

# HEINONLINE

Citation: 41 N.C. J. Int'l L. 761 2015-2016



Content downloaded/printed from [HeinOnline](#)

Wed Apr 5 02:08:16 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# Foreign Fathers, Japanese Mothers, and the Hague Abduction Convention: *Spirited Away*

*Barbara Stark<sup>†</sup>*

I.	Introduction .....	762
II.	Mothers Who 'Abduct' Their Children .....	765
	A. Before Japan Ratified the Abduction Convention .....	765
	B. Since Japan Ratified the Abduction Convention .....	769
III.	Diverse Criteria for Custody and Access: The Japanese Approach .....	771
	A. Divorce .....	771
	B. Custody .....	772
	1. The "Will of the Child" .....	774
	2. The Human Rights of the Child .....	775
	C. The Family Registration System (Koseki) .....	779
IV.	The 'Emerging Jurisprudence' of the Abduction Convention .....	781
	A. Domestic Violence .....	781
	B. Modifying Treaties .....	782
	1. A Cumbersome Process .....	783
	2. Domestic Laws as an Alternative .....	784
	a. Ne Exeat Clauses .....	784
	b. Japan's Implementing Legislation .....	786
	C. Relocation After Divorce and the Problem of Bad Faith .....	789
V.	Conclusion .....	791

---

<sup>†</sup> Barbara Stark, Professor of Law and John DeWitt Gregory Research Scholar, Maurice A. Deane School of Law at Hofstra University. I am deeply grateful to Professors Colin Jones and Frank Ravitch, for their generous introduction to Japan and Japanese family law, to international reference librarian Patricia Kasting and law student Kaneyasu Yosada for invaluable research assistance, to Mary Scruggs for organizing this symposium, and to Joyce Amore Cox for her skill and patience in preparing the manuscript.

## I. Introduction

In *Spirited Away*,<sup>1</sup> a ten-year-old Japanese girl, Chihiro, is in a car with her parents driving to their new home, when her father takes a wrong turn. The road ends at the entrance to an abandoned theme park. Although Chihiro is reluctant to get out of the car, she joins her parents, who want to explore. Chihiro finds herself in a world ruled by gods, witches, and spirits, in which nothing is as it seems. Her parents cannot help because they have both been turned into pigs. As this movie shows, family transitions may be strange and frightening. It is the international family lawyer's job to help her client—usually a parent—get through it, regain human form, and remain a part of the child's life after divorce. The hope is that the client, like Chihiro at the end of the film, can say, "I think I can handle it."<sup>2</sup>

While The Hague Convention on the Civil Aspects of Child Abduction (the "Abduction Convention")<sup>3</sup> was drafted to facilitate this process, its application in cases involving Japanese nationals is problematic, especially in cases where the mother is Japanese. This Article explains why this is so, and why it is so hard to harmonize the family laws of different countries. It also describes the real risks that a child, or a parent, may be 'spirited away,' with no chance of actual contact, for far too long.

"Legal kidnapping" . . . the removal [of a child], from one country to another by a parent [from another parent]" had become an issue in every Member State of The Hague Conference on Private International Law<sup>4</sup> by 1976. It was proposed at the Thirteenth Session that the Conference prepare a treaty to address "this topic, which has become broadly intercontinental in its scope with patterns of abduction routes cross-hatched across the globe, from Australia to Austria, from Canada to France (and back, by way of the secondary abduction), from Berlin to Israel, England to Holland,

---

<sup>1</sup> See *Spirited Away*, IMDB, [http://www.imdb.com/title/tt0245429/?ref\\_=nv\\_sr\\_1](http://www.imdb.com/title/tt0245429/?ref_=nv_sr_1) [<http://www.perma.cc/U4L6-FSTX>] (last visited Mar. 2, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter *Convention on the Civil Aspects*].

<sup>4</sup> Adair Dyer, *Report on International Child Abduction by One Parent* ("Legal Kidnapping"), Prelim. Doc. No. 1, Aug. 1978, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 14TH SESS., OCT. 6–25, 1980, *Actes et Documents de la Quatorzième Session: Child Abduction* 12 [hereinafter *Dyer Report*].

Holland to Morocco and so on in a seemingly endless flow.”<sup>5</sup>

Forty years later, the Abduction Convention is generally regarded as “extremely successful,” with more than ninety states parties and an emerging global jurisprudence.<sup>6</sup> Recent contributions to the Abduction Convention’s success include the U.S. Supreme Court decision in *Abbott v. Abbott*<sup>7</sup> and Japan’s ratification of the Convention in 2014.<sup>8</sup>

This Article revisits three basic assumptions by the original drafters of the Abduction Convention (and the original states parties) that are no longer true. It considers these assumptions in the context of Japan’s recent ratification of the Abduction Convention, and the sharp criticism of Japan’s implementation that has already surfaced. The first assumption was that the Abduction Convention was necessary to prevent non-custodial *fathers* from kidnapping their children.<sup>9</sup> Mothers, including Japanese mothers, are now in fact usually the abductors.<sup>10</sup> Second, the drafters of the Abduction Convention assumed that states parties had varying criteria for determining custody.<sup>11</sup> As explained below, this

<sup>5</sup> *Id.*

<sup>6</sup> See Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049 (2005).

<sup>7</sup> *Abbott v. Abbott*, 560 U.S. 1 (2010).

<sup>8</sup> *Japan Signs and Ratifies the 1980 Hague Child Abduction Convention*, HCCH (Jan. 24, 2014), <https://www.hcch.net/en/news-archive/details/?varevent=344> [<https://perma.cc/7S6P-SS3R>].

<sup>9</sup> *Summary of Findings on a Questionnaire Studied by International Social Service*, Prelim. Doc. No. 3, Feb. 1979, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 4, at 134 [hereinafter *ISS Summary*] (noting that out of 110 sample cases selected by local ISS units, the father was the abductor in eighty, and the mother was the abductor in eighteen).

<sup>10</sup> Nigel V. Lowe & Katarine Horosova, *The Operation of the 1980 Hague Abduction Convention—A Global View*, 41 FAM. L.Q. 59, 67 (2007) (analyzing statistical studies finding that a “high proportion” [68-70%] of abductors were mothers); see, e.g., Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT’L L. & POL. 221, 224 (2000) (“Over time, however, many ‘abductors’ have turned out to be custodial mothers—mothers who have lived abroad during the marriage, who have obtained custody when the marriage fails, and who desire to return to their home country after the breakdown of the marriage.”).

<sup>11</sup> *Dyer Report*, *supra* note 4, at 22. The drafters explicitly noted that:

[T]he legal standard used in most of the countries of the Hague Conference for determination of custody and care of a child is keyed to “the best interest of the child.” On a worldwide scale, however, a large number of countries retain the more traditional legal standards for the

diversity of criteria has been replaced, for the most part, by the assumption that a continuing relationship with both parents is in a child's best interests.<sup>12</sup> Third, it was assumed that the Abduction Convention would function as a formal, procedural corrective;<sup>13</sup> that is, its purpose was simply to return the child to her 'habitual residence,' and to a court authorized to determine custody. But the return of the child in itself often raises preliminary, substantive issues that must be addressed.

Part II of this Article describes the increase in international marriages involving Japanese nationals, the headlines made by Japanese mothers 'kidnapping' their children and taking them back to Japan, and the outrage of Western fathers denied access to their children. In 2014, after thirty years of foreign pressure, including pressure from foreign fathers' rights groups, Japan finally capitulated and ratified the Abduction Convention. This Part concludes by noting that the results, while disappointing to some, should not be surprising in view of Japanese family law, described in Part II.

Part III sets out the Japanese approach to divorce, custody, visitation, and, more generally, the relationship between the family and the state in Japan. It is presumed that sole custody is usually preferable in Japan, with visitation by the non-custodial parent left to the discretion of the custodial parent. These criteria, explicitly contemplated by the drafters in 1980,<sup>14</sup> make Japan a relative outlier in 2016. The trend toward ongoing contact with both parents may

---

assignment of custody, which range from the establishment of a presumption or an irrefutable right in favour of one sex or the other to systems where the legal dispute over custody centers around the 'fitness' or 'unfitness' of one of the parents . . . .

*Id.*; see also *ISS Summary*, *supra* note 9.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 429 (1982), <https://www.hcch.net/en/publications-and-studies/details4/?pid=2779> [<https://perma.cc/T7KP-YZSL>].

