.S. District Court for the District of Maryland stated,

66. *See, e.g.*, *Furnes v. Reeves*, 362 F.3d 702, 724 n.21 (11th Cir. 2004) (deferring to the district court's determination of the credibility of the testimony regarding the respondent's disclosure of the child's whereabouts).

67. *See generally* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for a Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 289–90 (2002) (arguing that courts should try to maintain a uniform interpretation of the Convention, but setting forth a framework that would permit deviation from the prevailing interpretation when necessary to further the object and purpose of the Convention).

68. *E.g.*, *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008); *Furnes*, 362 F.3d at 723; *Dietz v. Dietz*, No. 6:07-CV-1398, 2008 WL 4280030, at *16 (W.D. La. Sept. 17, 2008), *aff'd*, No. 08-31003, 2009 U.S. App. LEXIS 23200 (5th Cir. Oct. 20, 2009); *Arguelles v. Vasquez (In re Hague Child Abduction)*, No. 08-2030-CM, 2008 U.S. WL 913325, at *9 (D. Kan. Mar. 17, 2008); *Wasniewski v. Grzelak-Johannsen*, No. 06-cv-2548, 2007 WL 2071957, at *7 (N.D. Ohio July 13, 2007); *Van Driessche*, 466 F. Supp. 2d at 848; *Gonzalez v. Nazor Lurashi*, No. 04-1276, 2004 WL 1202729, at *11 (D. P.R. May 20, 2004); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1281 (N.D. Ga. 2004); *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1313 (S.D. Fla. 2004); *Belay v. Getachew*, 272 F. Supp. 2d 553, 563 (D. Md. 2003); *Mendez-Lynch*, 220 F. Supp. 2d at 1363; *Perez v. Garcia*, 198 P.3d 539, 544 (Wash. Ct. App. 2009). It also supports the argument that courts have discretion whether or not to grant the article 12(2) defense even if one year has passed and the child is well settled.

A rule that stated that a court considering a Hague petition *cannot* return a child if the “abducting” parent has established the elements of Article 12 would create a perverse incentive for abducting parents. Such a rule would inevitably result in scenarios where abducting parents, hoping to avoid the mandates of the Convention, attempt to conceal the child from the non-abducting parent for more than one year. Then, if hailed [sic] into court on a Hague petition (presuming the non-abducting parent could *ever* locate the child), the abducting parent would have achieved what amounts to an immunity from the Convention. The purposes of the Convention would be directly controverted were parents allowed to circumvent the Convention’s strictures by fleeing from the law.⁶⁹

This rationale focuses on denying abductors the ability to profit from their bad acts, and is similar to judicial reasoning on other issues in Hague cases. For instance, courts are generally hostile to abductors who argue that the child’s return, and consequent separation from the abductor, will cause the child a grave risk of harm within the meaning of article 13(b) of the Convention.⁷⁰ Courts point out that the need for return, and the resulting separation from the abductor, were created by the abduction itself, and an abductor should not benefit from a situation created by the abduction.⁷¹

Courts provide a different justification for equitable tolling than for equitable estoppel. Because equitable tolling is not premised on the secreting of children, courts are not concerned about rewarding that conduct by rejecting the doctrine. Rather, courts tend to be concerned with basic notions of fairness. For example, in *Gonzalez v. Nazor-Lurashi*,⁷² the court displayed palpable sympathy for the petitioner who had diligently pursued the return of her child. Tremendous delays in the processing of

69. *Belay*, 272 F. Supp. 2d at 563.

70. *See, e.g.*, *Walsh v. Walsh*, 221 F.3d 204, 220 n.14 (1st Cir. 2000) (“We disregard the arguments that grave risk of harm may be established by the mere fact that removal would unsettle the children who have now settled in the United States.”); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (concluding that the district court was incorrect to consider the possible separation of the child from the abducting parent in assessing whether return would expose the child to a grave risk of harm).

71. *Walsh*, F.3d at 220 n.14 (describing the separation of the child from the abducting parent as “an inevitable consequence of removal”).

72. No. 04-1276, 2004 WL 1202729, at *11 (D. P.R. May 20, 2004).

the petitioner's case were apparently caused by NCMEC when it was acting on behalf of the U.S. Central Authority.⁷³ For some reason, NCMEC apparently took no action on a petition after it was contacted by the Argentine Central Authority.⁷⁴ The court held, in *obiter*, that the one-year clock was tolled on the day the petitioner filed her petition with the Argentine Central Authority and only began to run when that authority sent the petition to NCMEC.⁷⁵ This judicial maneuver made the petition timely. Consequently, the well-settled defense was unavailable even though the application was filed in court more than one year after the child's wrongful retention.⁷⁶

II. *EQUITABLE PRINCIPLES: AN INVENTION WITH LITTLE BASIS*

Neither the phrase "equitable estoppel" nor "equitable tolling" is found in the text of the Hague Abduction Convention or the U.S. implementing legislation.⁷⁷ In fact, there is no indication that the drafters of the treaty or ICARA wanted either doctrine to apply. If anything, the evidence goes in the other direction. This fact has not stopped courts from either inferring the drafters' intent as supportive of the doctrine or adopting the doctrine for reasons of policy.

A. *Relying on Equitable Estoppel Despite the Convention's Silence*

Some courts that apply equitable principles to the well-settled defense claim that the principles are consistent with U.S. congressional intent. For example, the Eleventh Circuit remarked in the context of a child abduction case, "Unless Congress states otherwise, equitable tolling should be read into

73. *Id.* at *12.

74. *Id.*

75. *Id.*

76. *Id.*

77. See *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) ("There is nothing in the language of the Hague Convention which suggests that the fact that the child is settled in his or her new environment may not be considered if the petitioning parent has a good reason for failing to file the petition within one year."); cf. *Gonzalez v. Nator-Lurashi*, No. 04-1276, 2004 WL 1202729, at *10-12 (D. P.R. May 20, 2004) (recognizing that tolling is not in the Convention, but nevertheless applying the principle to the facts of the case); *Belay v. Getachew*, 272 F. Supp. 553, 563 (D. Md. 2003) (acknowledging that estoppel is not in the Convention, but applying it anyway).

every federal statute.”⁷⁸ This conclusion was drawn from non-Hague cases that discussed equitable principles in the context of statutes of limitations. In fact, the language quoted above came from a case discussing the Truth in Lending Act’s statute of limitations.⁷⁹

Congressional silence on the availability of equitable estoppel in Hague Convention adjudications coupled with language from a case discussing the statute of limitations for the Truth in Lending Act is a thin basis for the Eleventh Circuit’s conclusion about congressional intent in Hague Convention cases. Any such conclusion in the context of the Hague Abduction Convention should rest upon a close examination of that convention and ICARA. As the Second Circuit once said, citing the U.S. Supreme Court, “In order to read an implied equitable tolling provision into a statute that contains no such express provision, ‘[w]e must determine . . . whether equitable tolling is consistent with Congress’ intent in enacting’ the statutory scheme.”⁸⁰ Such a statute-specific inquiry has led federal courts, including the U.S. Supreme Court, to reject the application of equitable principles in other areas, including areas as to which Congress was silent.⁸¹

*John R. Sand & Gravel Co. v. United States*⁸² demonstrates the importance of analyzing the underlying statutory scheme, even in

78. *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004) (citing *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998)); see also *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998) (stating that it would be hard to “conceive of a time period arising by a federal statute that is so woodenly applied that it is not subject to some tolling, interruption, or suspension”).

79. *Ellis*, 160 F.3d at 705.

80. *Acierno v. Barnhart*, 475 F.3d 77, 81 (2nd Cir. 2007) (quoting *Bowen v. City of New York*, 476 U.S. 467, 480 (1986)). See also 54 C.J.S. *Limitations of Actions* § 115 (2008) (“Equitable tolling is only appropriate . . . if it is consistent with the legislative scheme.”).

81. See *United States v. Beggerly*, 524 U.S. 38, 48–49, (1998) (rejecting equitable tolling in a case involving the Quiet Title Act (“QTA”) because “[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute” and “the QTA, by providing that the statute of limitations will not begin to run until the plaintiff ‘knew or should have known of the claim of the United States,’ has already effectively allowed for equitable tolling” (citations omitted)); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (deciding that equitable tolling did not apply to a federal securities claim because three-year limit was a statute of repose and inconsistent with tolling).

82. 552 U.S. 130 (2008); see also *Marley v. United States*, 548 F.3d 1286, 1292 (9th Cir. 2008) (concluding that 28 U.S.C. § 2401(b) was not subject to equitable tolling).

the context of statutes of limitations. The case concerned whether a lessor of a mine could bring an untimely suit against the government for an unconstitutional taking. The government waived any objection to the timeliness of the suit, but the Court of Appeals had raised the issue *sua sponte*.⁸³ The relevant statute read: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."⁸⁴ In agreeing that the suit was untimely, the U.S. Supreme Court explained that statutes of limitations are divided into two groups: those that seek to protect defendants against stale claims and those that seek "not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal."⁸⁵ A non-exclusive list provided by the Court included "facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency."⁸⁶ Justice Breyer, writing for the majority, explained that the Court "has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period."⁸⁷

A similar result was reached in *United States v. Brockamp*.⁸⁸ There the Court held that the statutory time limit imposed for filing tax refund claims could not be tolled for equitable reasons, even though the plaintiff missed the deadline due to mental disabilities.⁸⁹ The Court concluded that Congress did not intend the tax statute to contain an implicit equitable tolling exception because the statute set out explicit limitations in a highly detailed manner, tax law typically does not take account of case-specific equities, and the doctrine would cause administrative burdens for the Internal Revenue Service.⁹⁰ *John R. Sand and Brockamp*

83. *John R. Sand*, 552 U.S. at 132.

84. 28 U.S.C. § 2501 (2006). The statute contained an exception: "A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." *Id.*

85. *John R. Sand*, 552 U.S. at 133.

86. *Id.* (citations omitted).

87. *Id.* at 133–34.

88. 519 U.S. 347 (1996).

89. *Id.* at 348–49.

90. *Id.* at 350–53.

illustrate that it is important to discern whether the time limit has a particular substantive purpose, whether congressional intent can be determined from the legislative history or statutory structure, and whether the importation of equitable doctrines might have unfavorable repercussions.

Unfortunately, courts that apply equitable principles in Hague abduction cases typically do not assess whether the principles are consistent with the statutory scheme.⁹¹ Yet even when an inquiry is made, courts have reached diametrically opposite conclusions on Congress's intent by pointing to different goals of the statutory scheme. In *Duarte v. Bardales*, for example, the court held that equitable estoppel applied by focusing on the "overarching intention of the Convention—detering child abduction."⁹² In contrast, in *Anderson v. Acree*, the court held that the doctrine did not apply because the purpose of the one-year deadline was to ensure that children were not hastily uprooted once they were settled.⁹³ Courts often do not try to reconcile these Convention goals, although, as Part II.B below suggests, it is possible to do so. A careful analysis of the Convention and its foundational documents suggest that the policy behind the article 12(2) defense trumps the general policy of the Convention when the two are in conflict, a conclusion that is contrary to that reached by at least one court that tried to reconcile the two goals.⁹⁴

91. See, e.g., *Furnes v. Reeves*, 362 F.3d 702, 723–24 (11th Cir. 2004) (accepting equitable "tolling" without discussing whether it is consistent with statutory scheme even though it was the first U.S. Court of Appeals to address the issue).

92. 526 F.3d 563, 570 (9th Cir. 2008). Yet the court also recognized the "serious concerns with uprooting a child who is well-settled." *Id.* Its solution was to require concealment as a prerequisite to the application of the doctrine. *Id.*; see also *In re B. Del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) (rejecting a "tolling" argument when there was no evidence that the abducting parent concealed the child).

93. 250 F. Supp. 2d 872, 874 (S.D. Ohio 2002) (determining that the drafters of the Convention "decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child's return"); cf. *Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998), *vac'd on other grounds*, 191 F.3d 23 (1st Cir. 1999) (noting that, because the one-year time limit was intended to limit the further uprooting of the child, the period starts on the date of wrongful retention, not the date on which petitioner learns of or receives notice of the wrongful retention).

94. See *In re B. del C.S.B.*, 559 F.3d at 1014 (deciding that equitable "tolling" is the appropriate method to balance the Hague Convention's overarching goal of deterring

1. The History Behind the One-Year Requirement

Whether equitable principles are consistent with or antithetical to the Hague Convention regime requires a more searching inquiry into the purpose of the article 12(2) well-settled defense. The purpose of the defense, along with a full reading of the defense's legislative history, suggest that concealment was not meant to alter the one-year time frame set forth in the defense.

Article 12 contains the well-settled defense. It states, in relevant part:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.⁹⁵

This provision suggests that an analysis of whether a child is well settled cannot begin unless the one-year prerequisite has passed. On the other hand, there is no time beyond which return is impossible. Even after one year has passed, a court "shall" order the child's return unless the child is "now settled" in his or her new location.

The well-settled defense was adopted, after considerable discussion, to protect the abducted child from the harm that might attend a repatriation following an abduction. A successful defense means that the child will not be summarily returned to the state of habitual residence and any custody contest will occur in the abducted-to state. In that custody proceeding, a court may still order the repatriation of the child, but only after examining

child abduction with the well-settled defense's goal of not uprooting a settled child (citing *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008)).

95. Hague Abduction Convention, *supra* note 1, art. 12.

all the evidence carefully. According to the Pérez-Vera Explanatory Report, which is considered an authoritative source on the meaning of the Convention,⁹⁶ the defense was designed to permit a more thorough examination of the evidence by a court in the place where the child is located.⁹⁷ After a child has become settled in his or her new environment, “its return should take place only after an examination of the merits of the custody rights exercised over [the child]—something which is outside the scope of the Convention.”⁹⁸

Article 12(2) reinforces the fact that the Convention is designed to be an expeditious remedy. Senator Paul Simon, the Senator who introduced ICARA, put it succinctly: “‘Prompt return’ is the cornerstone of the convention”⁹⁹ As several English experts on the Convention have also noted, “[T]o return a child after he has spent a considerable period away from his country of habitual residence is very different from the classic case of a summary return in the immediate aftermath of an abduction.”¹⁰⁰ These experts point out that the Convention remedy “is designed to be one of hot pursuit,” citing Lord Justice Thorpe in the case of *In re C (Abduction: Grave Risk of Psychological Harm)*.¹⁰¹

The Convention’s legislative history reveals that the drafters did not envision exceptions to the application of the well-settled defense. Specifically, the drafters did not propose a different

96. Robert v. Tesson, 507 F.3d 981, 988 & n.3 (6th Cir. 2007) (referring to the Pérez-Vera Explanatory Report as the “official commentary on the Hague Convention”). Professor Pérez-Vera, however, noted that there are inherent limits to the accuracy of the report: “[I]t would be as well to remember that this Report was prepared at the end of the Fourteenth Session, from the *process-verbaux* and the Reporter’s notes. Thus it has not been approved by the Conference, and it is possible that, despite the Rapporteur’s efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.” Elisa Pérez-Vera, *Rapport Explicatif [Explanatory Report]*, in 3 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, 6 AU 25 OCTOBRE, 1980: ENLÈVEMENT D’ENFANTS [HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, OCTOBER 6 TO 25, 1980: CHILD ABDUCTION] 426, 427–28 (1982) [hereinafter ACTES ET DOCUMENTS].

97. See Pérez-Vera, *supra* note 96, at 458.

98. *Id.* at 458.

99. 134 CONG. REC. 6485 (1988).