<sup>14</sup> *Dyer Report*, *supra* note 4, at 22 (citing JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)). See generally Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L.Q. 393 (2007) (hypothesizing that the nations that signed the Convention have failed at keeping the child's best interest at the center of their policies).

also be in tension with deference to the ‘will of the child’ under Japanese law. This resonates with the right of the child to have her opinion taken into account and to participate in decision-making, as set out in the Convention on the Rights of the Child (CRC).<sup>15</sup>

Part IV discusses the emerging jurisprudence of the Abduction Convention, including the growing recognition of the role of domestic violence in these cases, and its implications for Japan. This section highlights Japan’s response to domestic violence by foreign husbands, which some critics contend shows Japan’s bad faith.

The Article concludes that the emerging jurisprudence of the Abduction Convention should be robust enough to accommodate a range of custodial assumptions, especially for those states parties that cannot rely on the recent decisions of the European Court of Human Rights, or other human rights tribunals, to temper the decisions of foreign courts before which their nationals appear. The Abduction Convention is unlikely to function as originally intended, because the drafters’ assumptions are no longer true. As in *Spirited Away*, things are not as they seem. Whether the Convention is still useful, whether it can prevent children, or parents, from being *Spirited Away*, may ultimately depend on the good will between the states parties in a specific case.

## II. Mothers Who ‘Abduct’ Their Children

### A. Before Japan Ratified the Abduction Convention

The factors that convinced The Hague Conference to draft the Abduction Convention in the 1970s<sup>16</sup> did not immediately affect family law in Japan. While divorce rates in Japan, like those in Western states, rose steadily from the 1960s until the 1990s,<sup>17</sup> it was not until 2011 that Professor Takao Tanase observed that disputes

---

<sup>15</sup> Conventions on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>16</sup> See *Dyer Report*, *supra* note 4, at 18 (describing factors contributing to “rapid increase” in international child abduction, including “great improvements in international transportation and communications” and “trend towards freer crossing of borders, fewer visa requirements and decreasing rigour of passport control”).

<sup>17</sup> TAKAO TANASE, POST-DIVORCE LAWS GOVERNING PARENT AND CHILD IN JAPAN 42 tbl.2 (2010), [http://www.law-t.jp/pdf/post-divorce-laws\\_USDeptOfState\\_20100914.pdf](http://www.law-t.jp/pdf/post-divorce-laws_USDeptOfState_20100914.pdf) [https://perma.cc/8ZUE-Q9ST].

over visitation “almost quadrupled over the last ten years.”<sup>18</sup> Even then, as Professor Colin Jones notes, the number of cases involving a non-Japanese spouse or parent were a “very small minority.”<sup>19</sup>

These few international cases, however, attracted considerable international attention. Chie Kawabata was divorced from Kris Morness in 2012 in Seattle, Washington.<sup>20</sup> The mother had primary custody of their five-year old son, and the father had eight weeks visitation in the summer in Vancouver.<sup>21</sup> In a post-divorce application, Kawabata sought permission to relocate to Japan.<sup>22</sup> She explained that her mother had been diagnosed with stage four colon cancer and that she wanted to spend more time with her, and that her five year old son was very close to his maternal grandmother.<sup>23</sup> In addition, she had been offered a promotion to work for Cisco in Japan, which would significantly increase her income and also offered a more flexible work schedule so that she could spend more time with her son.<sup>24</sup> The summer visitation would remain the same, she assured the court, and she would also make her son available to communicate with his father via skype and telephone.<sup>25</sup> Kawabata’s application was denied by the court on the ground that, “the detrimental effects of relocation outweigh the benefits.”<sup>26</sup>

Disregarding the court order, Kawabata bought one-way tickets to Japan for herself and her son.<sup>27</sup> Kawabata sent her ex-husband

---

18 Takao Tanase, *Divorce and the Best Interest of the Child: Disputes over Visitation and the Japanese Family Courts*, 20 PAC. RIM L. & POL’Y J. 563, 563 (Matthew J. McCauley trans., 2011).

19 Colin P.A. Jones, *Towards an Asian Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention* 5 (Asian Law Inst., Working Paper Ser. No. 31, 2013) (noting that 7.5% of divorces in Japan in 2010 were “international,” involving a non-Japanese spouse and that 2%, or 22,000 children, were born in households with one non-Japanese parent).

20 Levi Pulkkinen, *Kirkland Mom Accused of Fleeing to Japan to Thwart Parenting Plan*, SEATTLEPI (Sept. 18, 2013), <http://www.seattlepi.com/local/article/Kirkland-mom-accused-of-fleeing-to-japan-to-4824996.php> [<https://perma.cc/WFSS-RX9L>].

21 *See id.*

22 *Kawabata v. Morness*, No. 11-3-00982-SEA (King Cty. Super. Ct., Wash., June 5, 2012), <http://chiekawabata.com/assets/pdf/2012.06.05-Relocation-to-Japan-Motion.pdf> [<https://perma.cc/GMG5-DRZU>] (Notice of Intended Relocation of Children).

23 *See id.* at 1–2.

24 *See id.*

25 *See id.*

26 Pulkkinen, *supra* note 20.

27 *Id.*

an email, in which she explained that that, “The torment I have endured in recent years have left me . . . emotionally ruined and forced my hands to take this step that I wish I did not have to take.”<sup>28</sup> The prosecutors quickly filed custodial interference charges against Kawabata, a kidnapping-related felony punishable by imprisonment.<sup>29</sup> Prosecutors in King County charged three other Japanese women, all of whom fled to Japan with their children, with the same crime.<sup>30</sup> In addition, the family courts in two of the cases had awarded the fathers sole custody following the mothers’ disappearance.<sup>31</sup>

Christopher and Noriko Savoie were married and lived in Japan for fourteen years before moving to Tennessee with their two children, eight-year-old Isaac and six-year-old Rebecca.<sup>32</sup> Shortly after the move, Christopher began an affair.<sup>33</sup> The Savoies divorced in January 2009 and Noriko was given custody of the children.<sup>34</sup> The divorce was bitter.<sup>35</sup> Roughly a month after the divorce, Noriko emailed her ex-husband and threatened to return to Japan with the children: “It’s very difficult to watch kids becoming American and losing Japanese identity . . . . I am at the edge of the cliff. I cannot hold it anymore if you keep bothering me.”<sup>36</sup>

Christopher immediately sought a court order to prevent her from taking the children to Japan.<sup>37</sup> At the hearing, Noriko told the court: “I was very, very—at the peak of my frustration . . . . He actually married three days before that e-mail. He remarried the person—a woman whom he was having affair, so I was very depressed and—but also angry.”<sup>38</sup> In response to a query by the court-appointed parental coordinators regarding her plans to take

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Mallory Simon, *Dad in Japan Custody Battle Thought Wife Would Take Kids*, CNN (Oct. 2, 2009), [http://www.cnn.com/2009/WORLD/asiapcf/10/02/japan.savoie.custody.battle/index.html?\\_s=PM:WORLD](http://www.cnn.com/2009/WORLD/asiapcf/10/02/japan.savoie.custody.battle/index.html?_s=PM:WORLD) [<https://perma.cc/W2HU-RDYZ>].

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



the children to Japan, Noriko replied, "I think the kids will be happy if I'm happy."<sup>39</sup> The judge asked her whether she would be willing to put up money to guarantee their return and she agreed, but was not required to do so.<sup>40</sup>

Judge James G. Martin III told Noriko that she would lose her alimony, education funds and other money if she fled with the children, before ruling that she and the children could go to Japan for a vacation.<sup>41</sup> She and the children left, and returned to Tennessee as promised.<sup>42</sup>

A few days later, however, Noriko returned to Japan with the children. The Tennessee court awarded Christopher sole custody, but Japan had not yet ratified the Abduction Convention. Christopher knew that a Japanese court would be unlikely to grant him custody, or even visitation, especially since he and Noriko were still considered married under Japanese law.<sup>43</sup>

Christopher decided to take matters into his own hands.<sup>44</sup> He flew to Japan and grabbed the children as Noriko was walking them to school.<sup>45</sup> He fled to the nearest U.S. consulate, yelling at the guards to let him in.<sup>46</sup> He was arrested by the Japanese police, who said that the children were Japanese and had Japanese passports.<sup>47</sup>

"I want Americans to know what's happening to me," Christopher told reporters, speaking in Japanese.<sup>48</sup> "I didn't do

---

39 *Id.* There is ample social science evidence supporting the proposition that, "in general, what is good for the custodial parent, is good for the child." See Judith Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 315 (1996).

40 Simon, *supra* note 32.

41 *Id.*

42 *Id.*

43 Their marriage had been entered in the family registry and no divorce had been entered. See *infra* Part III.C (describing the family registry system in Japan).

44 *Desperate Father Who Tried to 'Snatch' Children Back from Runaway Japanese Mother Awarded \$6.1 Million Settlement*, DAILY MAIL (May 10, 2011), <http://www.dailymail.co.uk/news/article-1385401/Desperate-father-Christopher-Savoie-tried-snatch-abducted-children-runaway-Japanese-mother-awarded-6-1-million-settleme nt.html> [<https://perma.cc/L8EJ-5SYM>] [hereinafter *Desperate Father*].

45 *Id.*

46 Simon, *supra* note 32.

47 *Id.*

48 *Id.*

anything wrong.”<sup>49</sup> After three weeks in a Japanese jail, he returned to Tennessee, where he was awarded \$6.1 million by a sympathetic Tennessee court.<sup>50</sup>

Christopher Savoie became the poster child for aggrieved Western fathers.<sup>51</sup> Following his arrest in September, the ambassadors from the United States, Canada, France, New Zealand, Italy, Australia, and Spain met with Japan’s then-Foreign Minister in October 2009 to “reiterat[e] that [they] place the highest priority on the welfare of children who have been the victims of international parental child abduction, and stressed that the children should grow up with access to both parents.”<sup>52</sup> The *Japan Times* reported that when Japanese Prime Minister Shinzo Abe visited President Obama in February 2013, he reportedly promised that Japan would join the Abductions Convention.<sup>53</sup> “From the perspective of children, there is an increasing number of international marriages and divorces,” Abe told reporters, “We believe it is important to have international rules.”<sup>54</sup>

### *B. Since Japan Ratified the Abduction Convention*

According to the Japanese Foreign Ministry, the treaty has “helped prevent child abductions to Japan.”<sup>55</sup> The ministry received twenty-five requests for help from parents seeking the return of children who were taken to Japan in the twelve months after Japan became a party to the treaty, in contrast to the eighty-one cases of children taken from the United States, thirty-nine each from Britain

<sup>49</sup> *Id.*

<sup>50</sup> *Desperate Father*, *supra* note 44.

<sup>51</sup> *Id.* See generally *Dyer Report*, *supra* note 4, at 19 (explaining how the frustration of non-custodial parents with “the slowness, expense and inefficacy of legal proceedings” contributes to “re-kidnapping”).

<sup>52</sup> Charlie Reed, *Japan Urged to Join Abduction Treaty*, STARS & STRIPES (Feb. 2, 2010), <http://www.stripes.com/news/japan-urged-to-join-abduction-treaty-1.98572> [<https://perma.cc/T3VD-H6J7>].

<sup>53</sup> Nathalie-Kyoko Stucky & Jake Adelstein, *Japan’s Child Kidnapping Problem*, DAILY BEAST (May 19, 2013), <http://www.thedailybeast.com/articles/2013/05/19/japan-s-child-kidnapping-problem.html> [<https://perma.cc/Y25C-6KRW>].

<sup>54</sup> *Id.*

<sup>55</sup> May Masangkay, *Child Abductions down in Year Since Hague Pact, but Not All Are Happy*, JAPAN TIMES (Apr. 2, 2015), <http://www.japantimes.co.jp/news/2015/04/02/national/child-abductions-year-since-hague-pact-happy/#.VtezJVIIdL0s> [<https://perma.cc/5C4H-EBXU>].

and Canada, and thirty-four from France between 2012 and 2013.<sup>56</sup> While the ministry said it “mostly succeeded” in facilitating visitation, at least one Canadian father, who had not seen his four-year-old son in Japan for two years, said that Japan’s ratification of the treaty was “disappointing.”<sup>57</sup> After mediation, he was offered two or three visits a year, only in Japan, and always under supervision.<sup>58</sup>

In 2014, the same year Japan ratified the Abduction Convention, Congress passed the International Child Abduction Prevention and Return Act (ICAPRA).<sup>59</sup> The Act was passed in response to almost ten years of determined lobbying by left-behind parents led by David Goldman, whose son, Sean, had been abducted by his mother and his maternal grandparents to Rio de Janeiro, Brazil in 2004, on a trip his father believed would be a few weeks’ vacation.<sup>60</sup> Upon their arrival in Brazil, however, Sean’s mother called his father and told him that they would not be returning.<sup>61</sup> Protracted litigation in both countries ensued.<sup>62</sup> David Goldman lobbied tirelessly, pointing out that Brazil, although a party to the Abduction Convention, had never returned an American child.<sup>63</sup>

As international family lawyer Patricia Apy notes, “Japan is singled out in the report, but only as a diplomatic success story, with contradictory information regarding its status within different sections of the report.”<sup>64</sup> But as Apy and others confirm, “Japan has

---

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> International Child Abduction Prevention and Return Act, 22 U.S.C. §§ 9101–9141 (2014).

<sup>60</sup> Patricia E. Apy, *The Case for Reciprocity: Significance of the International Child Abduction, Prevention and Recovery Act in the Private Practice of International Family Law*, N.J. LAW., Oct. 2015, at 46, 46.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> As the author explains:

[I]n nine of the cases “the case was not submitted to a judicial or administrative authority while the parents pursue mediation.” However, if delay actually refers to the mediation program advanced by the Japanese Central Authority in 2014, it has produced no recognizable success . . . there has been no successful access application or abduction application, nor any significant movement on pre-existing cases.

continued its historic patterns of recalcitrance in the return of abducted children or organization of rights of access.”<sup>65</sup> Professor Linda Elrod cites with approval a recent case in which a divorced Japanese mother, who took her son with her to Cambridge, England, where she had a one-year fellowship, was ordered by the English court to return her son to his father in Japan.<sup>66</sup> The ICAPRA requires the State Department to document its efforts, and their results, to resolve abduction cases and to establish border controls to insure the enforcement of judicial restraints.<sup>67</sup>

### III. Diverse Criteria for Custody and Access: The Japanese Approach

As set out in Japan’s responses to the questionnaire drawn up by Adair Dyer and distributed to member states, Japanese family law is very different from American family law, and even from the family law of other civil law states. This Part explains the Japanese approach to divorce, custody and the Abduction Convention.

#### A. Divorce

The Abduction Convention is concerned with the rights of parents and children, rather than husbands and wives.<sup>68</sup> The marital status of the parents is generally irrelevant.<sup>69</sup> Under the laws of most American states, however, the terms of custody and visitation are part of the divorce decree.<sup>70</sup> This is not necessarily the case in Japan, where the overwhelming majority of divorces do not go to court.<sup>71</sup> Rather, unhappy spouses divorce by filing ‘mutual consent’

---

*Id.* at 52.

<sup>65</sup> *Id.*

<sup>66</sup> Linda Elrod, *Japan Joins Hague Abduction Convention: England Returns Child*, 48 FAM. L.Q. 351, 353–357 (2014).

<sup>67</sup> Apy, *supra* note 60, at 48.

<sup>68</sup> Colin P.A. Jones, *Hague Jars with Japan’s Family Law, a Zero-Sum Game with Only One Outcome*, JAPAN TIMES (Apr. 16, 2014), <http://www.japantimes.co.jp/community/2014/04/16/issues/hague-jars-with-japans-family-law-a-zero-sum-game-with-only-one-outcome/#.Vth3-lIdL0s> [https://perma.cc/GX87-RZS7].

<sup>69</sup> *Id.*

<sup>70</sup> See IRA ELLMAN ET AL., FAMILY LAW 628–33 (2010).

<sup>71</sup> Noriko Mizuno, *Sex Discrimination in Japanese Family Law*, in FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES 155, 159 (Barbara Stark ed., 1992) (“The code further provides that the parties shall first consult and agree on each of the following important issues: which parent shall act as custodian of the children after divorce (Article

divorces with the family registry.<sup>72</sup>

### B. Custody

When couples file their mutual consent divorce, the parties include the name of the parent who will have custody and the parental rights that accompany it, including the right to make arrangements regarding the other parent's access to the child.<sup>73</sup> Absent dispute, the courts play no role in this determination.<sup>74</sup> While this approach is in marked contrast to custody determinations in the United States, which are always reviewed by the court,<sup>75</sup> it is quite common in other parts of the world, including England, Germany, and Iran.<sup>76</sup> As Professor Jones explains, the main corpus of Japanese family law is set out in Part IV of the Japanese Civil Code, titled "Relatives."<sup>77</sup> It contains rules for establishing, modifying and terminating relationships, but no rules governing post-divorce maintenance, child support or visitation.<sup>78</sup>

Under the Civil Code, unmarried mothers generally have sole custody of their children and married parents have joint custody of their children.<sup>79</sup> At divorce, however, only one parent can be granted custody.<sup>80</sup> "Custody" is the Japanese government's

766) or shall have parental power (Article 819, paragraph 1) . . .").