100. NIGEL LOWE ET AL., INTERNATIONAL MOVEMENT OF CHILDREN: LAW PRACTICE AND PROCEDURE 294–95 (2004).

101. *Id.* (citing *In re C (Minors) (Abduction: Grave Risk of Psychological Harm)*, [1999] EWCA (Civ) 771, (1999) 1 F.L.R. 1145 (Eng.)).

approach when the abductor hid the child, *id est*, they did not contemplate an approach that suspended the one-year clock during concealment. The drafters certainly recognized that abductors sometimes hide with their children as part of the abduction,¹⁰² but article 12(2) was provided as the complete solution for that type of situation. This history is important to recognize if courts are to achieve the proper interpretation of article 12(2).¹⁰³

Concealment was specifically rejected as a reason to stop the accumulation of time if a year had passed since the wrongful removal or retention. Initially, the Preliminary Draft Convention proposed two time periods, depending upon whether the child was hidden or not.¹⁰⁴ The Preliminary Draft Convention required that an authority return a child forthwith if a period of less than six months elapsed from the date of the breach of custody rights, but it contained a discovery rule when the child was hidden.¹⁰⁵ Yet the time gained through this discovery rule could not exceed one year from the date of the abduction because the defense would apply at the one year mark: “[W]here the residence of the child was unknown, the period of six months referred to in the previous paragraphs shall run from the date of the discovery of the child, subject to the proviso that the total period shall not exceed one year from the date of the breach.”¹⁰⁶ The time line was reported as follows: “[T]he Special Commission adopted the two time-limits which appear in article 11: in the case of the first,

102. See, e.g., *Réponses des Gouvernements au Questionnaire* [Replies of the Governments to the Questionnaire] (Feb. 1979), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 61, 88 (response of United States) (“There is a sixth problem which is becoming all too common—the taking and concealment of a child by a parent before or after a custody decree.”); *Observations des Gouvernements sur le Document Préliminaire No 6* [Comments of the Governments on Preliminary Document No. 6] (Sept. 1980), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 215, 231–32 (comment of Canada) (calling the “classic” abduction case one in which the child’s place of refuge is not usually known at the time of the abduction).

103. See *Robert v. Tesson*, 507 F.3d 981, 988 n.3 (6th Cir. 2007) (“When interpreting a treaty, a court ‘may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985))).

104. *Avant-projet de Convention Adopté par la Commission Spéciale et Rapport de Mlle Elisa Pérez-Vera* [Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera] (May 1980), art. 11, in 3 ACTES ET DOCUMENTS, *supra* note 96, at 168.

105. *Id.*

106. *Id.* at 166, 168.

of six months, the applicant knew where the child was; in the case of the second, with a *maximum* period of one year, the child's whereabouts were unknown."¹⁰⁷

The strict time line was important given the objective behind the defense, an objective that remained unchanged throughout the drafting sessions. Early on, Professor Pérez-Vera explained, "Now we know that the time factor acquires an overriding importance in cases of child removal. Indeed, the psychological confusion a child may experience following such a removal could reappear if a restitution order were adopted after a certain time had elapsed."¹⁰⁸ Therefore, as she said,

[if one examined the issue] from the point of view of the child's interests, when the child is well integrated in his new social environment, his return should not take place before the custody rights have been examined on the merits—which would fall outside the object of the Convention, which seek to ensure an immediate return without prejudging the custody on the merits.¹⁰⁹

Ultimately, the drafters settled on a single time frame of one year for all cases, regardless of whether concealment was involved. The single time frame had two benefits. First, it eliminated the need to determine the date on which the left-behind parent discovered, or should have discovered, the child's location. Such an inquiry was thought to cause "considerable difficulty."¹¹⁰ As Mr. Jones of the United Kingdom noted, "It was possible . . . that an applicant knew the country to which the

107. Elisa Pérez-Vera, *Rapport de la Commission Spéciale Établi* [Report of the Special Commission], in 3 ACTES ET DOCUMENTS, *supra* note 96, at 172, 202. At first, the Special Commission proposed that a court return a child immediately if the left-behind parent applied to a Central Authority within six months of a wrongful retention. See *Conclusions des Discussions de la Commission Spéciale de Mars 1979 sur le Kidnapping Légal* [Conclusions Drawn from the Discussions of the Special Commissions of March 1979 on Legal Kidnapping] (June 1979), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 162, 163–64. This six-month time limit applied "equally where the child has been abducted by stealth or force and where the child has left his or her State of origin for a temporary visit or sojourn elsewhere . . ." *Id.* at 164. After six months, a court in the abducted-to state could assume jurisdiction to address custody so long as the child was habitually resident for a period of time, recommended to be one year, unless there was a need to protect the child from serious physical danger. *Id.*

108. Pérez-Vera, *supra* note 107, at 177.

109. *Id.* at 172, 201.

110. *Procès-verbal No 7* [Official Report No. 7], (Oct. 13, 1980), in 3 ACTES ET DOCUMENTS, *supra* note 96 at 291 (comment of the United Kingdom).

child had been abducted but not the child's precise location therein."¹¹¹ Similarly, the representative from France thought a single time period was preferable because it would "remove the ambiguity from the point of the period provided" for by "discovery."¹¹² The final Explanatory Report captured this sentiment very well:

[T]he establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated.¹¹³

Second, the single time frame also had the advantage of establishing a minimum period of time before a court could consider the issue of whether the child was well settled. Professor Pérez-Vera noted in the final Explanatory Report that "the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard."¹¹⁴ The single time period was adopted by a definitive vote of twenty in favor and three against.¹¹⁵

There was considerable debate about the appropriate length of the time frame,¹¹⁶ but ultimately the drafters settled upon one year.¹¹⁷ The vote was definitive, although the United States was in

111. *Id.*

112. *Id.* (comment of France).

113. Pérez-Vera, *supra* note 96, at 459.

114. *Id.* at 458.

115. See *Proces-verbal No 7, supra* note 110, at 292 (comment of Chairman).

116. Compare, e.g., *Comments of the Governments on Preliminary Document No. 6, supra* note 102, at 216 (comment of the Federal Republic of Germany) (suggesting two years might be more appropriate for an abductor committed to concealing the child's place of abode), and *id.* at 231 (comment of Canada) (suggesting time limits in article 11 should be extended to twelve and eighteen months respectively), with *Proces-verbal No 6 [Official Report No. 6]* (Oct. 11, 1980), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 283, 288 (comment of the Netherlands) (suggesting that a short time limit of six months was appropriate).

117. See *Proces-verbal No 7, supra* note 110, at 292 (comment of the Chairman).

dissent.¹¹⁸ Before voting on whether one year was the length of time at which the defense should kick in, the delegates were repeatedly reminded that it might be very difficult to discover a concealed child's whereabouts in a country as large as the United States and that voting in favor of a one-year timeframe might benefit an abductor. For example, the United States, in strongly opposing the strict time lines, said,

As a practical matter, it may not be possible to locate a child and to bring proceedings in an appropriate court within these limits. This is particularly true in large federated States such as the United States A statute of limitations of six months from the date of the abduction to the institution of legal proceedings, or a maximum of one year in the case of the child's concealment, will cut off many deserving applicants and their children. . . . The United States urges that at the very least one-year and two-year limits be substituted for the present deadlines.¹¹⁹

The United States again reiterated this point: “[T]he existing time-limits established by article 11 [are] excessively restrictive [I]t might prove impossible to locate a child within a certain period of time.”¹²⁰ After the drafters decided they wanted a single timeframe, the United States argued for a minimum of eighteen months due to the “difficulty of locating a child and the abductor.”¹²¹

The United States' concerns were addressed, in part, by an amendment that required a court to return the child after one year if the child was not well settled. Therefore, the one-year timeline would set a floor for whether a court could address whether a child was well settled,¹²² but it would not set a ceiling on the time in which the court could return a child who was not well settled. The Federal Republic of Germany proposed this

118. *See id.* (noting twenty-one votes in favor and four against).

119. *Comments of the Governments on Preliminary Document No. 6*, *supra* note 102, at 242 (comment of the United States).

120. *Proces-verbal No 6*, *supra* note 116, at 288 (comment of the United States).

121. *Proces-verbal No 7*, *supra* note 110, at 292 (comment of the United States).

122. *See* Pérez-Vera, *supra* note 107, at 201. Setting a floor seemed wise for administrative reasons: “Now, it does not seem possible to express the criterion of the child's integration in an objective rule; therefore, the Special Commission opted for a time period which will always be of an arbitrary nature but which may answer its worries on that score in the ‘least detrimental’ possible way.” *Id.*

solution in Working Document No. 25.¹²³ The proponent explained that this provision was a “necessary compromise” and would “help ensure its ratification by as many States as possible.”¹²⁴ The United States delegate, Miss Jamison M. Selby, encouraged delegates to vote in favor of this provision because of the practical difficulties of implementing an unmodified rule in the United States,¹²⁵ and because the United States might not otherwise join the Convention.¹²⁶ Miss Selby clearly recognized that a court would not be able to return a well-settled child, even with the change afforded by Working Document No. 25.¹²⁷ The German proposal, after amendment,¹²⁸ was accepted by a vote of fourteen to ten, with the United States casting a vote with the majority.¹²⁹

In short, the drafters specifically addressed the tension between the petitioner’s need to find a hidden child and the child’s need for repose. Recognizing that sometimes it might

123. See *Documents de Travail Nos 20 à 25* [*Working Documents Nos. 20–25*] (Oct. 10, 1980), in 3 *ACTES ET DOCUMENTS*, *supra* note 96, at 274, 274 (proposal number 25 by the Federal Republic of Germany) (allowing the judicial or administrative authorities to return a child after the expiration of the relevant time frame “unless it is demonstrated that the child is now settled in his new environment and his return would cause excessive prejudice”).

124. *Proces-verbal No 7*, *supra* note 110, at 295 (comment of the Federal Republic of Germany).

125. See *Proces-verbal No 10* [*Official Report No. 10*], (Oct. 18, 1980), in 3 *ACTES ET DOCUMENTS*, *supra* note 96, at 312, 315 (comment of the United States) (“Miss Selby (United States) thought that article 15’s lack of clarity had been remedied by Working Document No 25. She asked delegates to consider the United States situation, in which the size of the country and the existence of 50 different judicial authorities could make it very difficult firstly to find people who might constantly be moving around and secondly to dispose of a matter once they had been founded, due to procedural delays. She was worried that the one-year time-limit could be abused by certain people seeking to avoid the application of the Convention.”).

126. See *Proces-verbal No 10*, *supra* note 125, at 315 (comment of the United States) (“Miss Selby stressed that the United States delegation wanted other States to benefit from American ratification of the Convention, and that the adoption of the proposal in Working Document No 25 would facilitate its operation in the United States.”).

127. See *id.* (“The basic principle must be made clear that a child should be returned, and the proposed time-limit of two years, subject to the exception of the child’s assimilation into a new environment, was in her view a necessary clarification.”).

128. The German proposal was amended to take out the words “during the period of two years” and “and his return would cause excessive prejudice.” *Id.* (comment of the Federal Republic of Germany).

129. See *Proces-verbal No 10*, *supra* note 126, at 316 (comment of the Chairman). The proposal to eliminate article 15 followed immediately thereafter, and was rejected by a vote of ten to nine, with five countries abstaining. *Id.*

take more than a year to find a child, the Convention mandates the child's return even if proceedings are brought more than a year after the abduction. In fact, a court "shall do so."¹³⁰ The limitation, however, is that the child must not be "now settled in its new environment."¹³¹ Professor Pérez-Vera explained:

The second paragraph [of article 12] answered to the need, felt strongly through the preliminary proceedings, to lessen the consequences that would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears *whenever* it can be shown that "the child is now settled in its new environment."¹³²

As just discussed, the main component of the equitable estoppel defense—consideration of the respondent's concealment—was not supposed to alter the application of the article 12 defense. It is likewise notable that the other component of equitable estoppel, the petitioner's due diligence, also figured into the debate over the well-settled defense and its incorporation ultimately failed. Canada proposed on two occasions that a petitioner's diligence be considered. For example, in Working Document No. 73, Canada proposed the following language: "For the purpose of this article [12], where the applicant did not take any steps to seek the return of the child within [six or twelve] months after the removal or retention, it shall be presumed to have consented or acquiesced to the removal or retention."¹³³ Canada's proposal was a specific

130. Hague Abduction Convention, *supra* note 1, art. 12(2).

131. *Id.*

132. Pérez-Vera, *supra* note 96, at 459 (emphasis added). She continued, The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard.

Id.; see also A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 549 (2009); Pérez-Vera, *supra* note 96, at 458 (explaining that the drafters rejected the possibility of an "extension of the time-limit" even though there might be difficulty in locating the child).

133. *Documents de Travail Nos 69 à 74* [Working Documents Nos. 69–74] (Oct. 22, 1980), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 348 (proposal number 73 by Canada).

response to Germany's proposal, in Working Document No. 25, that a court should be able to return a child even after the expiry of one year unless the child is well settled. The Canadian delegate said:

That was so whatever might have been the conduct of the applicant. The thrust of the new [Canadian] proposal was whether the Convention wishes to reward indolence or diligence. If the latter, then it should not allow the aggrieved parent to sleep on his rights, to borrow a term from the new law relating to laches, and should provide that where the aggrieved parent takes no steps to remedy the situation, then following the expiry of the period contained in square brackets, the aggrieved parent should be presumed to have acquiesced in the state of affairs. He suggested that the proposal should be seen as an attempt to resolve one of the difficulties left open by the adoption of the proposal of Germany namely, that an abduction could be left hanging for anything up to twelve years by the non-activity of the aggrieved parent. He found that also to be a sobering prospect.¹³⁴

The Canadian recommendation was ultimately withdrawn by Canada after some pointed observations by other delegates.¹³⁵ For example, a representative from the United Kingdom noted,

The Convention already contained the ground of refusal that the applicant had consented to or acquiesced in the removal or detention. . . . In addition, the question of what constituted the steps to be taken raised the burdensome problem of proof and opened up a scale of vagueness. Furthermore, if the proposal were to be adopted, would that imply that where some step had been taken there could be no question of acquiescence?¹³⁶

The United States agreed with these observations.¹³⁷ Of course, the criticisms leveled by the United Kingdom against the Canadian proposal apply equally to the due diligence

134. *Proces-verbal No 15* [Official Report No. 15] (Oct. 22, 1980), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 359 (comment of Canada). Canada was also concerned about the petitioner's diligence earlier in the proceedings. See Working Doc. No. 40, Proposal of the Canadian Delegation (Oct. 13, 1980), in 3 ACTES ET DOCUMENTS, *supra* note 96, at 290.

135. *Proces-verbal No 15*, *supra* note 134, at 360 (comment of Canada).

136. *Id.* at 359 (comment of the United Kingdom).

137. *Id.* (comment of the United States).

requirement that is often now part of the equitable estoppel analysis.

In sum, the legislative history of the Convention demonstrates that delegates rejected proposals that would have required judges to consider the respondent's concealment and the petitioner's due diligence. This history suggests that an equitable estoppel analysis is inappropriate in the context of article 12.

The legislative history attending the passage of ICARA also does not support the introduction of equitable principles when an article 12(2) defense is raised. An examination of that history shows the well-settled defense itself received little attention.¹³⁸ There was absolutely no discussion about whether equitable principles might temper the defense.

The aforementioned legislative history of the Convention and ICARA suggests that importing equitable principles into the application of the well-settled defense is inconsistent with the Convention. Since the defense exists to protect the child, not the abductor, the time frame has a particular substantive purpose. The framework is meant to apply even if concealment exits. The court has the ability to return the child at anytime, even after one year, but not if the child is well settled. When the child is well settled, a court in the abducted-to nation should consider the merits of the underlying dispute and only then determine whether the child should be returned. A court adjudicating return under the Convention, in contrast, is expected to return the child quickly after the abduction.