<sup>72</sup> Jones, *supra* note 19, at 8.

<sup>73</sup> Satoshi Minamikata, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei: (Family Court Mediation)*, 39 FAM. L.Q. 489, 490–92 (2005).

<sup>74</sup> *Id.*

<sup>75</sup> See ELLMAN ET AL., *supra* note 70.

<sup>76</sup> MARIANNE BLAIR ET AL., *FAMILY LAW IN THE WORLD COMMUNITY* 442–43 (3d. ed. 2015).

<sup>77</sup> MINPŌ [MINPŌ] [CIV. C.] arts. 725–1044 (Japan).

<sup>78</sup> Mizuno, *supra* note 71, at 158 ("This characteristic of the Civil Code is widely recognized and referred to as the *shiraji-kitei-sei* (blank provisions) of the Civil Code. It reflects the 'characteristically Japanese approach or optimism that issues can and should be avoided or resolved through mutual consultation,' and threads through all family law provisions in the Civil Code."); Colin P.A. Jones, *Judges Fill the Gaps in Japan's Family Law*, JAPAN TIMES (Jan. 26, 2010), <http://www.japantimes.co.jp/community/2010/01/26/issues/judges-fill-the-gaps-in-japans-family-law/#.VuS-LJMgvR0> [https://perma.cc/85QU-LKW9].

<sup>79</sup> MINPŌ [MINPŌ] [CIV. C.] art. 818 (Japan); *see also* Jones, *supra* note 19, at 10 n.21; Mizuno, *supra* note 71, at 156 ("Generally, modern civil law is considered ineffective vis-à-vis family issues because it plays a passive or limited role.").

<sup>80</sup> MINPŌ [MINPŌ] [CIV. C.] art. 819 (Japan); *see also* Jones, *supra* note 19, at 11 n.24 (noting that some division of parental authority may be possible after divorce, if the parents

translation of the Japanese term ‘kango,’ which is translated elsewhere in the Code as “care,” referring to the parental obligation to care for and educate children.<sup>81</sup> Although Article 766 of the Code refers to post-divorce custody, in practice, Japanese courts frequently award custody, support and access (or denial of access) while the proceedings are pending.

The proceedings may be pending for a long time, since mediation is mandatory before proceedings can begin.<sup>82</sup> Both parties meet individually with two mediators, a man and a woman between the ages of forty and seventy selected by the court.<sup>83</sup> Except for the age restriction, there are no formal requirements for mediators. They have no special education or training.<sup>84</sup>

The parties are kept separate throughout the mediation in order to avoid unpleasant confrontations.<sup>85</sup> Meeting with the mediators are usually scheduled every six weeks.<sup>86</sup> The number of sessions before agreement is reached generally ranges from three to ten.<sup>87</sup> Mediators are reluctant to press for visitation over the opposition of the custodial spouse, usually the mother, because of concerns that the child would be burdened by the tension between her parents.<sup>88</sup> According to Professor Tanase, fathers usually acquiesce to minimal visitation because they are worn down by the process, during which they generally have no contact with their children.<sup>89</sup>

Except for the restrictions on post-divorce joint custody, and a reference to the “interests of the child,” the Code leaves the disposition of custody to the parents and, if they are unable to agree, to the discretion of the Family Court.<sup>90</sup> As Professor Elrod notes, since 2011, “contact (visitation or access) has been stipulated in

---

agree, but notes that this is “fairly rare”); Elrod, *supra* note 66, at 352 (“Until 2012, Japan . . . did not recognize joint parental authority . . . after divorce.”).

<sup>81</sup> Jones, *supra* note 19, at 11.

<sup>82</sup> *Id.*

<sup>83</sup> Tanase, *supra* note 17, at 12.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 12–14.

<sup>89</sup> Tanase, *supra* note 17, at 14.

<sup>90</sup> Jones, *supra* note 78.

article 766 the Civil Code.”<sup>91</sup> The terms of the agreement or order are not recorded in the family registry.<sup>92</sup> Rather, the form now contains a box that can be checked to indicate the existence of such an agreement.<sup>93</sup>

### 1. *The “Will of the Child”*

Professor Tanase criticizes what he views as the misplaced reliance on the “will of the child” in Japanese custody and access determinations.<sup>94</sup> He describes in detail the investigator’s reports of a case involving a five-year-old child, who was separated from his mother.<sup>95</sup> He did not have any contact with her for a year and a half, since he was five.<sup>96</sup> The investigator interviewed the child at that point and completed the investigation two years later.<sup>97</sup>

Tanase explains that this is commonplace, reflecting the influence of a custodial parent who has no inhibitions about criticizing the non-custodial parent, and no concerns that he will be criticized in turn because the other parent will never have the opportunity.<sup>98</sup> Indeed, the more the custodial parent demonizes the non-custodial parent, the less likely it becomes that the latter will ever have the opportunity to communicate with the child at all.<sup>99</sup> The tension between the need to take a child’s desires and perceptions into account, and concerns that the child is being manipulated or even brainwashed by the custodial parent, is familiar to family law professionals in the United States and elsewhere.<sup>100</sup>

Courts and other law makers have addressed it with a range of measures, including ‘friendly-parent provisions’ and parent

---

<sup>91</sup> Elrod, *supra* note 66, at 353.

<sup>92</sup> See *id.* (noting the Ministry changed the divorce form and now only a checked is box required to signal agreement).

<sup>93</sup> *Id.*

<sup>94</sup> Tanase, *supra* note 18, at 569–75.

<sup>95</sup> *Id.* at 573–75.

<sup>96</sup> *Id.* at 573.

<sup>97</sup> *Id.* at 573–74.

<sup>98</sup> *Id.* at 574–75

<sup>99</sup> *Id.* at 575 (showing that “denial of the ex-wife that constitutes the will of the custodial parent becomes the will of the child through the control of the child in the custodial household”).

<sup>100</sup> See ELLMAN ET AL., *supra* note 70, at 664 (discussing the “lollipop syndrome” in American courts).

education.<sup>101</sup> The California statute, for example, requires the court to consider “which parent is more likely to allow the child . . . frequent . . . contact with the non-custodial parent” following an award of sole custody.<sup>102</sup> As Professor Andrew Schepard noted 20 years ago, “courts in more than 40 states” offer educational programs for families coping with “difficult transitions.”<sup>103</sup> As a father in one program observed, “They steer you 150 percent away from the idea that I’m going to go in and win, saying (instead) I am going to go in and get the best results for my children.”<sup>104</sup>

Professors Tanase and Jones argue that the limited authority granted to Japanese family court judges under the civil code presents unique difficulties, but other civil code jurisdictions have had similar problems.<sup>105</sup> As Japan has recognized in its reports filed with the Committee on the Rights of the Child, these difficulties do not justify denying the child the right to participate in custody determinations, and to express her opinion.<sup>106</sup>

## 2. *The Human Rights of the Child*

The CRC, as virtually every commentator observes, is the most comprehensive and the most widely ratified human rights treaty in the world. Japan became a party to the CRC in 1994.<sup>107</sup> The CRC literally incorporates all of the rights and protections set out in previous instruments and extends them to children, including, as

<sup>101</sup> *Id.* at 663, 681.

<sup>102</sup> *Id.* at 676 (citing Cal. Fam. Code § 3040 Order of Preference in granting custody).

<sup>103</sup> See, e.g., Andrew Schepard et al., *The Push for Parent Education: Blueprints for Helping Families Cope with Divorce*, 19 FAM. ADVOC. 52, 53 (1997), [http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1716&context=faculty\\_scholarship](http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1716&context=faculty_scholarship) [https://perma.cc/8XFP-PEXQ].

<sup>104</sup> Sondra Miller et al., *Parent Education and Custody Effectiveness (P.E.A.C.E.): A Preliminary Report to the New York Legal Community*, N.Y. ST. B. J., Feb. 1996, at 42, 43.

<sup>105</sup> See, e.g., Nina Dethloff, *Parental Rights and Responsibilities in Germany*, 39 FAM. L.Q. 315, 320–23 (2005) (discussing disputed custody); Hugues Fulchiron, *Custody and Separated Families: The Example of French Law*, 39 FAM. L.Q. 301, 304–308 (2005) (discussing the sharing of parental responsibilities by separated parents).

<sup>106</sup> See Tanase, *supra* note 18, at 578 (discussing Japan as a signatory to the Convention on the Rights of the Child which requires the States to protect a child’s rights).

<sup>107</sup> *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <http://indicators.ohchr.org/> [https://perma.cc/T3WC-YS9J] (last visited Mar. 2, 2016).



Professor Jaap Doek points out, “even the youngest.”<sup>108</sup> The CRC, which had not been drafted when the Abduction Convention came into force,<sup>109</sup> should also be considered in making Hague determinations, especially where “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.”<sup>110</sup> Under Article 13 of the Convention, the CRC recognizes the child as a subject, entitled to rights of her own, rather than a passive object to be protected.<sup>111</sup>

This is a radical leap, and it calls for radical practice—that the child is to be listened to, and is entitled to have her views and opinions taken into account. That is, every human being is entitled, from birth, to be treated with respect. In its General Comment No. 7, *Implementing Child Rights in Early Childhood*,<sup>112</sup> the Committee stressed that Art. 12, which “recognizes the right of the child to express his or her views and to have them taken into account in *all matters* affecting the child,”<sup>113</sup> contributes to the child’s ability to “actively take part in shaping their environment, their society, and the world they will inherit.”<sup>114</sup> As a party to the CRC, Japan has filed the usual self-monitoring reports with the Committee charged with its administration.<sup>115</sup> In its report, Japan states that children’s statements are considered in custody determinations if the child is

<sup>108</sup> Jaap E. Dock, *What Does the Children’s Convention Require?*, 20 EMORY INT’L L. REV. 199, 201 (2006).

<sup>109</sup> The human rights of the child, however, have long been recognized by commentators such as Professor Silberman. See, e.g., Silberman, *supra* note 10, at 242–44 (explaining why Art. 12 of the CRC “should not be interpreted as an absolute requirement that would interfere with the summary Hague return proceeding”).

<sup>110</sup> Convention on the Civil Aspects, *supra* note 3, art. 13; see also *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HCCH art. 13, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> [https://perma.cc/7AWF-WSTJ] (last visited Mar. 2, 2016).

<sup>111</sup> See Convention on the Civil Aspects, *supra* note 3, art. 13; see also Silberman, *supra* note 10, at 243–44 (discussing the recognition that children have “minds of their own” and the “concept of ‘children’s rights’”).

<sup>112</sup> *Implementing Child Rights in Early Childhood*, U.N. Doc. CRC/C/GC/7 para. 14 (Nov. 1, 2005), <https://www1.umn.edu/humanrts/crc/comment7.html> [https://perma.cc/76QW-D6WB].

<sup>113</sup> Dock, *supra* note 108.

<sup>114</sup> *Id.* (quoting from *A World Fit for Children*, G.A. Res. S. 27/2, ¶ 7(9), U.N. Doc. A/RES/S-27/2 (Oct. 11, 2002)).

<sup>115</sup> *UN Convention on the Rights of the Child*, CRC/C/JPN/3 (Sept. 25, 2009), <http://www.refworld.org/docid/4afae5bf2.html> [http://perma.cc/HFH4-AZU7] (showing that Japan turned in its third periodic report).

over fifteen, and may be considered if the child is younger.<sup>116</sup> According to Professor Minamikata, in practice courts usually listen to the opinions of children “near the age of ten or older.”<sup>117</sup>

As Professor Weiner has pointed out, the European court of Human Rights, which views the European Convention as incorporating the CRC, has held that in any action concerning children, the child’s best interest is a primary consideration under Article 3.<sup>118</sup> In *Neulinger & Shuruk v. Switzerland*,<sup>119</sup> a Swiss mother and an Israeli father married in Israel in 2001, and had a child in 2003. According to the mother, the father joined an ultra-Orthodox Jewish sect after the child’s birth, and she was afraid that he would take the child out of the country to join the sect’s community abroad.<sup>120</sup> In 2004, she obtained an order preventing him from doing so.<sup>121</sup>

In 2005, the parties were divorced.<sup>122</sup> The mother was granted custody and the father was granted access.<sup>123</sup> In March 2005, the court rejected the mother’s application to lift the non-removal order.<sup>124</sup> In June 2005, the mother took the child to Switzerland without the father’s permission.<sup>125</sup> In May 2006, the mother and child were found and the Israeli family court issued an order holding

---

<sup>116</sup> *Id.* at 62.

In personal status actions, during trials related to the designation of parental authority over children who are 15 years of age or older such as in a divorce proceeding, a statement from the child shall also be heard (Article 32, paragraph 4 of the Code of Procedure Concerning Cases Relating to Personal Status). Moreover, in cases of the above trial, the court may examine the facts (Article 33, paragraph 1 of the said Code), which consequently makes the hearing of statements from children under 15 years of age also possible.

*Id.*

<sup>117</sup> Minamikata, *supra* note 73, at 499.

<sup>118</sup> Merle Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 315 (2002) (including in the footnote that “particular weight should be attached to the best interests of the child”).

<sup>119</sup> *Neulinger v. Switz.*, App No. 41615/07, Eur. Ct. H.R. (July 6, 2010), <http://hudoc.echr.coe.int/eng?i=001-99817> [<https://perma.cc/AQ9Z-RPYV>].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

the mother's removal of the child wrongful.<sup>126</sup> The father filed a return petition in June 2006, but the Swiss family court denied his petition on the ground that the return to Israel presented a "grave risk" to the child under Art. 13.<sup>127</sup> The father's first appeal was dismissed, but in August 2007, the Swiss Federal Court ordered the child returned.<sup>128</sup> In September 2007, the mother and child filed a petition with the European Court of Human rights.<sup>129</sup> The Court held that:

a child's return cannot be ordered automatically or mechanically . . . . The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences . . . . For that reason, those best interests must be assessed in each individual case.<sup>130</sup>

In *Neulinger*, the Court held that an assessment of the relevant factors precluded return, since:

The child was abducted to and lived in (Switzerland) for approximately five years, . . . the mother might receive sanctions if forced to return to Israel, . . . return without the mother would potentially psychologically harm the child, . . . the father had restricted access rights prior to abduction and it was unclear if the father had the capacity to care for the child in the event of the child's return.<sup>131</sup>

Professor Silberman has criticized the *Neulinger* decision as well as a later decision, *Raban v. Romania*<sup>132</sup> for failing to uphold the Abduction Convention. In *Neulinger*, Professor Silberman argues that the Court improperly considered the "entire family situation," four years after the initial abduction, when it should have restricted its inquiry to the facts as of the time of the initial return

---

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Raban v. Rom.*, App. No. 25437/08, Eur. Ct. H.R. (Oct. 26, 2010), <http://hudoc.echr.coe.int/eng?i=001-101471> [<https://perma.cc/4F5A-25V2>].

order.<sup>133</sup> This rewards the abductor, she notes.<sup>134</sup>

The alternative in *Neulinger*, however, would have been to punish the child by insisting on technical compliance with the Abduction Convention at the child's expense.<sup>135</sup> In *Raban*, the Court upheld the decision of the Romanian court denying the return of the child under the Abduction Convention on the ground that the father had in fact consented to the children's removal, even though he had been granted joint custody by the Israeli court.<sup>136</sup> The European Court of Human Rights denied the father's claim that this decision violated his and the children's rights to family life under Article 8, finding that under "the margin of appreciation afforded to the State," Romania had shown that its decision had an adequate factual basis.<sup>137</sup>

These recent cases are notable both for their focus on the human rights of the child and their deference to the national courts and the national law of the child's residence. While the decision of the ECHR is obviously not binding on Japan (unless the case involves a Japanese national) the reasoning of the court in these cases is instructive, especially in view of the emphasis in Japan's implementing legislation on the human rights of the child.<sup>138</sup>

### C. The Family Registration System (*Koseki*)

When a woman and a man marry in Japan, they are required under Article 750 of the Civil Code to assume the same last name

<sup>133</sup> Linda J. Silberman, *The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe*—Abbott, *Neulinger*, Zarraga, 63 OKLA. L. REV. 733, 744 (2011).

<sup>134</sup> *Id.* (concluding it also encourages "would-be abductors" to take a similar course of action as the mother in *Neulinger*).

<sup>135</sup> *Id.* at 743.

The Court of Human Rights insisted that it had the responsibility to 'ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors' as to what would be best for an abducted child in the context of an application for return.

*Id.* But, "Article 12 of the Abduction Convention, which provides a defense to return if the child is settled in its new environment, but only when the Hague return proceedings are commenced after one-year of the wrongful removal or retention." *Id.* at 744. Therefore, the Court applied the rules incorrectly.

<sup>136</sup> *Id.* at 744.