Courts in the United States, whether they accept or reject equitable tolling, have not addressed the legislative history of article 12(2) in any depth. A number of courts have at least recognized that the article 12 defense is unlike a statute of

138. There was some discussion about whether the article 12(2) defense would raise issues typically addressed in a custody dispute and whether the federal courts should have jurisdiction to resolve Hague cases. *See, e.g.*, 134 CONG. REC. 6482-85 (1988) (comments of Sens. Hatch & Dixon); *International Child Abduction Act: Hearing on S. 1347 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. 67-68 (1988) (statement of Kevin R. Jones, U.S. Deputy Assistant Att'y Gen.) [hereinafter *1988 Senate ICARA Hearing*]; *International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 Before the H. Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 47-49 (1988) (statement of Stephen J. Markam, U.S. Assistant Att'y Gen.) [hereinafter *1988 House ICARA Hearing*].

limitations because of the focus on the child. As one court adjudicating a Hague petition noted, statutes of limitations are about “repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.”¹³⁹ In contrast, the article 12 defense is about ensuring the child’s interest in stability is considered in the process of adjudicating his or her return.¹⁴⁰ The same court continued, “Equitable estoppel, if accepted, would place the interests of the petitioning parent above those of the potentially settled child simply because the petitioner may have had good reason for failing to file sooner.”¹⁴¹ Equitable principles, the court concluded, would be “inconsistent with the Convention’s careful balancing of interests.”¹⁴² Similarly, another court came to this conclusion:

[T]his court is not convinced that the one-year period referred to in Article 12 is a statute of limitations. A petition for the return of a child is not barred if it is filed over one year from the date of removal. Rather, the drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child’s return. This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child’s whereabouts. There is nothing in the language of the Hague Convention which suggests that the fact that the child is settled in his or her new environment may not be considered

139. *See Matovski v. Matovski*, No. 06-cv-4259, 2007 WL 2600862, at *12 (S.D.N.Y. Aug. 31, 2007) (citing *Young v. United States*, 535 U.S. 43, 47 (2002)). Simply put, a “second harmful disruption” might occur, making the return of the child presumptively unwise after a certain point in time. *In re Robinson*, 983 F. Supp. 1339, 1345 (D. Colo. 1997). For courts that cite the drafters’ belief that a tribunal should consider the harm that could result from removing a child after a year has lapsed, see, for example, *Blondin v. Dubois (Blondin II)*, 238 F.3d 153 (2d Cir. 2001); *Nunez v. Ramirez*, No. 07-01205, 2008 WL 898658 (D. Ariz. Mar. 28, 2008) (citing *Matovski*, 2007 WL 2600862); *In re Robinson*, 983 F. Supp. at 1345.

140. *See Matovski*, 2007 WL 2600862, at *12 (citing *Blondin II*, 238 F.3d at 164).

141. *Id.*

142. *Id.*

if the petitioning parent has good reason for failing to file the petition within one year.¹⁴³

The conclusions reached by these authorities are correct and should be followed by other courts.

2. Potential Authority Supporting the Adoption of the Doctrine

Although the Convention's *travaux préparatoires* and ICARA's legislative history do not support the introduction of equitable principles into Hague adjudications, other sources might justify its adoption. Two sources come to mind: the official interpretation of the Convention by the U.S. State Department¹⁴⁴ and foreign case law. While these sources should have less weight than the relevant text and its legislative history, courts sometimes do rely on these sources to support developments in Hague Convention jurisprudence. Even so, neither of these sources provides a solid basis for the invocation of equitable principles.

The State Department's legal analysis of the Convention has been an important aid to the interpretation of ICARA for some courts deciding other issues.¹⁴⁵ Some courts also cite to the State Department's legal analysis as supporting an application of equitable principles.¹⁴⁶ The legal analysis says,

143. *Anderson v. Acree*, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002); *see also Toren v. Toren*, 26 F. Supp. 2d 240, 244 (D. Mass. 1998), *vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999) ("The language of the Convention is unambiguous, measuring the one-year period from the 'date of the wrongful . . . retention.' It might have provided that the period should be measured from the date the offended-against party learned or had notice of the wrongful retention, but it does not. That is not surprising, since the evident import of the provisions is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitation does, but rather to put some limit on the uprooting of a settled child." (citing Hague Abduction Convention, *supra* note 1, art. 12)); *In re Robinson*, 983 F. Supp. 1339, 1346 (D. Colo. 1997).

144. Hague International Child Abduction Convention; Text and Legal Analysis, *supra* note 10.

145. *See, e.g., Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008) (noting that although the State Department's analysis is not binding, it is entitled to deference); *Baxter v. Baxter*, 423 F.3d 363, 373 n.7 (3d Cir. 2005) (indicating that State Department interpretation should be given "great weight"); *Danaipour v. McLarey*, 286 F.3d 1, 14–19 (1st Cir. 2002) (relying on the State Department's legal analysis to decide whether sexual abuse posed an "intolerable situation" under article 13(b)).

146. *See, e.g., Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008); *Arguelles v. Vasquez (In re Hague Child Abduction)*, No. 08-2030-CM, 2008 U.S. WL 913325, No. 08-2030, 2008 WL 913325, at *9 (D. Kan. Mar. 17, 2008); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1348 (S.D. Fla. 2002).

The reason for the passage of time, which may have made it possible for the child to form ties to the new country, is also relevant to the ultimate disposition for the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations.¹⁴⁷

Courts should not give too much weight to this passage. If, in fact, this excerpt supports the application of equitable estoppel, it is at odds with the Convention itself. The State Department may have included this language to encourage judicial development of a position that the United States desired, but was rejected during the drafting of the Convention. Regardless of why this language was used, any interpretation of the Convention that is inconsistent with the drafters' intent would arguably put the United States in breach of its international obligations, and should be avoided.¹⁴⁸

Moreover, courts need not read this passage as supporting the application of equitable principles. While the quotation seems to suggest that the parent who hides the child should not benefit from his or her acts, there is an equivocation. The words "highly questionable" suggest the issue is unresolved. In addition, the admonition contains a caveat: "absent strong countervailing considerations." This language implies that the court should make a searching inquiry before returning a child, a result inconsistent with the application of equitable estoppel (equitable estoppel stops the accumulation of time so that the one-year threshold is not met and an in-depth inquiry never occurs). Therefore, the State Department's interpretation does not support the application of equitable estoppel, but rather supports making concealment relevant at a different place in the analysis. Concealment might be relevant, for example, to a court's interpretation and application of the words "now settled," as described below in Part III,¹⁴⁹ or to a court's decision to return

147. Hague International Child Abduction Convention; Text and Legal Analysis, *supra* note 10, at 10,509.

148. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

149. See *infra* notes 337–39 and accompanying text.

the child after a consideration of all the evidence related to custody.

Foreign case law might also lay the foundation for a new interpretation of the Convention by our courts. Congress stressed that the Convention should have a uniform interpretation worldwide.¹⁵⁰ Uniformity is, in fact, an important value in child abduction jurisprudence.¹⁵¹ In other contexts, U.S. courts cite foreign authority when interpreting the Hague Convention.¹⁵²

The case law of U.S. treaty partners has not, however, been the impetus for the acceptance of equitable principles by U.S. courts. U.S. courts do not cite foreign authority on this matter. In fact, foreign cases do not treat concealment as a factor that stops the one-year threshold from being reached. The courts of some of our treaty partners have even rejected equitable estoppel outright. Rather foreign courts tend to treat concealment either as a mitigating factor in determining whether the child is settled, as a reason to refuse the defense once the child is found to be well settled, or as altogether irrelevant to the defense's application. Examples of these approaches follow.

In *Cannon v. Cannon*,¹⁵³ the Court of Appeal of England and Wales flatly rejected the "American doctrine of tolling." The court found the American method "too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome."¹⁵⁴ Instead, the court found concealment relevant to whether the child was well settled and whether the court should exercise its discretion to return the child notwithstanding the existence of the defense.¹⁵⁵

150. See 42 U.S.C. § 11601(b)(3) (2006) ("Congress recognizes—(A) the international character of the Convention; and (B) the need for uniform international interpretation of the Convention.").

151. See *Weiner*, *supra* note 67, at 289–90 (explaining that a uniform interpretation of the Convention is important if child abduction is to be deterred because abductors would otherwise exploit divergent interpretations and engage in forum shopping).

152. See, e.g., *Furnes v. Reeves*, 362 F.3d 702, 717–18 (11th Cir. 2004) (relying on the interpretations of foreign courts in deciding whether a violation of a *ne exeat* clause constitutes wrongful removal); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (relying on the opinions of foreign courts to decide proper analysis of habitual residence).

153. [2004] EWCA (Civ) 1330, (2005) 1 W.L.R. 32 (Eng.).

154. *Id.* at [51].

155. See *id.* at [6]–[9].

The case involved a mother who abducted her child from California to England in July 1999.¹⁵⁶ For approximately four years, she purposefully concealed the child by establishing new identities for herself and the child.¹⁵⁷ That concealment was relevant to the court's "broad and purposive construction of what amounts to 'settled in its new environment.'"¹⁵⁸ Construing the Convention text in this way allowed a full consideration of the facts of the case, "including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay."¹⁵⁹ The court acknowledged that concealment comes in "many guises and degrees of turpitude."¹⁶⁰ The extent of the wrongfulness is relevant to the emotional and physical aspects of the child's life, both of which are components of whether a child is settled.¹⁶¹

The appellate court also observed that article 18 gave the trial court discretion to return the child even if the child was well settled.¹⁶² The court noted that returning the child might be appropriate for cases of "manipulative delay," that is, delaying the proceedings specifically to benefit from the twelve-month limit.¹⁶³ This holding was significant because an exercise of discretion under the Convention gave primacy to the Convention's objectives while an exercise of discretion under England's domestic law gave primacy to the child's welfare.¹⁶⁴

This latter aspect of the *Cannon* decision—that a court has discretion to return a child even after it is established that the child is well settled—was reaffirmed by the House of Lords in the case of *In re M (Children) (Abduction: Rights of Custody)*.¹⁶⁵ By a four-to-one vote, the House of Lords held that the discretion to return a child who was well settled existed under the Convention.¹⁶⁶ Baroness Hale of Richmond mentioned that a court should consider the general policy behind the Convention,

156. *See id.* at [5].

157. *See id.*

158. *Id.* at [53].

159. *Id.*

160. *Id.* at [54].

161. *See id.* at [56]–[58].

162. *See id.* at [62].

163. *Id.* at [59].

164. *See id.* at [38].

165. [2007] UKHL 55, [2008] 1 A.C. 1288 (appeal taken from Eng.) (U.K.).

166. *See id.* at [31].

including deterring abduction, when exercising this discretion.¹⁶⁷ However, she qualified this statement by also saying, “the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.”¹⁶⁸ In the end, the House of Lords held that the children in that case should not be returned because of the father’s and authorities’ delay in instituting proceedings.¹⁶⁹ This was the outcome even though the case involved concealment, as the mother had secreted the children for “many months.”¹⁷⁰ Baroness Hale concluded, “These children should not be made to suffer for the sake of general deterrence of the evil of child abduction worldwide.”¹⁷¹

Similarly, in *In re C (Abduction: Settlement) (No. 2)*,¹⁷² the court found that concealment existed, but nonetheless exercised its discretion to grant the defense. *In re C* was decided by the Family Division in England after the Court of Appeal remanded the case of *Cannon v. Cannon*, which is the same case discussed above, although denominated differently.¹⁷³ To remind the reader, there, a mother abducted her child from California to England.¹⁷⁴ The mother then went into hiding with the child, changing their names and date of birth.¹⁷⁵ It took five years for the father to find them, at which point he instituted a Hague proceeding.¹⁷⁶ The mother defended on the basis that the child was well settled.¹⁷⁷

The trial court had no difficulty finding that the child was well settled, physically,¹⁷⁸ emotionally,¹⁷⁹ and psychologically.¹⁸⁰

167. *See id.* at [46]–[47].

168. *Id.* [44].

169. *Id.* at [54]. The court noted that the father was to be blamed for taking a long time to institute proceedings. It took him more than a year after he was notified by his child to come and get them. The authorities then dragged their feet for eight months. All the while the children “got on with making their lives here, where they are happy and have become fully integrated in their local church and schools.” *Id.* at [52].

170. *Id.* at [50] (quoting *In re M (Children) (Abduction)*, [2007] EWCA (Civ) 992 at [121], (2007) 3 F.C.R. 564 (Eng.)).

171. *Id.* at [54].

172. (2005) 1 F.L.R. 938 (Fam. 2004) (Eng.).

173. *See supra* text accompanying notes 153–64.

174. (2005) 1 F.L.R. at 939 (Fam. 2004) (Eng.).

175. *See id.* at 942.

176. *See id.* at 939.

177. *See id.*

178. *See id.* at 941.

Among other evidence, there was considerable proof from the school, friends, and her church about how well the child was doing.¹⁸¹ The court found “a clear and compelling picture of a child who is happy, successful, stable, settled and flourishing to an exceptional degree.”¹⁸² The judge deciding the case went so far as to state that “I see no signs of withdrawal, reserve, tentativeness or transience about [the child]’s life in Liverpool. . . . I am entirely satisfied that she was and is settled in every sense of the word.”¹⁸³

Turning to the discretion it had to return a settled child, the court noted in great detail the negative effects of not returning the child, including the “most serious” fact that “the father suffered the injustice of not being able to ask the court to adjudicate upon the matter.”¹⁸⁴ Nonetheless, the court did not return the child. It did not get into the merits of the mother’s departure, although it noted the words of Lord Justice Thorpe in *Cannon v. Cannon* that “[c]oncealment or subterfuge in themselves have many guises and degrees of turpitude[, so] the degree of wrong will vary from case to case.”¹⁸⁵ Rather, it found that a return would be “extremely distressing for the child” because stability was important for children and this child was very well settled.¹⁸⁶ The court noted that “the time for swift and summary return under the Convention” had passed.¹⁸⁷ Relevant to this determination was that the mother had no means of support in the United States, the father’s offer of support was unreliable, and the child could not live with the father.¹⁸⁸ The Department of Children and Family Services had “serious concerns if any child is placed under [the father’s] care and supervision,” as the father had been convicted and sentenced to prison for child cruelty with respect to two girls, ages five and

179. *See id.* at 945.

180. *See id.*

181. *Id.* at 942–44.

182. *Id.* at 945.

183. *Id.* at 946.

184. *Id.* at 948–49.

185. *Id.* at 947 (quoting *Cannon v. Cannon*, [2004] EWCA (Civ) 1330 at [54], (2005) 1 W.L.R. 32, 49 (Eng.)).

186. *Id.* at 949.

187. *Id.* at 950.

188. *See id.* at 949.

seven, who were his partner's daughters.¹⁸⁹ The court acknowledged that the child was entitled "to look to the court for justice."¹⁹⁰ The child had spontaneously told a police officer that she loved her life, did not want to leave, felt safe, and wondered why they could not stay.¹⁹¹ The court was unpersuaded that returning the child would have little effect on her in the end because she would be allowed to live with her mother and then relocate: it was uncertain whether the state of the child's habitual residence would have an expeditious hearing or necessarily permit the mother to relocate with the child.¹⁹² Among other things, the mother might be prosecuted for child abduction in that jurisdiction.¹⁹³ In the end, the court was unwilling to return the child to set an example for others who might abduct.¹⁹⁴

The Supreme Court of Ireland examined the diligence of the petitioner in exercising its discretion to return a well-settled child. In *In re R (A Minor) (No. 2)*,¹⁹⁵ the mother took the children abroad and the father claimed he did not know where they went.¹⁹⁶ The court emphasized that the father did not exercise diligence in searching for the mother: "It is extraordinary that he did not telephone her parents or attempt to do so to inquire of her and [the child]. It is remarkable in the circumstances that Interpol was asked to trace her—that neither the father or his lawyers rang her home in Ireland."¹⁹⁷ In addition, the father waited almost one year to start proceedings after the mother was located.¹⁹⁸ This delay was apparently caused by his lawyers' need to prepare documentation, but that was not an adequate reason for the delay in the eyes of the court.¹⁹⁹ "Significant culpable delay by a requesting party is contrary to the fundamental policy of the Convention," regardless of whether the delay rises to the level of acquiescence on part of the father.²⁰⁰ The child was

189. *Id.* at 946.

190. *Id.* at 950.

191. *See id.*

192. *See id.* at 949.

193. *See id.* at 949–50.

194. *See id.* at 949.

195. [1999] IESC 32, [1999] 4 I.R. 185 (Ir.).

196. *Id.* at [10].

197. *Id.* at [37].

198. *See id.* at [38].

199. *See id.*

200. *Id.* at [48].

permitted to remain in Ireland in the child's settled environment.²⁰¹

A different approach was evident in a case adjudicated in Hong Kong. There the emphasis was on whether the children were settled. The court did not address whether discretion exists to deny the well-settled defense after it is established, but rather found that the term "settled" is flexible enough to take account of concealment. In *AC v. PC (Abduction: Settlement)*,²⁰² the court specifically rejected U.S. authorities invoking equitable estoppel and instead sided with English authority, even though the children were hidden for almost five years.²⁰³ The father in the case had abducted the children from Australia and relocated them to Hong Kong. He then took them to Mainland China²⁰⁴ and later returned to Hong Kong without detection by immigration officials on the lookout for him.²⁰⁵ When he removed the children, he took "active steps . . . to keep the children beyond the reach of any legal process [the mother] may (in any practical sense) have been able to commence."²⁰⁶ The court stated, unequivocally,

[F]rom the time of their removal from Australia the father has taken steps to physically locate the children beyond the reach of the Convention and/or to conceal their whereabouts from the mother. . . . The father's policy of concealment was pursued by him from the time he removed the children from Australia on 16 August 1999 until the commencement of proceedings in this matter on 17 May 2004.²⁰⁷

This included engaging in trickery to make the mother think the children were in Taiwan, when they were not.²⁰⁸

201. *See id.* at [51]–[52].

202. [2004] HKCFI 594, [2005] 2 H.K.C. 90, No. H.K.M.P. 1238/2004, at [38] (C.F.I.).

203. *See id.* at [43] (rejecting the U.S. case *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004) in favor of *In re C (Abduction: Settlement)* [2004] EWHC (Civ) 1245, [2005] 1 FLR 127 (Eng.)).

204. *See id.* at [17].

205. *See id.* at [20].

206. *Id.* at [23].

207. *Id.* at [30].

208. *See id.* at [24].

The court then concluded that the Pérez-Vera report supported the rejection of the “equitable tolling” doctrine.²⁰⁹ The court stated,

[A]lthough largely unspoken, one of the principal objects of the Convention is to secure the best interests of abducted children rather than punishing those who abduct them. That being the case, even if there has been morally reprehensible conduct on the part of the abductor, a time must be reached when, if the circumstances so dictate, it harms rather than helps children to order their return.²¹⁰

The court emphasized that the Convention’s remedy of return was meant to address abduction by “an early restoration of the status quo which is achieved by ensuring the prompt return of the child,”²¹¹ as is evident from the objects of the Convention in article 1.²¹² That was not possible in this case so the well-settled defense had to be considered, and equitable estoppel would be inconsistent with that approach.²¹³

The court then turned to the concept of “settlement” and observed that concealment “is of direct (and perhaps overriding) relevance to the factual question of whether a child has settled in its new environment”²¹⁴ Despite the father’s actions, the court noted that the children themselves had not been leading a covert lifestyle since their return to Hong Kong.²¹⁵ They attended dance classes and rode the bus.²¹⁶ In addition, there was no chance that they would be deported, as they had a right of residence in Hong Kong.²¹⁷

Other courts have similarly emphasized that concealment can be addressed through an examination of whether the child is “settled.” For example, a 2000 Swiss case that was summarized on the International Child Abduction Database (“INCADAT”) website, reached a similar conclusion.²¹⁸ The case involved a

209. *See id.* at [47].

210. *Id.* at [48].

211. *Id.* at [49].

212. *Id.* at [51].

213. *See id.* at [55].

214. *Id.* at [39].

215. *See id.* at [69].

216. *See id.* at [69]–[70].

217. *See id.* at [70].

218. *See* Justice de Paix du Cercle de Lausanne [Magistrate Court, District of Lausanne, Vaud Canton], July 6, 2000, No. J 765 CIEV 112E (Switz.), *available at*

mother who abducted her six-year-old child and was not discovered for four years. Despite the length of time that had passed, the court ordered the child's return. The child "had not become settled in his new environment given the clandestine nature of his existence over the previous 4 years, during which he had not attended school, or developed any social relationships."²¹⁹

A final approach to concealment is evident in the decision of the Supreme Court of New Zealand in *Secretary for Justice v. HJ*.²²⁰ The Supreme Court rejected the argument that the trial court had residual discretion to return children after it determined they were settled, "at least where the mother had not manipulated the delay and her actions were of 'limited moral gravity.'"²²¹ The trial court had found that the article 12(2) defense was established, but returned the children when the mother could not satisfy the judge "that the father should have known or discovered that the children were in New Zealand . . ."²²² The trial court thought it would "undermine the integrity of the Hague Convention . . . if the mother were to obtain an advantage by her own wrong-doing in not advising the father she had taken the children to New Zealand."²²³ The New Zealand Court of Appeal reversed the trial court, explaining it did not undermine the integrity of the Convention to apply the defense.²²⁴ The New Zealand Supreme Court affirmed. Once the defense was established, then the decision to return "must be determined principally in accordance with their welfare and best interests," as required by the relevant statute governing custody.²²⁵ Chief Justice Elias expressly rejected the suggestion that a court should "balance" the objectives of the Convention against the welfare and interests of the child.²²⁶ He explained, "I see no conflict between the aims of the Convention and the welfare and interests of the child once a ground to refuse return

<http://www.incadat.com> (follow "Case Law Search"; then search "Incadat Record Number" for "434").

219. *See id.*

220. *Sec'y for Justice v. HJ*, [2006] NZSC 97, [2007] 2 N.Z.L.R. 289 (S.C.).

221. *Id.* at [1] (quoting *HJ v. Sec'y for Justice*, [2006] N.Z.F.L.R. 1005 (C.A.)).

222. *Id.* (citing *Sec'y for Justice v. HJ*, No. 372/02 (Apr. 15, 2004) (D.C.)).

223. *Id.*

224. *Id.* (citing *HJ v. Sec'y for Justice*, [2006] N.Z.F.L.R. 1005 (C.A.)).

225. *Id.* at [3].

226. *Id.*

is established.”²²⁷ Simply, the New Zealand Supreme Court discounted the significance of concealment by focusing on the Convention’s structure.

In sum, U.S. treaty partners have addressed the issue of concealment in various ways. They have not, however, adopted the doctrine of equitable estoppel.

III. THE POLICY BEHIND EQUITABLE ESTOPPEL: DETERRING THE HIDING OF CHILDREN

Although the use of equitable estoppel is neither supported by the legislative history nor accepted by U.S. treaty partners, courts are still drawn to it for an understandable reason. Courts want to discourage the concealment of children. Courts assume that concealment will be discouraged if they eliminate the legal benefits associated with such behavior. For example, when the U.S. Court of Appeals for the Ninth Circuit accepted equitable estoppel, it acknowledged that both the Convention and ICARA were silent on the doctrine and that there were “serious concerns with uprooting a child who is well settled regardless of whether the abducting parent hid the child.”²²⁸ Nonetheless, it accepted equitable estoppel because it felt compelled to “give significant consideration to the overarching intention of the Convention—deterring child abduction.”²²⁹ The court was worried that any other ruling would “encourage hiding the child from the parent seeking return.”²³⁰

It is important to explore whether this justification has enough merit to warrant the application of equitable estoppel since this justification carries weight for so many courts.²³¹ Would the absence of equitable estoppel encourage the hiding of children, or more particularly, abduction? Such a conclusion rests on three assumptions, all of which are highly questionable. First, it assumes that there are no other legal mechanisms that discourage abduction and concealment, or that equitable estoppel is particularly effective. Second, it assumes that the Convention doesn’t have other mechanisms by which courts can

227. *Id.*

228. *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008).

229. *Id.*

230. *Id.*

231. *See supra* notes 68–71 and accompanying text.

consider the concealment, or that a left-behind parent cannot institute suit until the child's exact location is known. Third, it assumes that deterring abduction is the be-all and end-all of the Convention.

A. *Provisions External to the Hague Convention that Deter the Hiding of Children*

If the Hague Convention were the only legal mechanism designed to deter child abduction, it would perhaps be appropriate to expect it to do considerable heavy lifting. However, other legal devices also exist to discourage abduction. Therefore, courts can stay focused on the intrinsic limits of the Convention without fearing an abduction calamity.

Various legal provisions address abduction and, specifically, the secreting of children during abduction. For example, all states make child abduction a crime,²³² and some make the secreting of the child a more serious crime²³³ or relevant to sentencing.²³⁴ Courts sometimes suspend the statutes of limitations for the prosecution of criminal acts when the whereabouts of the defendant is unknown.²³⁵ At the federal level,

232. Kathi L. Grasso et al., *The Criminal Justice System's Response to Parental Abduction*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't Justice, Wash., D.C.), Dec. 2001, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/186160.pdf>.

233. See *Costlow v. State*, 543 So. 2d 1259, 1260 (Fla. Dist. Ct. App. 1989) (describing section 787.03 as a lesser included offense of section 787.04). Compare FLA. STAT. §§ 787.03–04 (2008) (outlawing interference with custody), with § 787.04 (outlawing removal of minors from state or concealment of minors contrary to a state agency order or court order).

234. See CAL. PENAL CODE § 278.6 (West 2008) (including as aggravating factors whether the child was "taken, enticed away, kept, withheld, or concealed outside the United States," or whether the abductor substantially altered the child's appearance or name, or denied the child an appropriate education during the abduction); MO. ANN. STAT. § 565.150 (West 2008) (elevating from a misdemeanor to a felony the crime of interference with custody if the child is concealed); *Id.* § 565.153 (increasing the felony level depending on the length of time a child is concealed).

235. See *People v. Seda*, 712 N.E.2d 682 (N.Y. 1999) (tolling statutory period to bring a criminal prosecution when the suspect's location was unknown despite reasonable efforts to find him); cf. *Ingram v. State*, 703 P.2d 415 (Alaska Ct. App. 1985), *aff'd*, 719 P.2d 265 (Alaska 1986) (refusing to rule that the State violated the 120-day speedy trial rule when the defendant's whereabouts were unknown and the police exercised due diligence in attempting to find him).

international parental kidnapping is a crime,²³⁶ and concealment might be relevant under federal sentencing guidelines.²³⁷ In addition, the secreting of a child is particularly relevant to the torts of custodial interference and intentional infliction of emotional distress.²³⁸ Concealment may also affect the statutes of limitations in the tort context. Concealment is certainly also relevant to any future custody dispute.²³⁹ Finally, the fact of

236. See 18 U.S.C. § 1204(a) (2006) (subjecting anyone who “removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights” to a fine, three years imprisonment, or both).

237. Concealment would presumably be relevant to sentencing because a conviction by itself authorizes a sentence up to the statutory maximum in an advisory guidelines regime, *United States v. Dallah*, 192 Fed. App’x 725, 729 (10th Cir. 2006), and concealment should be a factor justifying more time. Subject to certain constitutional considerations, the court can consider the “conduct of a person” convicted of an offense for purposes of imposing an appropriate sentence. See 18 U.S.C. §§ 3661 (2006). In addition, the sentencing guidelines permit upward departures for aggravating circumstances in child crimes, U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1)(B), and other crimes, if those circumstances were of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b)(2)(A)(i) (2006). Accordingly, concealment might be an aggravating circumstance. See, e.g., *United States v. Wise*, 278 Fed. App’x 552, 566 (6th Cir. 2008) (approving upward departure in a case involving interstate travel for the purpose of engaging in illicit sexual conduct with a minor when defendant took “overt steps to keep her location a secret”). Admittedly, there may be constitutional issues regarding enhancements since concealment is not part of the underlying criminal offense. Cf. *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1168 (D. Or. 2004). Finally, downward departures are sometimes offered during the plea bargaining stage for returning the child. See Anna I. Sappone, *Children as Pawns in their Parents’ Fight for Control: The Failure of the United States to Protect Against International Child Abduction*, 21 WOMEN’S RTS. L. REP. 129, 135 (2000). By implication, continued concealment of a child should affect the willingness of the government to settle.

238. See, e.g., *Raftery v. Scott*, 756 F.2d 335, 339–40 (4th Cir. 1985) (finding facts sufficient to support a claim of intentional infliction of emotional distress where the mother left the state with the child and the father was unable to locate them until four years later and evidence suggested the mother “engaged in a continuing and successful effort” to destroy the relationship between the father and son); *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980) (upholding award for intentional infliction of mental anguish for the mother against the ex-husband’s relatives who conspired to take and keep the children out of state and concealed their location from the mother); *Arthur v. Huschke*, 25 Conn. L. Rptr. 401 (Conn. Super. Ct. 1999) (granting prejudgment remedy for the parent against the grandparent for aiding and abetting tort of custodial interference and infliction of emotional distress for helping conceal the child’s whereabouts); *D & D Fuller CATV Constr., Inc. v. Pact*, 780 P.2d 520 (Colo. 1989) (en banc) (in context of personal jurisdiction, discussing the grandparents’ alleged tortious interference with the parent-child relationship based on efforts to conceal the child from the mother).

239. See *Catlin v. Catlin*, 494 N.W.2d 581, 584–85 (N.D. 1992).

concealment should be relevant to contempt for violation of a custody order.²⁴⁰

Fortunately, the Hague Convention is not the only legal provision that helps prevent child abduction and the concealment of children. The Convention could not adequately deter abduction and concealment by itself. The number of potential abductors who know about the Hague Convention, its defenses, and particularly the judicially created doctrine of equitable estoppel is undoubtedly miniscule. It is far more likely that people know about the criminal law than a court-created equitable device that only some U.S. courts accept. To the extent that parents are generally aware of the Hague Convention, they likely assume that the Convention prohibits concealment, even without the equitable estoppel device, as “child abduction” has that connotation. Even if a potential abductor somehow learns of the specifics of the Hague Convention and the equitable estoppel device, deterrence will depend upon his or her own assessment of whether he or she can avoid the doctrine. A fully informed potential abductor might not be discouraged from concealing a child at all given the amount of discretion courts have to determine whether and when equitable estoppel applies.

B. *Provisions Internal to the Hague Convention that Deter the Hiding of Children*

It is also incorrect to assume that courts applying the Hague Convention cannot already take concealment into account, even without equitable estoppel. For example, courts have mentioned the significance of concealment to an assessment of whether a child’s opinion should be heeded in applying the defense found in article 13.²⁴¹ In addition, courts also have considered

240. *See, e.g., In re the Marriage of D’Attomo*, 570 N.E.2d 796, 797 (Ill. App. Ct. 1991) (reciting that defendant was found in criminal contempt for absconding with son and concealing him in Italy for more than two years).

241. *Cf. Wasniewski v. Grzelak-Johannsen*, No. 06-CV-2548, 2007 WL 2344760, at *5 (N.D. Ohio Aug. 14, 2007) (refusing to give weight to thirteen-year-old’s opinion when his “generalized statements” suggested “his mother’s influence . . . biased [the child’s] opinion of Poland, particularly given [her] efforts to isolate [the child] from his father and his earlier childhood”); *Gonzalez v. Nator-Lurashi*, No. 04-1276, 2004 WL 1202729, at *5 (D. P.R. May 20, 2004) (refusing to find a thirteen-year-old’s opinion conclusive because the “child has not seen Petitioner nor his sister in over 16 months even though they occasionally communicate by telephone, e-mail and letters. Thus, we understand

concealment when deciding whether a child is “settled.”²⁴² These provisions already provide disincentives to concealment.

There is another reason why equitable estoppel may not be needed to deter concealment. If a petitioner can commence a Hague proceeding even when the child’s exact location is unknown, then the timely commencement of the lawsuit itself would defeat the application of the well-settled defense.

It is surprising that the respondent’s amenability to suit has not been an issue in the Hague cases that discuss equitable estoppel. After all, courts adjudicating Hague petitions have drawn upon case law discussing statutes of limitations and equitable tolling. In cases involving statutes of limitations, courts have held that tolling does not apply if the defendant is still amenable to service despite his or her unknown location.²⁴³ For whatever reason, an analogous argument has not yet appeared in the context of article 12(2), or at least it has not been captured in the reported opinions.

This section now analyzes whether a petitioner can successfully commence a Hague proceeding even when the child’s exact location is unknown. The following seventeen pages of analysis could be its own article and perhaps should be. Yet the discussion is included here because courts applying equitable estoppel implicitly assume that a petitioner cannot file suit when a child is hidden. If this assumption is false, then equitable estoppel has no basis and should be avoided. In addition, the analysis is relevant for courts that already accept equitable estoppel. Those courts should be exploring the respondent’s amenability to suit as part of their inquiry into the petitioner’s due diligence.