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., Convention on the Civil Aspects, *supra* note 3, art. 28 (including violations of human rights as a ground for refusing removal of a child in Japan).

and the new family is registered in the Family Registry.<sup>139</sup> Births, deaths, marriages, divorces, and changes in gender are all recorded in the family registry.<sup>140</sup> Only Japanese nationals can have family registries.<sup>141</sup> If a Japanese national marries a foreigner, a special notation is made in the Japanese spouse's registry.<sup>142</sup> The family registry system governs practical questions of daily life, including identity, relationships, and the validity or existence of a marriage or divorce.<sup>143</sup> If a foreign court enters a judgment of divorce, or an order regarding custody of a child, under Japanese law it has no legal effect until and unless it is entered in the registry.<sup>144</sup> Thus, Christopher Savoie was arrested for kidnapping his children since under Japanese law he and Noriko were still married in Japan, and he did not have sole custody.<sup>145</sup>

Christopher, who lived in Japan for 14 years and spoke Japanese, was not blindsided by the family registry system, but foreign spouses, or former spouses, of Japanese nationals—along with their foreign lawyers—are often stymied.<sup>146</sup> The procedure for obtaining a divorce provides a vivid example. Divorce by mutual consent (*kyōgi rikon*) is effective as soon as a divorce notification paper (*rikon todoke*) is filed with the family registry office.<sup>147</sup>

While forged notification papers are invalid, they are likely to be accepted if the form is properly completed.<sup>148</sup> Once a divorce has been noted in the family registry, however, it cannot be invalidated without a court order of annulment.<sup>149</sup> Once fraudulent notification papers have been accepted, and the divorce noted, it is

---

<sup>139</sup> Mizuno, *supra* note 71, at 158; *see also* MINPO [MINPO] [CIV. C.] art. 750 (Japan).

<sup>140</sup> Jones, *supra* note 78.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See* Simon, *supra* note 32; *see also supra* Part II.A (describing the Savoies' divorce, and subsequent kidnapping and re-kidnapping attempt).

<sup>146</sup> Simon, *supra* note 32.

<sup>147</sup> Mikiko Otani, *Fujuri Todoke: A Valuable Insurance Policy If Your Marriage Is on the Rocks*, JAPAN TIMES (Apr. 23, 2013), <http://www.japantimes.co.jp/community/2013/04/23/how-tos/fujuri-todoke-a-valuable-insurance-policy-if-your-marriage-is-on-the-rocks/#.VtSZD8eOr88> [<https://perma.cc/3CNZ-EGVE>].

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

up to the defrauded spouse to obtain the required order.<sup>150</sup> According to Japanese Justice Ministry statistics, roughly 700 cases seeking annulment of *kyōgi rikon* are sought annually.<sup>151</sup> As lawyer Mikiko Otani notes, “Foreigners, in particular those with ‘spouse of Japanese national’ visas, are especially at risk of finding themselves divorced and even vulnerable to deportation due to a falsified *kyōgi rikon* filed by their Japanese spouse.”<sup>152</sup>

The standard mechanism for assuring compliance in a foreign jurisdiction with a court order setting out the terms of visitation is to simultaneously obtain a ‘mirror order’ in the foreign jurisdiction.<sup>153</sup> In Japan, however, all that matters is the family registry, and the only indication of the existence of such a foreign order is a checked box on the divorce notification, showing that established. If the foreign spouse seeks enforcement, the Japanese family court can only refer the matter to mediation.<sup>154</sup>

#### IV. The ‘Emerging Jurisprudence’ of the Abduction Convention

##### A. Domestic Violence

As set out in Part II, the majority of abducting parents, contrary to the expectations of the drafters, are in fact custodial mothers. As Professor Weiner explained in her groundbreaking article, *International Child Abduction and the Escape from Domestic Violence*,<sup>155</sup> many of these women are fleeing domestic violence. The Abduction Convention recognizes that notwithstanding a wrongful removal, the return of a child may be refused if the defendant can establish “that there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” under Article 13(b).<sup>156</sup> But courts have not found that violence toward the *mother*

---

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See Jeremy D. Morley, *The Impact of Foreign Law on Child Custody Determinations*, 10 J. CHILD CUSTODY 209, 224 (2013) (describing a mirror order).

<sup>154</sup> See *supra* Part III.B (describing “custody” in Japan).

<sup>155</sup> Merle Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000).

<sup>156</sup> Convention on the Civil Aspects, *supra* note 3, art. 13(b); see, e.g., *Blondin v. Dubois*, 189 F.3d 240, 247 (2d Cir. 1999) (recognizing that “grave risk” could be shown

necessarily presents such a risk to the child.<sup>157</sup> Rather, there must be a showing of actual psychological or other harm to the *child* and, crucially, the inability or unwillingness of the court in the country of habitual residence to protect the child.<sup>158</sup>

Commentators have criticized the Abduction Convention regime for failing to explicitly take domestic violence into account.<sup>159</sup> While the possibility of a protocol to amend the treaty has been raised, meetings of the Special Commission, strongly supporting reliance on 13(b) in domestic violence cases<sup>160</sup> suggest that a protocol may not be necessary. In view of the practical obstacles to amending or modifying a multilateral treaty as set out in Section B., below, such support may serve as a welcome alternative. Another option, also set out below, is to amend domestic law.

### *B. Modifying Treaties*

First, a treaty addressing family law is qualitatively distinguishable from other private international law treaties and requires a different approach. Second, more specifically, other state parties have enacted domestic laws, including *ne exeat* laws, which effectively give the non-custodial spouse the unilateral right to veto the relocation of the custodial spouse. These laws, moreover, operate to impose a presumption that ongoing contact with both parents is in the best interests of a child, notwithstanding domestic presumptions, like Japan's, to the contrary. Those states, including the United States in *Abbott*, have effectively legitimated the use of domestic law to further domestic norms in Hague proceedings, and should not condemn Japan for doing the same.

---

by finding that the father has physically abused the mother, "often in the children's presence, and that he also had beaten [his daughter]").

<sup>157</sup> See *Friedrich v. Friedrich*, 78 F.3d 1060, 1067–68 (6th Cir. 1996) (describing an instance where the father abused the mother but there was no evidence the father abused the child).

<sup>158</sup> See *id.* ("If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to respond accordingly.").

<sup>159</sup> See, e.g., Weiner, *supra* note 155, at 599 (discussing "the minimal legal relevance domestic violence has to a Hague Convention proceeding").

<sup>160</sup> *Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ¶ 129 (Nov. 2011), <http://www.hcch.net/upload/wop/abduct2012pd14e.pdf> [<https://perma.cc/HD3D-KJ2A>].

### 1. *A Cumbersome Process*

Multilateral treaties like the Abduction Convention are extraordinarily hard to modify or amend.<sup>161</sup> Under Article 40 of the Vienna Convention on the Law of Treaties, amendment requires the same participation, negotiation, and ratification as that required for a new treaty.<sup>162</sup> Modification, in which a subset of the original states parties agrees to change some of the provisions of the treaty as it operates among themselves, may be less onerous, but in the context of the Abduction Convention it would complicate what is supposed to be an efficient and straightforward regime. It would also undermine the development of any global jurisprudence.<sup>163</sup>

But such a global jurisprudence does not preclude recognition of the diverse approaches of states parties to custodial rights, as the drafters of the Abduction Convention understood. As Justice Stevens observes in his cogent dissent in *Abbott*:

The Court believes that the views of our sister signatories to the Convention observe special attention when, in a case like this, “Congress has directed that ‘uniform international interpretation’ of the Convention is part of the Convention’s framework.” . . . This may well be correct, but we should not substitute the judgment of other courts for our own. . . . And the handful of foreign decisions the court cites . . . provide insufficient reason to depart from my understanding of the meaning of the convention, an understanding shared by many U.S. Courts of Appeals.

I also fail to see the international consensus—let alone the “broad acceptance”—that the Court finds among those varied decisions from foreign courts that have considered the effect of a similar travel restriction within the Convention’s remedial scheme. The various decisions of the international courts are, at best, in equipoise. Indeed, the Court recognizes that courts in Canada and France have concluded that travel restrictions are not “rights of custody” within the meaning of the Convention.<sup>164</sup>

---

<sup>161</sup> See Chandra Zdenek, Comment, *The United States Versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance*, 16 SAN DIEGO INT’L L.J. 209, 257 (2014) (arguing that amendment would be feasible).

<sup>162</sup> Vienna Convention on the Law of Treaties art. 40, May 23, 1969, 1155 U.N.T.S. 331.

<sup>163</sup> Zdenek, *supra* note 161, at 257–58.

<sup>164</sup> *Abbott v. Abbott*, 560 U.S. 1, 43–44 (2010).



Professor Weiner suggests another alternative, looking to the object and purpose of the treaty.<sup>165</sup> This thoughtful proposal is not without appeal, but it is probably unworkable.

## 2. Domestic Laws as an Alternative

Globalization notwithstanding, the world remains complex. Differences are particularly sharp in the context of family law, as opposed to business law, for example. Modification or updates to family law conventions are particularly problematic for precisely this reason.<sup>166</sup> Some states parties have addressed this by changing their own law.<sup>167</sup> Thus, the replacement of the drafters' assumption of diverse criteria by the notion that it is in the child's best interest to have contact with both parents has been accompanied by preemptive domestic laws equating *ne exeat* rights with rights of custody.<sup>168</sup> Japan's implementing legislation can be understood as a similar effort to reconcile international obligations and national norms.

### a. *Ne Exeat* Clauses

The issue in *Abbott*, decided May 17, 2010, was whether a *ne exeat* right was a right of custody under the Abduction Convention.<sup>169</sup> The British father and American mother moved to Chile with their son in 2002.<sup>170</sup> In 2003, the parties separated and the Chilean court granted the mother sole custody and the father visitation.<sup>171</sup> Under Chilean law, once visitation was awarded, the father's authorization was automatically required before the child could be taken out of the country.<sup>172</sup> In 2005, while litigation was pending, the mother took her son to Texas, where she filed for

---

<sup>165</sup> See Weiner, *supra* note 118, at 293–294 (“A purposive construction, in contrast, requires that the decision-maker examine the ‘object and purpose’ of a treaty at the outset of the analysis.”).

<sup>166</sup> See *id.* at 279 (“[T]reaty amendment is a difficult, if not impossible, process.”).

<sup>167</sup> See *Conclusions and Recommendations*, *supra* note 160 (describing how states like the United Kingdom and Switzerland have changed their own laws).

<sup>168</sup> See, e.g., *Abbott*, 560 U.S. at 1–2 (holding that in the United States “a parent has a right of custody under the Convention by reason of that parent’s *ne exeat* right”).

<sup>169</sup> *Id.* at 5.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 6.

<sup>172</sup> *Id.*

divorce in state Court.<sup>173</sup> The father filed suit in federal Court, seeking the return of his son under the Convention and the implementing legislation.<sup>174</sup> The District Court denied relief, holding that a *ne exeat* right was not a right of custody and the Fifth Circuit Court of Appeals affirmed.<sup>175</sup> Three other Circuit Courts agreed, but the Eleventh Circuit did not.<sup>176</sup>

The Supreme Court granted certiorari to resolve the issue.<sup>177</sup> The Court looked to the text of the Abduction Convention, the views of the State Department, decisions of foreign courts, and the purposes of the Convention to conclude that a *ne exeat* right constituted a right of custody.<sup>178</sup> Since custody, as defined under the Convention, includes the right to determine the child's place of residence, the Court reasoned that the *ne exeat* right, which gave the father a veto, amounted to "decision-making authority regarding a child's relocation" and was thus a right of custody.<sup>179</sup> International lawyers were pleased with the decision.

In an ASIL Insight, Paul Stephan noted with approval that, "the majority . . . emphasizes the systemic interests of treaty partners, as expressed through foreign court decisions, scholarly work organized by international bodies, and the views of the U.S. Department of State."<sup>180</sup> Family lawyers, however, were dismayed.<sup>181</sup> As set out in the Amicus Brief of Eleven Law Professors (Amicus Brief), the majority conflated a right of visitation, which is all the father had, with a right of custody, which is required before return is possible under the Convention.<sup>182</sup> By holding that a parent with the right of visitation had a right of return, the Court ordered the return of the child to a country where he had

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 7.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 9–22.

<sup>179</sup> *Id.* at 7.

<sup>180</sup> Paul B. Stephan, *Abbott v. Abbott: A New Take on Treaty Interpretation by the Supreme Court*, AM. SOC'Y INT'L L. INSIGHTS (Aug. 4, 2010), <https://www.asil.org/insights/volume/14/issue/24/abbott-v-abbott-new-take-treaty-interpretation-supreme-court> [<https://perma.cc/LV5Q-BYRU>].

<sup>181</sup> See Brief of Eleven Law Professors as Amici Curiae in Support of Respondent at 14–16, *Abbott v. Abbott*, 560 U.S. 1 (2010) (No. 08-645).

<sup>182</sup> *Id.*

no custodial parent.<sup>183</sup> Professor Stephan characterized the dispute between the *Abbott* majority and the dissent as an abstract conflict between “international cooperation” and “national sovereignty.”<sup>184</sup> The family law professors, in contrast, characterized it as a dispute between a custodial mother and a father who sought the prerogatives of custodial responsibility, without the obligations.<sup>185</sup>

The majority in *Abbott* assumes that parents have equal custodial rights. As Professor Silberman observed in 2011, “Because courts and legislators in numerous countries have taken seriously the psychological studies that emphasize the need for a child to have a continuing relationship with both parents, legal regimes have often made a custodial parent’s ability to relocate contingent upon the consent of the non-custodial parent, with a possible judicial override . . . .”<sup>186</sup> As noted in the *Dyer Report*, however, psychological studies have also supported a “psychological parent” presumption,<sup>187</sup> in which the parent who has had primary caregiving responsibility (typically the mother) is granted custody.<sup>188</sup> The shift to a “best interest of the child” standard, in which there is a continuing relationship with both parents (resulting in some form of joint or shared custody), may be better attributed to well-organized fathers’ rights movements than to any consensus among international psychologists, psychoanalysts, social workers, and counselors.<sup>189</sup>

#### *b. Japan’s Implementing Legislation*

Implementing legislation in general, and Japan’s implementing legislation in particular, must be interpreted in the context of the very limited mechanisms available for amending, or updating, a treaty. There is no need for a protocol to raise the issue of domestic violence as a defense in Japan. Prior to ratifying the Abduction

---

<sup>183</sup> See *id.* at 12–16.

<sup>184</sup> Stephan, *supra* note 180.

<sup>185</sup> See Brief of Eleven Law Professors, *supra* note 181, at 10–12.

<sup>186</sup> Silberman, *supra* note 133, at 736.

<sup>187</sup> JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17–20 (1979).

<sup>188</sup> See *id.*

<sup>189</sup> See generally *Dyer Report*, *supra* note 4, at 24 (explaining why no attempt is made to apply the theories and insights of child psychologists and psychiatrists to ascertain a child’s “susceptibility” to abduction).

Convention, Japan passed legislation explicitly taking domestic violence into account.<sup>190</sup> Under the recent Japanese law, domestic violence (including harsh words) may itself amount to a ‘grave risk’ under the Abduction Convention.<sup>191</sup>

As set out in Japan’s implementing legislation, if an Article 13(b) exception is claimed, the court shall consider:

- (i) Whether or not there is a risk that the child would be subject to the words and deeds, such as physical violence, which would cause physical or psychological harm (referred to as “violence, etc.” in the following item) by the petitioner, in the state of habitual residence,
- (ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child if the respondent and the child entered into the state of habitual residence,
- (iii) Whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence . . . .<sup>192</sup>

Under the Japanese legislation, accordingly, violence threatening the abducting parent as well as violence presenting a risk to the child must be taken into account.<sup>193</sup> Nor is the threat limited to a physical threat; “words” may suffice.<sup>194</sup> Finally, even if neither the parent nor the child is at risk of “violence, etc.” the court must consider “whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence . . . .”<sup>195</sup> As Professor Jones characterizes the Japanese legislation, these are “whale-size caveats.”<sup>196</sup> This may well be the most lenient standard for Article 13(b) proceedings in the world.

<sup>190</sup> See generally Act on the Prevention of Spousal Violence and the Protection of Victims, Law No. 31 of 2001 (Japan) (criminalizing spousal abuse and other forms of domestic violence in Japan).

<sup>191</sup> See *supra* Part IV.B.1.

<sup>192</sup> Act for Implementation of the Convention on the Civil Aspects of International Child Abduction, Law No. 48 of 2013, ch. 3, § 1, art. 28 (Japan).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Colin P.A. Jones, *Expectations Low as Hague Signing Approaches*, JAPAN TIMES (Feb. 21, 2012), <http://www.japantimes.co.jp/community/2012/02/21/issues/expectations-low-as-hague-signing-approaches/#.Vtehpm4HR0> [https://perma.cc/3W79-9TEM].