The following analysis involves several layers. It starts with an examination of the Convention to see what it says about where a suit must be filed. It suggests that the words “where the child is” mean only that the suit must be brought in the country in which the child is located. Both ICARA and the law of civil procedure

the child has been heavily influenced by Respondent’s wish for the child to remain in Puerto Rico.”).

242. See *supra* notes 153–83 and accompanying text; *infra* note 339 and accompanying text.

243. See generally Kenneth J. Rampino, *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158 (1974).

indicate, however, that a court in the United States must have subject matter jurisdiction, personal jurisdiction, and venue in order to issue an order. As described below, these predicates can exist even when the child's location is unknown. While a court may conclude for policy reasons that it should not adjudicate a Hague petition when the child is hidden, a court might also reach a different conclusion for policy reasons if the respondent is likely to receive actual notice of the proceeding. In addition, a court applying equitable estoppel might be particularly inclined to accept the argument that a petitioner can institute suit even when the child is hidden because its decision will not actually result in the adjudication of a hidden child. Rather, accepting the argument will only mean that equitable estoppel should not be applied, a result that is consistent with some courts' emphasis on the importance of a petitioner's due diligence.

As preliminary matter, it is important to note that "commencement of proceedings before the judicial or administrative authority of the contracting state" in the United States refers to a court, and not the Central Authority.²⁴⁴ It is beyond the scope of this article to examine the merits of that position.

The question addressed here is where proceedings must be commenced. "Commencement of proceedings" clearly refers to the "commencement of proceedings" in the country in which the child is located. The Convention requires the "commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child *is*."²⁴⁵ The reference to "is" actually means where the child "is located." The Conference initially decided to leave in the words "where the child is located" over removing them altogether,²⁴⁶ but then later took out the word "located" simply because the word translated poorly into French.²⁴⁷ The drafters wanted proceedings brought where the

244. *See, e.g.,* *Wojcik v. Wojcik*, 959 F. Supp. 413 (E.D. Mich. 1997) (concluding that the relevant article 12 period is the time between wrongful retention and commencement of a civil action, and that the Convention specifically used the term "administrative authorities" in a manner not to include the Central Authority).

245. Hague Abduction Convention, *supra* note 1, art. 12 (emphasis added).

246. *Proces-verbal No 7*, *supra* note 110, at 293 (comment of the Chairman) (reporting a vote of fourteen against eliminating the words, six in favor, and five abstentions).

247. *Proces-verbal No 15*, *supra* note 134, at 360–61 (comment of the Chairman).

child “is” because otherwise the action might linger with no practical ability to return the child.²⁴⁸

Yet the Convention does not specify anything more, and “is located” can have various meanings: it can mean the town, state, or country in which the child is located. The Convention does not indicate where in a country the proceedings must be brought. While the *travaux préparatoires* contains some comments by delegates that suggest that a petitioner might be able to file a petition in any court in the abducted-to country when the child is hidden,²⁴⁹ other comments suggest that national law will define specifically where the action must be brought.²⁵⁰

248. Mr. Dyer, the First Secretary of the Permanent Bureau, spoke of the importance of an action being commenced in a court that could immediately enforce its order. The Netherlands and the United Kingdom proposed eliminating “where the child is located” since the child may have been removed to yet another country unknown to the petitioner, and a return order might “place pressure on the kidnapper.” *Working Document No. 33*, in 3 ACTES ET DOCUMENTS, *supra* note 96, at 282. Mr. Dyer spoke against this proposal because it could affect the length of time an application might be pending:

He felt that a dangerous situation would arise if a deprived parent could continue an application indefinitely merely by filing an application in a State of the child’s habitual residence within the period of one year, since the whole matter could thereby drag on for years. He was therefore in favour of retaining the phrase “where the child is located.”

Proces-verbal No 7, *supra* note 110, at 293 (comment of Mr. Dyer). A similar point was made by the Netherlands’ representative when he spoke against the elimination of a reference to the child’s location. *Id.* (comment of the Netherlands) (“[A]ny decision obtained [in a state where the child was not located] . . . might not be enforceable in the State where the child was ultimately found.”).

249. For instance, at least one delegate thought that the inability to locate the exact whereabouts of a child in a country should not stop the filing of a Hague petition. The representative from the United Kingdom was responding to Mr. Dyer’s recommendation that the text of Working Document 75 should read “where the child is staying” instead of “where the child is located.” *Compare Proces-verbal No 15*, *supra* note 134, at 360 (comment of Mr. Dyer) (expressing his dislike for the proposal to delete the word “located,” but recognizing the ambiguity inherent in the word and suggesting the alternative “where the child is staying”), with *Working Doc. No. 75*, in 3 ACTES ET DOCUMENTS, *supra* note 96, at 349 (“Where a child has been wrongfully removed or retained in terms of article 3, and, at the date of the application to the judicial or administrative authority of the Contracting State *where the child is located* a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority shall order the return of the child forthwith.” (emphasis added)). The delegate from the United Kingdom called Mr. Dyer’s proposal “positively undesirable.” *Proces-verbal No 15*, *supra* note 134, at 360 (comment of the United Kingdom). He explained, “It was often the case that one knew that the child was within a particular Contracting State without knowing exactly in that State where the child was to be found.” *Id.*

The ambiguity created by the delegates' conflicting comments alongside the Convention's silence might support an argument that the commencement of suit in any court in the abducted-to country should stop the one-year clock, even if the court were not the proper court to adjudicate the matter. If true, then the petitioner could stop the one-year clock at any time by filing suit anywhere in the country and equitable estoppel would be inappropriate.

That argument should not succeed, however, for policy reasons, among others. The one-year clock should only be stopped if the court before which the petition is filed can actually adjudicate the Hague matter. Otherwise, time should continue to accumulate because the child's situation will remain unresolved and the child will continue to put down roots in the new location. In fact, this understanding is consistent with the legal analysis of the U.S. State Department, which emphasizes that "[a]

Yet too much should not be read into the United Kingdom's comment since the delegate might not have understood that jurisdiction and venue could be obstacles in the United States and there was no indication that the U.K. delegate wanted the Convention to override these local concepts. See *1988 Senate ICARA Hearing, supra* note 138, at 27 (Testimony of Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State) ("Unlike other countries that negotiated the Hague Convention, the United States has more than 50 different jurisdiction [sic], and has parallel Federal and State court systems.").

250. The comments of other delegates suggested that the appropriate court in the state where the child was located would have to be approached, as defined by national law, for purposes of stopping the article 12 clock. The Netherlands' delegate, for example, said:

The language contained no rules with regard to jurisdiction. While an applicant could approach any judicial or administrative authority which had jurisdiction, the Convention itself did not confer such jurisdiction, and it was therefore not true that the applicant could seize *any* judicial or administrative authority of the matter It was not the case that the deadline would be complied with by an applicant approaching *any* authority within the twelve month period, since an applicant was required to approach the correct authority from which a decision was sought, within the time-limit.

Proces-verbal No 7, supra note 110, at 293 (comment of the Netherlands). These comments were made in reaction to a recommendation of the Czechoslovakian delegate to delete the reference to the child's location. The delegate suggested that such a change would allow a proceeding to be commenced anywhere, "irrespective of whether the child was located in that State or not." *Id.* at 292 (comment of Czechoslovakia) (referring to Working Document No. 33). He continued, "The problem of searching for the child would then not be a problem, since even after eleven months had elapsed, a parent could send his application to another Contracting State and still bring himself within the time-limit." *Id.* The Chairman also raised doubts about the Czechoslovakian interpretation. *Id.* at 293 (comment of the Chairman).

petition for return would be made directly to the *appropriate court* in the Contracting State where the child is located.”²⁵¹

There is the possibility, however, that a U.S. court other than a court in the state where the child is located would be an “appropriate” court to adjudicate the matter. An examination of U.S. law related to jurisdiction leaves open this possibility. One must start with ICARA, which specifies in which court a petitioner must file a Hague petition. Section 11603(b) of the Act indicates that a civil action is commenced “by filing [the] petition for relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.”²⁵²

As explained below, ICARA can be read to permit a Hague petition to be filed with any court that has subject matter and personal jurisdiction, because then its order would be enforceable in the state where the child is, once the child’s location becomes known. Admittedly such an argument is a bit of a stretch. After all, the drafters of ICARA assumed jurisdiction existed in a court where the child was located, and did not give much thought to whether other courts might also have jurisdiction.²⁵³

251. Hague International Child Abduction Convention; Text and Legal Analysis, *supra* note 10, at 27 (emphasis added).

252. See 42 U.S.C. § 11603(b) (2006).

253. Telephone Interview with Linda Silberman (Oct. 19, 2009). Linda Silberman was part of the Advisory Study Group Committee that drafted ICARA. This understanding appears to have been grounded, at least in part, on a footnote in *May v. Anderson*, 345 U.S. 528 (1953). The case held that Ohio did not have to give full faith and credit to a Wisconsin custody decree when the Wisconsin court issued it in an *ex parte* divorce action with no personal jurisdiction over the mother: “For the general rule that in cases of the separation of parents, apart from any award of custody of the children, the domicile of the children is that of the parent with whom they live and that only the state of that domicile may award their custody.” *May v. Anderson*, 345 U.S. 528, 534 n.7 (1953) (citing RESTATEMENT OF CONFLICT OF LAWS (1934), §§ 32, 146, *illus.* 1–2). Of course, the footnote in *May* does not resolve the question of whether additional courts—apart from the one where the child is located—might also be able to adjudicate the Hague petition. The passage addressed custody, not the provisional remedy of the Hague, and the next footnote in *May* expressly noted a potential exception for an abduction:

The instant case does not present the special considerations that arise where a parent, with or without minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here

While a court in the child's location would certainly have jurisdiction under ICARA, ICARA does not say that court would have exclusive jurisdiction. Section 11603 does not say the action must be filed "where the child is located." If Congress had wanted to limit jurisdiction and venue to courts in the state where the child was located, it would have said so plainly. But it did not. In fact, an earlier version of ICARA required that the petition be filed where the child was located, but that language was eventually changed to its current formulation.²⁵⁴ Moreover, since it was well known that parties sometimes hide children within a country, it seems unlikely that Congress would restrict

the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other.

Id. at 534 n.8.

254. For example, the relevant language of House Bill 2673 was the following: Sec. 102. Administrative and Judicial Remedies

(a) The courts of the States, the District of Columbia, and the territories and possessions of the United States, and the United States district courts shall have concurrent original jurisdiction with regard to actions arising under the Convention and this Act.

(b) Any person seeking judicial relief under the Convention and this Act may commence a civil action by filing a petition in any court described in section (a) within the jurisdiction of which a child is located at the time the petition is filed.

1988 House ICARA Hearing, *supra* note 138, at 6 (emphasis added). House Bill 3971, which was considered at the same time, contained a slightly different formulation, but the relevant language was similar:

Sec. 3. Judicial Remedies

...

(b) Petitions—Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access may do so by commencing a civil action by filing a petition for the relief sought in any court described in subsection (a) within the jurisdiction of which a child is located at the time the petition is filed.

1988 House ICARA Hearing, *supra* note 138, at 18 (emphasis added). The Senate version of the bill contained similar language too. See 1988 Senate ICARA Hearing, *supra* note 138, 6, § 102(b) (1988) ("Any person seeking judicial relief under the Convention and this Act may commence a civil action by filing a petition in any court described in subsection (1) within the jurisdiction of which a child is located at the time the petition is filed."). The House Report on the bill described the legislation in slightly different language, and perhaps was the beginning of the current formulation: "Petitions are to be filed with the court which has jurisdiction where the child is located." H.R. REP. NO. 100-525 (1988), at 11 ("Section 4(a) expressly provides that a person seeking relief under the Convention has an original cause of action in any State court in the jurisdiction of which the child is located at the time the petition is filed. The U.S. District Courts shall have jurisdiction in cases arising under the Convention where the jurisdiction exists under title 28, U.S.C. chapter 85. Section 4(b) provides for filing of petitions to seek the return of a child under the Convention. Petitions are to be filed with the court which has jurisdiction where the child is located.").

the ability of petitioners in such cases to file a Convention petition. The few courts that have suggested that the abducted child must be in the state where the court sits have primarily dealt with children who were not in the United States at the time of filing.²⁵⁵ As discussed above, these holdings appear correct, yet they do not resolve the issue of whether a court in the United States can adjudicate the matter when the child is located in another U.S. state.

A few courts have addressed the question of jurisdiction when the child is in the United States, but not in the state in which the court sits. These cases are inconclusive.²⁵⁶ In *Miller v. Miller*,²⁵⁷ for example, the Fourth Circuit affirmed the district court's conclusion that the action had been filed within one year of the abduction even though the action was commenced in a jurisdiction where the child was not.²⁵⁸ The abduction occurred on August 28, 1998, and the petition was initially submitted to the U.S. District Court for the Western District of New York on August 23, 1999, where other family court matters were already pending.²⁵⁹ But "[t]he action was thereafter transferred to the Western District of North Carolina, where venue properly lies."²⁶⁰

255. See *Diorinou v. Mezitis*, 237 F.3d 133, 136 (2d Cir. 2001) (noting that the district court, in prior litigation, dismissed the Hague petition because "the children were not then within the Southern District," but rather in Greece); *Espinoza v. Mattoon*, No. 09-0381, 2009 WL 1919297, at *1 (W.D. Wash. June 30, 2009) (stating that it did not have jurisdiction to hear the case because "[l]ocated' under ICARA does not require a showing of residency, but contemplates the place where the abducted [child is] discovered," but child was in Canada at the time of filing (quoting *Lops v. Lops*, 140 F.3d 927, 937 (11th Cir. 1998))); *Sorenson v. Sorenson*, No. 07-4720, 2008 WL 750531 (D. Minn. Mar. 19, 2008) (same, because child was in Australia at time of filing).

256. Other courts have made statements about jurisdiction, but none of them have reached the issue as part of the holding or examined the precise issue being discussed here. See *Holder v. Holder*, 305 F.3d 854, 869 n.5 (9th Cir. 2002) (remarking, without resolving the issue, "Jeremiah probably could not have brought his Hague Convention petition in California in the first instance because California probably does not have jurisdiction to hear it."); *Lops*, 140 F.3d at 937 (holding that a Georgia court had jurisdiction when children were discovered there, even if not resident there, because "[l]ocated' under ICARA does not require a showing of residency but contemplates the place where the abducted children are discovered" (citing 42 U.S.C. § 11603(b))).

257. 240 F.3d 392, 397 (4th Cir. 2001).

258. See *id.* at 396.

259. See *id.* at 396-97.

260. *Id.* at 397 (indicating that a Hague Convention petition can be filed "in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed" (quoting 42 U.S.C. 11603(b) (2006))).

The decision did not mention the date of transfer, but the Fourth Circuit was clearly looking at the initial filing date of the petition for purposes of the one-year clock and the child was presumably not located in that place at that time.²⁶¹ In contrast, in *Lazaridis v. Lazaridis*, the District Court for the District of Delaware determined that it lacked jurisdiction to hear the action when the petitioner put on no evidence that the child was in Delaware.²⁶² The petitioner argued that jurisdiction was proper because “the child was under the care of her father [the petitioner] and his parents in Wilmington, Delaware at the time of the filing of the petition” because a Michigan court had granted the father temporary legal custody.²⁶³ The district court dismissed the case and noted, “Petitioner’s signature was not on the petition or accompanying declaration,” and he put on no evidence showing the child was in Delaware at the time of filing.²⁶⁴ Yet apparently the petitioner did not argue that Delaware might have jurisdiction for other reasons. Consequently, the legal question at issue here was not squarely confronted.

ICARA can be read to confer jurisdiction on a court even if the location of the abducted child is unknown so long as the child is somewhere in the United States and the court has subject matter and personal jurisdiction. First, the initial reference to “jurisdiction” in section 11603(b) has no qualification.²⁶⁵ Presumably “jurisdiction” has the same meaning as in other federal statutes—subject matter jurisdiction and personal jurisdiction.²⁶⁶ In fact, at the time ICARA was crafted, the Second Restatement on Conflict of Laws indicated that a child’s presence was *not* a prerequisite to a court’s ability to decide the child’s

261. *See id.* at 396 n.4.

262. No. 02-1681, 2003 WL 21056744 (D. Del. May 07, 2003).

263. *Id.* at *1.

264. *Id.*

265. *See supra* note 252 (a civil action is commenced “by filing [the] petition for relief sought in any court which has jurisdiction of such action”).

266. *See, e.g.,* *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1264–66 (11th Cir. 1998) (determining that the Fair Credit Reporting Act, which permitted suit in any court of “competent jurisdiction,” required both personal and subject matter jurisdiction). *But see, e.g., In re Nat’l Century Fin. Enter., Inc., Inv. Litig.*, 323 F. Supp. 2d 861 (S.D. Ohio 2004) (reading the language “a State forum of appropriate jurisdiction” from 28 U.S.C. § 1334(c)(2) to mean “a state forum which has subject-matter jurisdiction, not one which has both subject-matter and personal jurisdiction”).

custody. Under the Restatement, jurisdiction would exist when “the controversy is between two or more persons who are personally subject to the jurisdiction of the state.”²⁶⁷ Second, the requirement that the court must be “authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed”²⁶⁸ could mean that the court’s order must be enforceable where the child is found. This phrase would ensure that prior to litigation the petitioner can establish that the child is located somewhere in the United States, since a U.S. court order is never guaranteed enforcement in a foreign jurisdiction. Since the Full Faith and Credit Clause of the U.S. Constitution makes a U.S. court order enforceable in other U.S. states when the issuing court had subject matter and personal jurisdiction, and notice was given, ICARA’s requirement would not limit the ability of U.S. courts to adjudicate the matter when the child is in the United States, but the precise location of the child is uncertain. This interpretation is consistent with the intent of the framers that the action should be brought in the country where the child “is.”²⁶⁹

Assuming that “jurisdiction” in the first part of section 11603 means jurisdiction as it is commonly understood (subject matter and personal jurisdiction), the question remains whether a court can have subject matter and personal jurisdiction when a child is hidden. The answer to that question is a qualified yes. Subject matter jurisdiction is not an issue even when a child is hidden in the United States: ICARA vests federal and state courts with subject matter jurisdiction.²⁷⁰ Personal jurisdiction may exist depending upon the respondent’s or child’s contacts with the forum.²⁷¹ In litigation outside of the Hague Abduction

267. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971). This provision gives a state the power to exercise judicial jurisdiction when either the child is domiciled in the jurisdiction, the child is present in the jurisdiction, or “the controversy is between two or more persons who are personally subject to the jurisdiction of the state.”

268. See 42 U.S.C. § 11603(b) (2006); *supra* note 252.

269. See *supra* notes 245–48.

270. 42 U.S.C. § 11603(a) (“The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.”); see also *Abbott v. Abbott*, 495 F. Supp. 2d 635, 637 (W.D. Tex. 2007) (referring to the second clause in § 11603(b) as a “venue” provision).

271. For purposes of the discussion, I am assuming that the court must have personal jurisdiction over the respondent and not just the child. In many instances, the

Convention context, personal jurisdiction can exist when a respondent's location is unknown.²⁷² There is no reason to think that Hague proceedings should be treated any differently so long as an assertion of jurisdiction is consistent with the state's long-arm statute²⁷³ and with the respondent's due process rights. Most states have long-arm statutes that permit a court's jurisdiction to reach as far as the Due Process Clause of the U.S. Constitution permits,²⁷⁴ so the principle inquiry will usually be whether the respondent has sufficient minimum contacts with the state to make the court's assertion of jurisdiction fair.²⁷⁵ While a more generous alternative test might exist,²⁷⁶ this Article assumes that

contacts will be the same because the respondent will have passed through the jurisdiction with the child, or the parent will have sent the child into the jurisdiction.

272. See, e.g., *Mwani v. Bin Laden*, 417 F.3d 1 (D.D.C. 2005). When the respondent defaults, "some courts have accorded plaintiffs greater flexibility in meeting their burden of proving jurisdiction. This is so, such courts explain, because the defendant's absence prevents the plaintiff from obtaining jurisdictional discovery." 102 AM. JUR. 3D *Proof of Facts* § 20 (2005).

273. Since ICARA doesn't authorize nationwide service of process, "[p]ersonal jurisdiction of a federal district court is coterminous with that of a court of general jurisdiction of the state in which the district court sits." 28 FEDERAL PROCEDURE, LAWYERS EDITION § 65:151 (2008) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." (citing FED. R. CIV. P. 4(k)(1)(A))); see also Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2922-23 (2009) ("Rule 4(k)(1)(A) directs that federal courts exercise the same personal jurisdiction as do the state courts of general jurisdiction in which they are located, but it provides no guidance on how to determine that jurisdiction. It thus requires resort to two external legal sources: state long-arm statutes and judicial opinions construing the parameters of state court personal jurisdiction and its Fourteenth Amendment due process limits. With respect to the long-arm statutes, a minority of states limit the power of their trial courts to serve process on out-of-state defendants to something less than the extent allowed by Fourteenth Amendment due process. Accordingly, a court sitting in one of these states must determine the manner in which the state legislature has statutorily limited its reach. The majority of states, however, permit personal jurisdiction to the fullest extent permitted by due process, which collapses the jurisdiction inquiry into the minimum contacts test and its supporting analyses." (citations omitted)).

274. See Sharpe, *supra* note 273, at 2922-23. For examples of these statutes, see ALASKA STAT. § 9.05.015 (2004); LA. REV. STAT. ANN. § 13:3201 (1988); NEB. REV. STAT. § 25-536 (1983).

275. See Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Special Session to Review Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 241.

276. It is beyond this Article to assess whether a federal district court might be able to assert jurisdiction under Federal Rule of Civil Procedure 4(K)(2) when the child and respondent are in hiding, and whether that provision might afford a court even more latitude in establishing personal jurisdiction. See FED. R. CIV. P. 4(K)(2) ("Federal Claim

the traditional minimum contacts test would apply and that it could be met at times even though the child and abductor are in hiding.

Sufficient minimum contacts between the state and the respondent should exist if the respondent has been in or through a particular state during the abduction.²⁷⁷ The assertion of jurisdiction would be specific, not general, and therefore should be easier to establish.²⁷⁸ Alternatively, the abductor may have sufficient general contacts with a state such that it would be fair to hale the abductor into court there, even if the abduction itself is not connected to that state. General contacts might be grounded in the respondent's and child's previous residence there or the child's conception in the state. Any assessment of "fair play" would depend upon a number of competing concerns, including the national interest in addressing international child abduction.²⁷⁹

The second question is whether the petitioner can select a court that is "authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed" if the child is hidden. If this is a venue provision, as ICARA's legislative history suggests,²⁸⁰ then it is not a restriction on the ability of a

Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." If this provision were used, a federal court might be more inclined to look at the respondent's contacts with the United States, and not the particular state, in assessing whether personal jurisdiction existed. *See Weiner, supra* note 275, at 241-42.

277. When a respondent travels with an abducted child through a state, the respondent's contact with the state involves "purposeful availment of the benefits and protections afforded by the forum's laws," *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 621 (1st Cir. 2001), and "the respondent should expect, by virtue of the benefits he receives, to be subject to the court's jurisdiction based on these contacts." *Id.* at 623-24.

278. *See id.* at 623. *See generally* VED P. NANDA & DAVID K. PANSIUS, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 1.4 (2007).

279. *See Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 104 F. Supp. 2d 279, 285 (S.D.N.Y. 2000) ("[W]hat is arbitrary requires consideration of the individual's interest in fundamental fairness, the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining effective and convenient relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the interest of the forum in furthering substantive social policies.").

280. *See 1988 House ICARA Hearing, supra* note 138, at 38 (Statement of Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State, House

court without venue to hear the action. Venue can be waived,²⁸¹ and if there is a reasonable possibility that the respondent received notice of the action, then venue could, and should, be deemed waived if the respondent does not appear in court. If, on the other hand, the respondent appears and raises a meritorious venue objection, the case can, and should, be transferred.²⁸²

One could reasonably conclude that the venue provision is not jurisdictional,²⁸³ that is to say, it is not a requirement that venue must lie in the court litigating the action.²⁸⁴ There are

Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations) (discussing section 102(b) of HR 2673). Some courts also refer to this provision as a venue provision. *See, e.g.*, *Miller v. Miller*, 240 F.3d 392, 397 (4th Cir. 2001); *Abbott v. Abbott*, 495 F. Supp. 2d 635, 636–37 (W.D. Tex. 2007); *Ostevoll v. Ostevoll*, No. 99-961, 2000 WL 1611123, at *4 (S.D. Ohio Aug. 16, 2000); *In re Suki*, No. 95-6805, 1995 WL 631696, at *1 (E.D. Pa. Oct. 27, 1995). *But see* *Holder v. Holder*, 305 F.3d 854, 869 n.5 (9th Cir. 2002) (suggesting that provision relates to jurisdiction); *Lops v. Lops*, 140 F.3d 927, 937 n.11 (11th Cir. 1998) (same).

281. *See, e.g.*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) (stating the well-established rule that objections to venue are waived if not timely raised because venue “is largely a matter of litigational convenience” (citing *Heckler v. Ringer* 466 U.S. 602, 638 n.25 (1984) (Stevens, J., concurring))).

282. 28 U.S.C. § 1404(a) (2006).

283. Occasional venue can be jurisdictional and mandatory. *See, e.g.*, PETER N. SWISHER, ET AL., *VIRGINIA FAMILY LAW: THEORY AND PRACTICE* § 6:3 (3d ed. 2003) (discussing a former statute, VA. CODE ANN. § 20-96B, that required a divorce action to be brought in certain place, including where the plaintiff resided if the defendant’s whereabouts were unknown); *see also* *Netzer v. Reynolds*, 345 S.E.2d 291, 293–94 (Va. 1986) (discussing same statute). This statute was amended so that venue is no longer jurisdictional and mandatory. *See* SWISHER ET AL., *supra*, § 6:3 n.24 (citing VA. CODE ANN. § 8.01-261(19)).

284. Admittedly, this conclusion perhaps seems contrary to a statement made by David W. Lloyd, General Counsel for the National Center for Missing and Exploited Children, during the ICARA congressional hearings. His testimony suggested that litigation would be improper before the petitioner located the child:

The child would be retrieved once the child was located in a particular jurisdiction. I mean, one would not want to file in 51 jurisdictions, either the State courts plus the Federal courts for each jurisdiction. One would request the assistance of the Central Authority in actually locating the child But once the application would be made to that court the normal service of process should certainly be attempted upon the respondent.”

1988 House ICARA Hearing, supra note 138, at 111 (statement of David W. Lloyd, General Counsel, Nat’l Ctr. for Missing and Exploited Children). Mr. Lloyd was not addressing the specific question of whether venue could be waived when a parent was in hiding. In addition, Peter Pfund and Senator Frank suggested that the petitioner could choose the court and the respondent “wouldn’t have any choice.” They would be “stuck with it.” *See id.* at 113.

numerous federal provisions that relate to venue,²⁸⁵ and these venue provisions can typically be waived,²⁸⁶ just like venue generally.²⁸⁷ Waiver can even be implicit for a defendant who is in hiding. As one commentator said in reference to a defendant whose location was unknown, “the defendant himself has created a situation in which it is impossible to know which forum is convenient. The court could regard this as an effective waiver of defendant’s right to raise the issue.”²⁸⁸ This seems particularly appropriate when it is likely that the defendant will receive notice of the action, so that the defendant could object to venue if he or she only showed up to litigate.

In sum, whether a court can adjudicate the matter when the child’s location is unknown turns on whether the court has

285. See *Meteoro Amusement Corp. v. Six Flags*, 267 F. Supp. 2d 263, 267 (N.D.N.Y. 2003) (discussing the relationship of the venue provisions in 28 U.S.C. § 1400(b) and 28 U.S.C. § 1391(c) for patent infringement cases); *Quarles v. General Inv. & Dev. Co.*, 260 F. Supp. 2d 1, 8 (D.D.C. 2003) (holding that 42 U.S.C. § 2000e-5(f)(3) governs venue for Title VII actions); *Wellmark, Inc. v. Deguara*, No. 4:02-CV-40534, 2003 WL 21254637, at *2, *4 (S.D. Iowa May 28, 2003) (discussing how 29 U.S.C. § 1132(e)(3) provides venue for actions under the Employee Retirement Income Security Act); *Williams v. United States*, 932 F. Supp. 357, 363 (D.D.C. 1996) (warning of the significance of failing to adhere to 28 U.S.C. § 1402(b) for a malpractice claim against the government).

286. See *Gen. Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 435 (1932) (concluding that the privilege conferred upon defendants in patent cases by 28 U.S.C. § 1400 with respect to where suits may be maintained against them is a privilege that can be waived); *A.J. Taft Coal Co. v. Barnhart*, 291 F. Supp. 2d 1290, 1301 (N.D. Ala. 2003) (stating that a defense of improper venue is waived under 28 U.S.C. § 1391 when a defendant files a responsive pleading or a rule 12 motion and fails to assert improper venue (citing *Lipofsky v. N.Y. State Workers Comp. Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988))).

287. See, e.g., FED. R. CIV. P. 12(h)(1) (specifying when the defenses of lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process are waived); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063 (3d ed. 2009) (“But improper venue must be made the subject of a timely motion by the defendant; in the absence of such a motion, the defense is deemed waived and the original court may proceed to decide the case.”). Typically venue at the federal level is “statutory and judicially created, not constitutional, [and is] designed to insure that litigation is lodged in a convenient forum and to protect the defendant against the possibility that the plaintiff will select an arbitrary place in which specifically to bring suit.” *Id.*

288. Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 540 n.236 (1980) (discussing the appropriateness of *forum non conveniens* when one state is better able to hear all aspects of an otherwise divisible divorce); see also *Heiss v. Nielsen*, 132 F. Supp. 541, 544 (D. Neb. 1955) (noting “a defect in venue is waived if the defendant entitled to urge it ‘remains passive, neither answering nor appearing, and suffers judgment by default’” (quoting *Commercial Cas. Ins. Co. v. Consol. Stone Co.*, 278 U.S. 177, 178 (1929))).

subject matter and personal jurisdiction, and whether it is likely that the respondent will receive notice of the action.²⁸⁹ If those requirements are satisfied, then the respondent must raise the issue of incorrect venue in a timely manner, otherwise the objection is waived. Since an adjudication conducted in an incorrect venue does not generally make a default judgment void,²⁹⁰ courts need not concern themselves with the prospect of relitigation such as when personal jurisdiction is lacking. Therefore, the filing of a petition in a court with personal and subject matter jurisdiction, but with questionable venue, could be viewed as stopping the accumulation of time for purposes of the article 12 clock so long as reasonable notice to the respondent is given.²⁹¹

Whether the respondent will likely receive notice of the action depends upon the level of information a petitioner has about the child's whereabouts and whether the petitioner has ongoing communication with the respondent (or perhaps the children). Notice is not an insurmountable obstacle when the respondent is in hiding because ICARA includes methods of notification aimed at absent respondents. ICARA says, "notice of an action . . . shall be given in accordance with the applicable law governing notice in interstate child custody proceedings."²⁹² The

289. Section 205 of the Uniform Child Custody Jurisdiction and Enforcement Act indicates that a custody order is not entitled to interstate enforcement under the Act if there has not been notice and an opportunity to be heard. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 205, 9 U.L.A. 676 (1999). The Parental Kidnapping Prevention Act also requires notice and an opportunity to be heard if a custody determination is to receive full faith and credit. Parental Kidnapping Prevention Act of 1980 § 8(a), Pub. L. No. 96-611, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A(e) (2006)). While a return order is not technically a custody order, the requirements of notice and opportunity to be heard also have constitutional roots. *See* U.S. CONST. amend. V (procedural due process).

Improper venue does not appear to be a basis for refusing to give full faith and credit to an out-of-state judgment. *See* *Educ. Placement Serv. v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986); *Gibson v. Grupo de Ariel, LLC*, No. 05-cv-415, 2006 WL 42369, at *2 n.6 (N.D. Tex. Jan. 9, 2006). Typically, venue in a federal proceeding exists in a judicial district where the respondent resides, or where a substantial part of the events or omissions giving rise to the claim occurred, or where the respondent is found if there is no other place where the action could be brought. *See* 28 U.S.C. § 1391(b) (2006).