The manual drafted to accompany the implementing legislation similarly favors the Japanese parent.<sup>197</sup> Prior to ratification, the Japanese parliament passed legislation authorizing a court-appointed officer to “forcibly retrieve a child abducted or retained by a parent residing in Japan in defiance of an overseas custody ruling . . . who refuses to hand over the child.”<sup>198</sup> The Supreme Court then issued a detailed Manual for court-appointed administrators on “how to retrieve children in parental cross-border abduction cases under the Hague Convention, minimizing the use of force to avoid traumatizing the kids . . . .”<sup>199</sup> The Manual says that administrators “should take utmost consideration” to protect the interests of the child.<sup>200</sup> The Manual directs the officer to attempt to take custody of the child at her home, in private, in a place “the child feels safe.”<sup>201</sup> Seizing a child in a day care center or on a street may traumatize the child, the Manual warns.<sup>202</sup>

If an officer is told that the child is not present, the Manual instructs the officer to call out the child’s name and check for the presence of the child’s belongings.<sup>203</sup> The use of force is strictly limited.<sup>204</sup> If the child cries or refuses to leave, for example, the officer cannot forcibly remove the child.<sup>205</sup> In the case of an infant, the Manual allows the officer to remove the baby from the crib “with the parent’s consent.”<sup>206</sup> But the “the officer must not try to forcibly take custody of an infant if the parent is hugging it tightly to prevent such action.”<sup>207</sup> Without the cooperation, or at the very least, the acquiescence of the custodial parent and the child, the child cannot be removed.<sup>208</sup> As this suggests, even though Japan

---

<sup>197</sup> See Magdalena Osumi, *Manual Issued for Hague Treaty Child Retrievals*, JAPAN TIMES (Aug. 10, 2013), <http://www.japantimes.co.jp/news/2013/08/10/national/crime-legal/supreme-court-manual-lays-out-procedures-for-hague-treaty-child-retrievals/#.VtekTpM4HR0> [<https://perma.cc/L4C5-WFQ>].

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See *id.*

has become a party to the Abduction Convention, and passed domestic implementing legislation, a foreign father seeking relief still faces formidable obstacles.<sup>209</sup>

### *C. Relocation After Divorce and the Problem of Bad Faith*

This section discusses the increasingly common scenario of a custodial mother seeking to relocate after divorce and the father seeking to prevent her from doing so, mostly because he fears losing access to their children.<sup>210</sup> As Professor Jones observes,

Since most takings are by mothers who are the primary caregivers, a request for a return order is often by a father who may actually be willing to accept the mother's relocation as long as he continues to have a meaningful relationship with his children—something that could often have been provided for if the mother had first asked a court in the child's home country for consent to an international relocation.<sup>211</sup>

These can be difficult cases. Where they arise within a single country, like the United States, or a unified region like Europe, in which the laws of the states regarding custody and visitation are harmonized and enforceable across state lines, these problems are not insurmountable. But the construction of the *ne exeat* clause in *Abbott*, along with the understandable wariness of counsel post-*Abbott*, and the serious problems still faced by non-custodial parents seeking access in Japan, are not conducive to the mutual good faith required to make such an arrangement work.<sup>212</sup> Nor are the mirror

---

<sup>209</sup> This is not new, of course, nor limited to Japanese/Western divorces. See Pérez-Vera, *supra* note 13.

[I]t must not be forgotten that it is by invoking “the best interests of the child” that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

*Id.* art. 22.

<sup>210</sup> See Jones, *supra* note 196.

<sup>211</sup> *Id.* But see *supra* Part II.A (describing Chie Kawahzta's petition).

<sup>212</sup> See Yaffa Frederick, *Japan's Child Abduction Laws in Limbo*, WORLD POL'Y BLOG (Mar. 6, 2014), <http://www.worldpolicy.org/blog/2014/05/06/japans-child->

orders or other mechanisms used as a substitute for good faith likely to be effective.

As Professor Silberman notes, the *Abbott* decision “will obviously strengthen restrictions on relocation.”<sup>213</sup> The resulting burden on the custodial parent is at odds with the ALI Principles, which allow a parent having primary custodial responsibility to relocate where there is a valid purpose, the relocation is in good faith, and the location is reasonable in light of the purpose.<sup>214</sup> The current trend seems to permit greater freedom to the parent with primary custody.<sup>215</sup> This is consistent with both the notion that custodial arrangements should reflect pre-divorce custodial responsibilities and the growing appreciation for the difficulties of primary caregivers.<sup>216</sup> They cannot take care of their children, or themselves, without support from their own families, and their own culture. If the parties shared parenting responsibilities before the divorce, of course, the parent seeking to block the relocation has a stronger claim. But in most cases involving a Japanese mother and a foreign father, the mother has been the primary caregiver.<sup>217</sup> Like Noriko Savoie,<sup>218</sup> many may well have moved to accommodate their spouses’ employment, and, as newly single parents, find it hard to cope with a foreign language and culture, and limited employment opportunities.<sup>219</sup> The burden of traveling in order to enjoy visitation with his child, in contrast, may not be that onerous for the father.<sup>220</sup>

Restrictions on relocation may contribute to the desperation of a Japanese mother in a state with a preference for joint custody.<sup>221</sup>

---

abduction-laws-limbo [<https://perma.cc/KE8J-4HWB>].

<sup>213</sup> Silberman, *supra* note 133, at 740.

<sup>214</sup> See Sally Adams, *Avoiding Round Two: The Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 FAM. L.Q. 181, 185–87 (2009).

<sup>215</sup> *Id.* at 187–88.

<sup>216</sup> *Id.* at 188.

<sup>217</sup> Sarah Netter & Abbie Boudreau, *Abducted to Japan: Hundreds of American Children Taken*, ABC NEWS (Feb. 16, 2011), <http://abcnews.go.com/International/abducted-japan-hundreds-american-children-retained/story?id=12898351> [<https://perma.cc/483H-JMVV>].

<sup>218</sup> See *supra* Part II.A.

<sup>219</sup> See Frederick, *supra* note 212.

<sup>220</sup> See Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1750–51 (2007) (urging courts to take the noncustodial parent’s mobility into account in relocation disputes).

<sup>221</sup> *Id.* at 1787–92.

Abduction may well be the only alternative to a life of ongoing turmoil and stress, shuttling the child between parents and homes. The Japanese mother, meanwhile, is alone in a foreign country, far from any family support. Even if she later relents, and considers allowing the child to visit her father, compromise may be impossible where the mother risks loss of custody, stiff financial penalties, and even prison should she return to the United States.<sup>222</sup>

Nor, despite *Abbott*, is a Japanese mother likely to have a wrongfully removed child returned under the Abduction Convention. As explained in a recent article by a trio of international family lawyers, *The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention*, “The United States is a refuge state for child abductors; in the United States, the abductor almost always wins.”<sup>223</sup> First, a left behind mother has to know where the father and child are.<sup>224</sup> If she does not know about the procedure under the Abduction Convention, it is a matter of luck whether the state lawyer whom she hires will.<sup>225</sup> Instead, a family lawyer may well treat the matter like a domestic relocation case.<sup>226</sup>

So, knowledgeable counsel is unlikely to advise a father to agree to a relocation request by his Japanese wife, because of the legal quagmire awaiting left-behind fathers in Japan. At the same time, knowledgeable counsel is unlikely to advise a Japanese mother to allow the child to visit her father in the United States, because of the similarly daunting obstacles she will face if the child is not returned.

## V. Conclusion

Part II of this Article has described the increase in international marriages, and international divorce, between Japanese women and foreign men. It also explained the inversion of the drafters’ premise in this context; i.e., the drafters of the Abduction Convention assumed that the abductor was the dominant spouse, the spouse with the resources and the gumption to defy the court. But this is rarely

---

<sup>222</sup> See, e.g., *supra* Part II.A (discussing the Savoie’s divorce).

<sup>223</sup> Andrew A. Zashin et al., *The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention*, 28 J. AM. ACAD. MARTRIMONIAL LAW. 249, 249 (2015).

<sup>224</sup> *Id.* at 259.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*



the case where the mother is the abductor, and virtually unheard of where a Japanese mother is the abductor. Although Japan's ratification of the Abduction Convention in 2014, and the passage of ICAPRA in the United States the same year, were both viewed as welcome, long-sought reforms by left-behind parents, their results to date have been disappointing. It is hard to understand how anyone could have expected otherwise, in view of the Japanese approach to the family and family law.

As set out in Part III, Japan leaves the details of family life to be resolved by the members of the family, at the dissolution of the marriage as well as during the marriage. When the parties are unable to agree, a protracted, drawn-out mediation process is triggered. The result of the mediation itself remains private, between the parties. The only indication that terms of child support and visitation have been agreed, or ordered by a court, is a checked box on the divorce form filed in the family registry.

Part IV explained that the 'emerging jurisprudence' of the Abduction Convention has not been as uniform as some may have hoped. Rather, as lawyers representing mothers in Japan and fathers in the United States have found, their only common ground may be their shared distrust of foreign legal systems.