290. *See* 46 AM. JUR. 2D *Judgments* § 240 (2006).

291. Allowing the commencement of proceedings in such a court to stop the accumulation of time for purposes of triggering the article 12(2) defense is consistent with the fact that filing an action in a court without venue still meets the statute of limitations. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-66 (1962).

292. 42 U.S.C. § 11603(c) (2006).

Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), which almost all states have adopted, governs notice in interstate child custody proceedings. Section 108 states, in pertinent part, “Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.”²⁹³ This provision expressly permits substituted service, and even by publication if necessary.²⁹⁴

The UCCJEA’s requirement that service be “reasonably calculated to give actual notice” echoes the principle that notice must be constitutionally sufficient.²⁹⁵ As the U.S. Supreme Court said in *Mullane v. Central Hanover Bank & Trust Co.*,²⁹⁶ the U.S. Constitution requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.”²⁹⁷ However, “if with due regard for the peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.”²⁹⁸

The unique aspects of a Hague case, including an evasive respondent, would be highly relevant to the type of notice permitted. One type of notice that is becoming more common, and that seems well suited to cases involving evasive respondents, is service by email. Both state and federal courts have authorized the use of email service, most typically when the defendant is abroad and other methods have failed.²⁹⁹ For example, in *Hollow v. Hollow*,³⁰⁰ the husband returned to Saudi Arabia, where he was resident, in order to evade service of process for a divorce

293. See, e.g., UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT [UCCJEA] § 108(a), 9 U.L.A. 652 (1999); see also, e.g., MINN. STAT. ANN. § 518D.108 (2009); GA. CODE ANN., § 19-9-47 (2001); MD. CODE ANN., FAM. LAW, § 9.5-107 (2004); VA. CODE ANN. § 20-146.7 (2001).

294. See UCCJEA § 108(a), 9 U.L.A. 652 (1999).

295. *Id.*

296. 339 U.S. 306 (1950).

297. *Id.* at 314–15.

298. *Id.*

299. See, e.g., *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1016–19 (9th Cir. 2002); *Williams v. Adver. Sex LLC.*, 231 F.R.D. 483, 487–88 (N.D. W. Va. 2005); *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 562–63 (E.D. Tenn. 2004); *In re Int’l Telemedia Assocs., Inc.*, 245 B.R. 713, 718–20 (Bankr. N.D. Ga. 2000). See generally *Service of Process Via Computer or Fax*, 30 A.L.R. 6th 413 (2008) (summarizing the state of the law regarding service by electronic media).

300. 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002).

action.³⁰¹ The court permitted service by email because the husband had “secreted himself behind a steel door, bolted shut, communicating with the plaintiff and his children exclusively through e-mail.”³⁰² Email service has also been used for evasive defendants who remain in the United States.³⁰³ This avenue, and also notice through social networking sites such as Facebook,³⁰⁴ may be appropriate in these sorts of Hague cases. After all, it is not unusual for the petitioner and respondent to be in communication through email, even when the respondent is in hiding and the children’s whereabouts are unknown.³⁰⁵

Less ideal, although still acceptable under the UCCJEA and the U.S. Constitution, is publication notice. Although insufficient when a respondent’s location is known, publication notice can be constitutionally sufficient when the respondent’s location is unknown.³⁰⁶ As one commentator noted,

The real test for determining if means of notice giving other than personal service or its equivalent will suffice is whether the method is reasonably calculated to give actual notice and, when there is some doubt on that point, the question becomes whether it is at least the best possible procedure available under the circumstances.³⁰⁷

301. *See id.* at 692.

302. *Id.* at 708.

303. *See Snyder v. Alternate Energy*, 857 N.Y.S.2d 442, 449 (N.Y. Civ. Ct., 2008) (citing *Rio Props.*, 284 F.3d at 1017).

304. “[T]he New Zealand High Court allowed a man to be served with process in a case involving failed business dealings. The New Zealand plaintiff’s lawyer argued that the defendant’s exact whereabouts were unknown, but demonstrated that the defendant maintained a social presence on Facebook.” *See Nick S. Pujji et al., Facebook: The Future of Service of Process?*, <http://www.dlapiper.com/facebook-the-future-of-service-of-process/> (Apr. 8, 2009) (citing Ian Llewellyn, *NZ Court Papers Can Be Served Via Facebook, Judge Rules*, N.Z. HERALD, Mar. 16, 2009, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561970).

305. *See, e.g., Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140 (E.D. Wash. 2007); *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828 (S.D. Tex. 2006); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347 (M.D. Fla. 2002).

306. In *Mullane v. Central Hanover Bank & Trust Co.*, the Court rejected the sufficiency of publication notice for trust beneficiaries whose addresses were known by the trustee, but found it sufficient for unknown beneficiaries or contingent beneficiaries whose whereabouts were unknown. 399 U.S. 306, 317–18 (1950); *see Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

307. 4A WRIGHT & MILLER, *supra* note 287, § 1074.

Courts have used notice by publication in custody modification actions that involve a parent who has absconded with the child, and it may be equally appropriate in some Hague cases when a respondent is in hiding.³⁰⁸ When the petitioner has some reasonable basis for suspecting that a respondent is in a particular state or, even better, a town, then publication notice seems acceptable because there is a likelihood that the respondent will get actual notice.

As the above discussion demonstrates, a petitioner does not necessarily need to know the exact location of the child in order to institute suit.³⁰⁹ Courts, nonetheless, have applied equitable estoppel to situations in which the petitioner could have instituted suit. For example, in *Mendez Lynch*, the mother had left Argentina with the children on January 19, 2000, and the father knew the children were in Florida since February 2000.³¹⁰ The mother inadvertently confirmed the location of the children in a March 7, 2000, email.³¹¹ On June 19, 2000, the mother gave the father her Fort Myers post office address.³¹² Nonetheless, the court applied equitable “tolling,” and said that the doctrine precluded the start of the one-year clock until either July 6, 2000 or November 6, 2000.³¹³ The former was a set date by the U.S. Central Authority to try to resolve the case without resort to litigation, and the later was the date the mother took the father to her house to see the children.³¹⁴ Yet, well before those dates, the father knew that the mother was in Florida, and even the town in which she resided with the children.³¹⁵ He had enough

308. See *Bays v. Bays*, 489 N.E.2d 555, 562 (Ind. Ct. App. 1986) (affirming trial court’s refusal to set aside default on motion to modify custody after publication notice).

309. See *id.* at 559–60.

310. *Mendez Lynch*, 220 F. Supp. 2d at 1353.

311. See *id.*

312. See *id.* at 1354.

313. *Id.* at 1363.

314. See *id.*

315. Interestingly, the court implicitly seems to recognize that a person’s exact location need not be known in order to institute suit. After all, the court entertained the earlier July 6 date as a possible date by which the estoppel would end even though the father did not know the mother’s exact location until November. Although the court talks about the policy of resolving disputes amicably, I am assuming that the court was not suggesting that outstanding offers to settle a dispute toll the well-settled defense. Not only would such a position be without a foundation in the Convention, but such a position is certainly inconsistent with how statutes of limitations work generally. No attorney would ever put off filing a lawsuit to meet the statute of limitations merely

information to make it likely that she would receive notice of a Hague proceeding.

Admittedly, it is unclear whether it is good policy to interpret ICARA to permit the commencement of proceedings when the child is in hiding (or to amend ICARA to make such an option explicit, or perhaps to make it available, if it is not presently). On the one hand, it seems like a good solution for situations where the abductor is likely to get notice of the action. After all, these cases will come before the courts more quickly and respondents that receive notice may, in fact, participate in those proceedings. Even if a respondent does not participate, the existence of a judgment will expedite the return of the child once the child is found. Permitting the commencement of proceedings in a court with jurisdiction over the respondent saves petitioners the time and money involved in chasing their children around the United States.

On the other hand, allowing an action to be brought when the child's location is unknown may make it more likely that courts will enter a return order by default, something that was probably never contemplated by the Convention's drafters and something that seems unwise given that so many of the defenses specifically further the child's interests.³¹⁶ In addition, this approach would rest the United States' treaty compliance upon state notions of jurisdiction.

These particular drawbacks should not, however, inhibit a court from accepting the analysis when applying equitable estoppel. After all, a determination that a U.S. court could have adjudicated the suit sooner would not actually require any court to adjudicate the Hague petition of a missing child. The inquiry here is solely for purposes of applying the Hague Convention to a child who is now before the court. If the petitioner could have commenced a proceeding before the child's location became

because the parties were negotiating. *See* *Crumpton v. Humana, Inc.*, 661 P.2d 54 (N.M. 1983) (holding that it was "entirely without merit" to think that the statute of limitations would be tolled while the parties were negotiating). There is also no indication in the record that Ms. Mendez Lynch said anything that would establish a basis for tolling in this context, such as misrepresenting that she would settle the dispute if Mr. Mendez Lynch did not file the lawsuit.

316. *See, e.g.*, Hague Abduction Convention, *supra* note 1, art. 13(b) (return would raise a grave risk to the child's physical or psychological well-being); *id.* art. 13 (return would impinge on the child's autonomy given the child's age and maturity).

known, then the court should find that the petitioner did not exercise due diligence, a prerequisite to the application of equitable estoppel. In short, acceptance of the preceding jurisdictional analysis in this context only means that the respondent would be able to invoke article 12(2) for the settled child and the child would have all of the evidence relating to his or her custody heard prior to being returned.

Alternatively, a court could avoid fretting about the jurisdictional rules by simply rejecting equitable estoppel outright.

C. *Limits to Deterring Abduction and Concealment*

Although the purpose of the Hague Abduction Convention is to discourage abduction by returning abducted children, discouraging abduction is not the be-all and end-all of the Convention. The Convention's remedy of return is set within a broader framework and that framework proves that abduction should not be deterred at all costs. After all, there are five defenses. These defenses recognize, among other things, the importance of the child's views,³¹⁷ the child's physical and psychological health,³¹⁸ and international human rights.³¹⁹

In addition, courts have never made the deterrence of abduction the sole touchstone for the interpretation of other core Convention concepts. The way that courts interpret the concept of "habitual residence" provides a useful example. If deterring abduction were the sole determinant for the correct analysis, then courts would say that a child's habitual residence could never change absent the agreement of both parents. Yet some courts disregard the parents' intentions and look only at whether the child has a settled purpose in the particular place.³²⁰ Even the Ninth Circuit in *Mozes v. Mozes*,³²¹ which represents the majority approach to determining habitual residence in the

317. *See id.*

318. *See id.* art. 13(b).

319. *See id.* art. 20.

320. *See, e.g.,* Robert v. Tesson, 507 F.3d 981, 993 (6th Cir. 2007); Tai Vivatvaraphol, Note, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3358–60 (2009) (citing foreign cases from civil law countries that take this approach).

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

United States,³²² acknowledges that the parents' intent is not always determinative. Although *Mozes* makes parental intent crucial to a determination of the child's habitual residence in most cases,³²³ a child's habitual residence can still shift absent parental agreement if the child has become acclimatized to a place.³²⁴

Other courts appropriately have held that the goal of discouraging abduction cannot justify an incorrect interpretation or application of the Convention. In *Ohlander v. Larson*, for example, a father executed a "grab and run" and took his daughter from Sweden to the United States without the mother's consent.³²⁵ The mother filed a Hague proceeding in the United States, and the court entered an order prohibiting the child's removal from the jurisdiction pending further order.³²⁶ Nonetheless, the mother grabbed her child and fled to Sweden, in blatant defiance of the court's order.³²⁷ The court ordered that the mother return the child to the United States, but she refused to comply.³²⁸ When the mother moved the U.S. court to dismiss her petition pursuant to rule 41(a)(2), the U.S. court refused to dismiss her action as punishment for the contempt.

On appeal, the Tenth Circuit declared that it would not "condone a court ignoring its duty to consider the merits of a motion to dismiss simply because a party has violated its orders."³²⁹ Among other things, it found the proper interpretation of the Hague Convention more important than punishing the mother's abduction. After all, the court was to adjudicate the respondent's removal, not the petitioner's,³³⁰ and the court's action could result in two conflicting decisions regarding the child's habitual residence.³³¹ Since the Convention was meant "to ensure that rights of custody and access under the

322. See MARIANNE BLAIR ET AL., *FAMILY LAW IN THE WORLD COMMUNITY* 440 (2009).

323. See *Mozes*, 239 F.3d at 1078.

324. While a court should not casually shift the child's habitual residence based upon the child's acclimatization, it is permissible. *Id.* at 1079.

325. See 114 F.3d 1531, 1535 (10th Cir. 1997).

326. See *id.*

327. See *id.*

328. See *id.*

329. *Id.* at 1537.

330. See *id.* at 1540.

331. See *id.* at 1541.

law of one Contracting State are effectively respected in other Contracting States,”³³² the trial court had to dismiss the case or else the court “would potentially render the Hague Convention meaningless.”³³³

Similarly, a court should not pervert the article 12(2) well-settled defense in its quest to deter abduction and punish concealment of abducted children. It should recognize the particular purpose of the article 12(2) defense and not undermine it: a settled child has a strong interest in having all the evidence related to custody considered by a court before the child is returned.³³⁴

IV. THE PREFERRED METHOD FOR ADDRESSING CASES INVOLVING CONCEALMENT

Any attempt to resolve the conundrum of how to address concealment within the context of the Convention should start by acknowledging that the Convention is meant to benefit children. Baroness Hale of Richmond aptly captured this point in the case *In re M (Children) (Abduction: Rights of Custody)* when she said, “[I]t should not be thought that the Convention is principally concerned with the rights of adults. Quite the

332. Hague Abduction Convention, *supra* note 1, art. 1(b).

333. *Ohlander*, 114 F.3d at 1541.

334. The question arises whether equitable tolling is just as problematic as equitable estoppel. On the one hand, both equitable tolling and equitable estoppel undermine the child’s interest in having a court hear all of the evidence related to custody before returning the settled child. On the other hand, equitable tolling may be more consistent with the drafters’ intent than equitable estoppel. From early on, the drafters recognized that a petitioner should not be prejudiced by delays occasioned by the authorities mishandling the matter. In the Preliminary Draft Convention, for example, the six-month period (during which the authorities had an obligation to return the child forthwith) was calculated from the point at which an application was filed for the child’s return with the authorities of the place where the child was located. See *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, *supra* note 104, at 168. Pérez-Vera explained, “[w]ith regard to the terminus ad quem, the Special Commission has preferred to adopt the moment when the application was introduced, rather than the date of the decision, considering that the possible delay in the action of the competent authorities must not be prejudicial to the interests which are protected by the Convention.” Pérez-Vera, *supra* note 96, at 202. Given this, one might conclude that equitable tolling is more consistent with the Convention than its equitable estoppel counterpart. Admittedly, however, this question goes beyond the scope of the Article and further analysis of the issue is needed.

reverse.”³³⁵ Her opinion demonstrates the truth of this proposition by going through the Convention and its history. For example, she refers to a passage in the Pérez-Vera report: “[T]hese exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.”³³⁶ Baroness Hale’s observations with regard to the proper interpretative orientation seem entirely correct, even though, as discussed below, one might disagree with certain conclusions drawn in that case (that discretion exists to reject the article 12(2) defense after the child is found to be well settled).

If one’s focus is on the abducted child, as article 12(2) intended, then one must assess whether the parent’s concealment is relevant to whether the child is well settled. It seems obvious that concealment might be extremely relevant to this question. A child who lives a life of deception may never acquire the sort of connections or regularity that is the basis of being “settled.” On the other hand, concealment might sometimes be irrelevant. After all, the child’s life may be minimally—if at all—affected by the parent’s concealment.

Courts can, and should, take a parent’s concealment into account in their assessment of whether a child is settled. This can be done without resort to equitable principles. The foreign authorities mentioned above in Part III demonstrate how concealment is very germane to an assessment of whether a child is “settled.” The assessment of whether a child is “settled” rests on a fact-intensive inquiry into the child’s circumstances, including the child’s living conditions and emotional tranquility. The court should consider “any relevant factor informative of the child’s connection with his or her living environment.”³³⁷ Typically this includes the “child’s age, the stability of the child’s

335. [2007] UKHL 55, [12], [2008] 1 A.C. 1288, 1298 (appeal taken from Eng.) (U.K.); see also *In re R (A Minor)* (No. 2) [1999] IESC 32, at [19], [1999] 4 I.R. 185, 195 (Ir.). (“[T]he Hague Convention and the Act are instruments for the benefit of the child. The child’s interest is paramount. Consequently defences to the application of plaintiff, which go to the core of the proceedings or which are specifically mentioned in the Act, may be considered by the Court in spite of the reprehensible behaviour of the [defendant].”).

336. *In re M*, [2007] UKHL 55, [12] (citing Pérez-Vera, *supra* note 96, at 432).

337. *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 387 (D.N.J. 2005); see also Joan Zoza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 283 (1995).

home, regular attendance at school or daycare, regular attendance at church, the stability of the [parent]’s employment, and the nature and proximity of friends and relatives.”³³⁸ But it can also include “any active measures taken to conceal a child,”³³⁹ as these measures can affect the indicators of stability, like regular attendance at school.

The benefit of this approach over the use of equitable estoppel is that it keeps the inquiry where it should be—on the child. This is consistent with the nature of the defense, which is based on a fact-intensive inquiry about the child. Equitable estoppel, in contrast, makes the abductor’s actions predominate in a way that is inconsistent with the child-focused nature of the defense. In addition, focusing on whether the child is “settled” allows a nuanced application of the article 12 defense instead of barring any consideration of evidence under it. The actions of the left-behind parent may become relevant to the extent that those actions affect the child’s current stability—just like the actions of the abductor can become relevant. For example, the fact that the abductor fled domestic violence is very relevant because the absence of such violence in the new location may explain why the child is well settled even if the child is in hiding. Equitable estoppel, in contrast, carries with it the potential to render irrelevant this sort of information about the left-behind parent. Equitable estoppel stops the one-year threshold from being met so that no further inquiry into the child’s circumstances is necessary.

Focusing on whether the child is “settled” is preferable to the method by which some U.S. treaty partners have addressed the issue. As discussed above, some courts outside of the United States have found the discretion to return the child even when

338. *In re B. Del C.S.B.*, 525 F. Supp. 2d 1182, 1194 (C.D. Cal. 2007); *accord* *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 847 (S.D. Tex. 2006) (citing *In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004)). It would also include the uncertain immigration status of the parent and the child. *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1281–82 (N.D. Ca. 2004) (including, among other factors, the status of both the respondent and the child as illegal immigrants in assessing whether the child was settled in the new environment).

339. *Van Driessche*, 466 F. Supp. 2d at 848 (citing *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1998)); *see also* *Silvestri*, 403 F. Supp. 2d at 388 (granting article 12(2) defense and noting respondent did not try to frustrate father’s efforts to locate his children and that he visited them many times in the past few years); *Re H* (Abduction: Child of 16), [2000] 2 F.L.R. 51, 55 (Fam.) (Eng.).

the article 12 defense is made out.³⁴⁰ Several U.S. courts have also taken this position.³⁴¹ As one judge sitting in the Southern District of New York stated:

[T]he petitioner's interests should be considered in exercising the discretion to deny a petition even where facts supporting an exception are established. Because the denial of a petition pursuant to Article 12 is discretionary, equitable tolling is unnecessary to deter an abductor from concealing the whereabouts of a wrongfully removed or retained child.³⁴²

Legal scholars have questioned whether the Convention actually provides a court with discretion in this context.³⁴³ Even the court in *Cannon* acknowledged that its conclusion on discretion was arguably contrary to the Convention's legislative history.³⁴⁴ Without repeating too much of the debate here, it is worth noting several points that make the existence of discretion dubious. First, articles 13 and 20 both explicitly give the decision maker discretion to return a child even after the defense is made out, but article 12 does not.³⁴⁵ Second, the drafters wanted a

340. See *supra* notes 153–94 and accompanying text.

341. See *Matovski v. Matovski*, No. 06-cv-4259, 2007 WL 2600862, at *12 (S.D.N.Y. Aug. 31, 2007); *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800, 815 (N.D. Iowa 2003) (citing Hague International Child Abduction Convention; Text and Legal Analysis, *supra* note 10, at 10,509). Yet, the State Department's legal analysis, which is used to support this position, does not expressly say that the court has such discretion. It only refers to the language, discussed above, that it is "highly questionable" whether a court should grant the defense when there has been concealment. See *supra* note 147.

342. *Matovski*, 2007 WL 2600862, at *12.

343. See, e.g., Rhona Schuz, *In Search of a Settled Interpretation of Article 12(2) of the Hague Child Abduction Convention*, 20 CHILD & FAM. L.Q. 1, 6 (2008).

344. Justice Thorpe said,

[W]hatever may have been the drafting intention and whatever may be the academic criticism, the global judicial community in the main construes article 18 to confer upon the court a discretion nevertheless to order return in a case where the defendant has established both that the proceeding were commenced more than twelve months after the abduction and that the child is settled in a new environment.

Cannon v. Cannon, [2004] EWCA (Civ) 1330, [48], (2005) 1 W.L.R. 32, 48 (emphasis added).

345. Hague Abduction Convention, *supra* note 1, art. 13 ("[T]he judicial or administrative authority of the requested State is not bound to order the return of the child if . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" and "[t]he judicial or administrative authority may also refuse to order the return of the child if it

court to examine all of the evidence relevant to custody before returning a child who was well settled, and the importation of discretion undercuts this objective. Third, it is difficult to conclude that article 18 provides a court with any discretion to return a child when the child is well settled, unless other domestic measures would permit it.

Article 18 reads, “The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.”³⁴⁶ The *travaux préparatoires* indicate that article 18 was aimed at domestic provisions separate and apart from the Convention. From the beginning, articles 12 and 18 were intended to be complementary.³⁴⁷ Article 15 of the Preliminary Draft Convention, the predecessor to the current article 18, stated, “The provisions of this Chapter do not limit the power of judicial or administrative authorities to order the return of the child after the expiration of the time-limits set out in article 11 [now article 12].”³⁴⁸ Professor Pérez-Vera explained article 15’s significance:

The practical importance of such a provision is undoubtedly limited, considering that there is always, even in the absence of a convention, the possibility of prescribing the child’s return, after the affair has been examined on its merits; but, since some experts thought that its inclusion was necessary for the relevant internal authorities to act in that way, the Special Commission adopted the text with a large majority.³⁴⁹

Later, when the Federal Republic of Germany proposed Working Document No. 25 (which would allow the judicial or administrative authorities to return a child after the expiration of the relevant time frame “unless it is demonstrated that the child is now settled in his new environment and his return would cause excessive prejudice”),³⁵⁰ the issue of the interrelationship of the

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.” (emphasis added)).

346. *Id.* art. 18.

347. Pérez-Vera, *supra* note 96, at 458 (referring to articles 11 and 15, later renumbered 12 and 18); see also *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, *supra* note 104, at 168 (article 11).

348. *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Pérez-Vera*, *supra* note 104, at 169 (article 15).

349. Pérez-Vera, *supra* note 107, at 202.

350. See *Working Documents Nos. 20–25*, *supra* note 123, at 274 (proposal number 25 by the Federal Republic of Germany).

two articles again emerged.³⁵¹ In that context, the U.S. delegate stated her understanding:

[She] understood article 15 as a facultative provision which expressly did not limit the power of authorities to order the return of the child at a later stage. It did not confer such a power upon them, but merely implied that they could use whatever proceedings or powers they possessed in domestic law. In particular, article 15 did not leave a residual power in judges after the expiration of the time-limits in article 11. The proposals in Working Document No 25 would therefore go beyond what was envisaged in the present text of article 15.³⁵²

Professor Pérez-Vera confirmed that she shared the U.S. delegate's understanding:

This provision [article 18] ... which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, *i.e.* where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.³⁵³

In short, it appears that article 18 only gives courts the power to use remedies in their domestic law to order the return of a child after the article 12(2) defense is made out. It does not give the courts the power within the Hague proceeding to deny the well-settled defense. This, in fact, was the accepted interpretation of the U.S. Department of State at the time of the Convention's adoption.³⁵⁴

This Article has recommended that courts consider concealment only in so far as it impacts the determination of

351. *See Proces-verbal No 7, supra* note 110, at 295 (comment of the Federal Republic of Germany).

352. *Id.* at 295 (comment of the United States). The provision was ultimately renumbered Article 18 and was the same text as in it Preliminary Draft.

353. Pérez-Vera, *supra* note 96, at 460.

354. *See* Hague International Child Abduction Convention; Text and Legal Analysis, *supra* note 10, at 10,507-08.

whether a child is settled. Admittedly, this approach does not eliminate all arbitrariness and inconsistency, two criticisms of equitable estoppel and the discretionary approach. Like any fact-intensive determination, courts that focus solely on whether a child is well settled have the discretion to emphasize certain facts over others or draw one of several potential conclusions based upon the totality of the circumstances. For example, in *Lops v. Lops*, the appellate court rejected an equitable tolling analysis, but found that the children were not “settled” based on the circumstances surrounding their living.³⁵⁵ The court mentioned the concealment, among other things.³⁵⁶ In fact, the father took great measures to keep his children’s whereabouts hidden.³⁵⁷ For example, his mother (the grandmother of the abducted children) purchased a home for the father and children, but the seller was to remain the legal owner until all mortgage payments were paid, thereby helping to conceal its true ownership.³⁵⁸ The father had no checking account and only transacted business in cash.³⁵⁹ He drove a vehicle registered under his mother’s name.³⁶⁰ He was not an employee, so he never gave out his social security number.³⁶¹ He never paid tax.³⁶² He had no credit cards.³⁶³ He did not obtain a driver’s license.³⁶⁴ Overall, it took the petitioner years to locate the children, despite the assistance of approximately “eleven state, national, and international agencies.”³⁶⁵

Nonetheless, the court’s conclusion that the children were not well settled was somewhat surprising since the children had

355. 140 F.3d 927, 946 (11th Cir. 1998).

356. The court also mentioned, for example, that the father “could be prosecuted for his violations of state and federal law because he was committing ‘four and five misdemeanors . . . to conceal, at least himself, from any authority.’” *Id.* (omission in original). The father’s potential future prosecution says little about whether the children were well settled at the time of the filing.

357. *See id.* at 946 & n.27 (noting the “active measures [the father and grandmother] were undertaking to keep Respondent Lops’s and the children’s whereabouts concealed from Petitioner and the German (and other) authorities”).

358. *See id.* at 931.

359. *See id.*

360. *See id.*

361. *See id.*

362. *See id.*

363. *See id.*

364. *See id.* at 931–32.

365. *Id.* at 933.

been living in the same home, attending the same private school, and in the company of their father, grandmother, and other U.S. relatives for approximately three years. Their grandmother's participation in her grandchildren's lives should have contributed to a finding that they were settled, although the court found her involvement weighed against their being well settled.³⁶⁶

Similarly, in *Aulwes v. Mai*,³⁶⁷ a Canadian court emphasized the objectives of the Convention and interpreted the notion of "settled" restrictively.³⁶⁸ The mother in this case went into hiding for approximately seven years after she fled to Canada from Iowa.³⁶⁹ In the Hague proceeding, the Canadian court returned the child even though the child had "developed and . . . maintained a strong network of loyal and devoted friends. [The child] has done well in school and is heavily involved in activities such as 4-H, riding and music lessons."³⁷⁰ The child had lived in Iowa, the place from which the child was abducted, for only three years and in Nova Scotia for seven years.³⁷¹ Nonetheless, the court found reasons to conclude the child was not well settled, such as the separation of the child's mother from her husband and their illegal immigration status in Canada.³⁷² Emphasizing the "perceived stability of [the child's] position into the future," it found "there is little true stability here"³⁷³ despite evidence "concerning place, home, school, friends and activities [that]

366. *Id.* at 946.

367. *Aulwes v. Mai*, [2002] NSCA 127, [2002] 220 D.L.R.4th 577 (Can.).

368. The appellate court took the position that it is "essential to apply the settled exception with careful attention to both the individual circumstances of the child whose return is sought and the broader purposes of the Convention." *Id.* at [62]. While returning the child would not secure a prompt return or restore the status quo, *id.* at [72]–[74], the court noted that "two other factors strongly support the view that the settled exception should not be applied here." *Id.* at [74]. The court then mentioned, "the deterrent purpose of the Convention. . . . By removing any benefit from abduction and flight, such conduct is deterred." *Id.* at [75]. The court called her deception "breath taking . . . making it all the more important to deter others from doing likewise." *Id.* at [77]. It then stated the "most important consideration": that "the best interests of an abducted child should generally be determined by the courts of the place of habitual residence." *Id.* at [78]. This was because there were earlier allegations of abuse, which the professionals in Iowa had investigated and the court there had addressed. *Id.* at [79].

369. *Id.* at [1].

370. *Id.* at [12].

371. *Id.* at [79].

372. *Id.* at [15]–[20].

373. *Id.* at [85].

supports the view that K.A. is now established in her community in this province.”³⁷⁴ The court forthrightly admitted that it believed a greater goal was at issue: “refusing to order return would seriously undermine the Convention’s intent to deter international child abduction and to respect the role of the Courts of Iowa in determining what [the child’s] best interests require.”³⁷⁵

Despite the risk that courts will use concealment as a reason to conclude that children are not well settled even when they are, the well-settled inquiry still minimizes the chances that the abductor’s concealment will lead the court to the wrong conclusion. Appellate courts can exercise much more meaningful review in this context than when they review the denial of the well-settled defense as an exercise of discretion, or when equitable principles are invoked that limit the defense’s availability.

The only time when a trial court could not consider concealment as part of the fact-specific analysis that the well-settled doctrine demands is when the parties stipulate that the child is settled.³⁷⁶ Presumably parties will stipulate less often that the child is settled when courts reject the equitable estoppel doctrine in the context of the article 12 defense. That means both parties will focus on the child and whether the child is settled instead of fighting about whether one parent was in hiding or the other parent exercised due diligence to find the child. Putting more attention on the child is always beneficial. The approach advocated in this Article would not necessarily increase the workload of the courts because a court would not have to examine the petitioner’s diligence. In addition, some courts already engage in their own analysis to ensure that a child is “settled” even when the parties so stipulate.³⁷⁷

374. *Id.*

375. *Id.* at [94].

376. *See, e.g., Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 848 (S.D. Tex. 2006) (“Van Driessche concedes that Melissa is well-settled in Houston.”); *Morrison v. Dietz*, No. 6:07-CV-1398, 2008 WL 4280030, at *15 (W.D. La. Sept. 17, 2008), *aff’d*, No. 08-31003, 2009 U.S. App. LEXIS 23200 (5th Cir. Oct. 20, 2009) (“The parties do not dispute this issue [that both children are well settled].”).

377. *See, e.g., Van Driessche*, 466 F. Supp. 2d at 848 (“[T]here is nothing in the record to suggest that Melissa is not well-settled in Houston. To the contrary, the Court finds there is substantial evidence that Melissa is well-settled”); *Morrison*, 2008 WL 4280030, at *15 (“[T]he Court finds that both children are well-settled.”).

CONCLUSION

Courts are increasingly permitting equitable principles to affect Hague Convention adjudications even though there is a weak basis for doing so. Courts justify their continued expansion of equitable estoppel by noting that the doctrine eliminates the benefit that might otherwise inure to a respondent who conceals a child and then invokes the article 12(2) well-settled defense. Yet equitable estoppel has the unfortunate side effect of denying a settled child a more complete judicial examination of all the evidence related to custody prior to his or her return. Since this effect is contrary to the drafters' intent, one would expect a great benefit from the continued use of equitable estoppel. Equitable estoppel, however, appears to be of dubious value as a deterrent to future abductors, especially since it is buried in the case law of only one Convention signatory and since there are other, more prominent legal tools to address concealment. Courts would benefit abducted children if they stayed focused on the key questions raised by the article 12 defense: (1) whether one year has passed between the wrongful removal or retention and the date the petitioner commenced proceedings, and (2) whether or not the child is now settled. Concealment is certainly relevant to the latter question, and courts should address concealment as part of their fact finding on that issue.