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What Do Courts Do Now? The Effects and Potential Solutions in the Aftermath of *Chafin v. Chafin*, 133 S. Ct. 1017 (2013)

Sarah J. Kniep

University of Nebraska College of Law

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What Do Courts Do Now?: The Effects and Potential Solutions in the Aftermath of *Chafin v. Chafin*, 133 S. Ct. 1017 (2013)

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I. INTRODUCTION

With the ease of international communication and travel, marriages between foreign national citizens have increased.¹ Consequently, child custody issues upon a couple's separation or divorce

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* Sarah J. Kniep: JD Candidate, 2015, University of Nebraska College of Law; B.A. University of Nebraska-Kearney, 2012. I would first like to thank my husband, Phil, for his continual encouragement, support, and understanding throughout this entire Note writing process. I would also like to thank the NEBRASKA LAW REVIEW members for their help with developing, editing, and publishing this Note. The entire process has been an extremely challenging and rewarding experience.

1. See PAUL R. BEAUMONT & PETER E. MCCLEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 3 (1999).

have also run rampant as one parent takes the child and flees to a foreign nation.² Each year, over one thousand children are parentally abducted to or from the United States alone.³ The 1980 Hague Convention on Civil Aspects of International Child Abduction (1980 Hague Convention or Convention) was created to develop a solution to this rapidly growing problem.⁴ In the company of over eighty nations,⁵ the United States became party to the Convention in 1988, and that same year it implemented the International Child Abduction Act (ICARA).⁶ However, the Convention is silent on numerous jurisdictional issues, such as an appeal of a return order after the child has already returned to the foreign nation, leaving each country to its own interpretation. The United States Supreme Court attempted to clarify this issue in its decision in *Chafin v. Chafin*.⁷

In order to comprehend the complexity of the issue at stake for this case and the outcome of future cases, the Convention must be fully examined.⁸ *Chafin* addresses the conflict between the Convention's stated goals of quick judicial resolution while avoiding competing judicial resolution in different countries or, even worse, parents fleeing to another country with more favorable custody laws.⁹ This is a source of controversy both within the United States and other international countries party to the Convention. However, there are significant weaknesses in the *Chafin* decision.

The *Chafin* case illustrates the need for uniformity in an expedited appeals process that will ensure the proper recourse for a losing parent, while also enabling finality and stability for the child. As a starting point in implementing more effective procedures on an appeal, this Note suggests that courts should adopt a comparative law approach. Such an approach will enable a court's final decision, including an appellate decision, to be made within six weeks. It is crucial that all courts adhere to a more uniform standard in order to ensure the best

2. OFFICE OF CHILDREN'S ISSUES, U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2010), archived at <http://perma.unl.edu/7KLJ-EBY9>.

3. *Id.* at 14.

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct 25, 1980, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter 1980 Hague Convention].

5. *Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Apr. 10, 2014), archived at <http://perma.unl.edu/BU7G-962B>.

6. International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 22 U.S.C. §§9001-9011 (2012)) [hereinafter ICARA].

7. 133 S. Ct. 1017 (2013).

8. *See infra*, subsection II.A.1 (discussing the Convention's purposes and provisions).

9. *See infra*, subsection II.B.2.

interest of the child and cooperation among the other foreign nations involved in the disputes.

This Note begins in Part II with the history and development of the 1980 Hague Convention and discusses the intricacies of the international attempt to regulate parental child abductions. Further, Part II introduces the U.S. circuit court split regarding whether the losing parent has the right to stay the proceedings while perfecting an appeal. As this Note explains, such an unpredictable judicial process within different jurisdictions of the United States frustrates the overall purpose of the 1980 Hague Convention, impeding a foreign court's ability to take the case and offer finality to the parents and children involved. Finally, Part II introduces the *Chafin* decision, which ultimately decided that, according to the right to due process of law under the U.S. Constitution, a parent who loses the right to custody at the trial level has the right to an appeal. Part III analyzes the *Chafin* decision, discussing the benefits of having a conclusive structure to deal with 1980 Hague Convention appeals within the United States, while also pointing to several issues that must be resolved before the international system can become a fluid and cohesive unit. Ultimately, this Note suggests that while legislative action would be the most effective means of change, the courts cannot wait for lawmakers to act; they must have a plan to expedite procedures for the benefit of the families involved in such international custody disputes. It is imperative that the U.S. circuits have a plan of attack as the problem of international custody disputes shows no signs of decreasing.

II. BACKGROUND

A. The Hague Convention: Purposes and Provisions

The discussion of whether an appeal should be granted must first begin with the 1980 Hague Convention, which is the source of authority over international child abduction cases. In 1988, the United States implemented legislation to adopt the 1980 Hague Convention, with ICARA.¹⁰ The Convention serves several key purposes. First and foremost, the Convention promotes the consideration of the best interest of the child above all else.¹¹ As one report explains, the Convention's philosophy realizes "the struggle against the great increase in international child abductions must always be inspired by the de-

10. ICARA, *supra* note 6. ICARA is effectively a mirror image of the Convention.

11. The Preamble of the 1980 Hague Convention states clearly that the states ratifying the treaty are, first, "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody," and, second, "[d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." 1980 Hague Convention, *supra* note 4, at pmb1.

sire to protect children and should be based upon an interpretation of their true interest.”¹² Second, the Convention seeks to eliminate the attractive temptation for one parent to flee to a foreign nation to access more favorable custody laws.¹³ The Convention provides an avenue by which two foreign nations can return the wrongfully removed child to the country of habitual residence as swiftly as possible.¹⁴ The Convention emphasizes the importance and necessity of both speed and finality in the decision.¹⁵ Lastly, both of the foregoing goals necessitate the final purpose of promoting cooperation and deference between the two foreign nations.¹⁶ Without judicial deference or cooperation, the orders within one nation would be meaningless, and a final decision would be nearly impossible. Thus, this final purpose is gravely important to the Convention’s core goals.

The Convention is triggered when a child is wrongfully removed to or retained in a foreign country,¹⁷ effectively giving a parent the abil-

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12. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426, ¶ 24 (1982) [hereinafter, Pérez-Vera Report], archived at <http://perma.unl.edu/5J63-XNCZ>. The report further states:

[T]he true victim of the childnapping [sic] is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.

Id. at 432 (internal quotation marks omitted).

13. 1980 Hague Convention, *supra* note 4, at art. 1(a).
14. *Id.* The Convention also provides limited exceptions to the return of a child. *Id.* at arts. 13, 20. The exception to return applies when: (1) the parent with legal custody rights was either not exercising that right when the child was removed or retained, or had agreed to the removal or retention; (2) a grave risk of a physical, psychological, or other harm exists upon return; (3) the child is old enough and mature enough to object to the return. *Id.* One other exception is available when the return “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” *Id.* at art. 20.
15. See 1980 Hague Convention, *supra* note 4, arts. 1, 2, 7, 11. The Convention specifically states that expeditious proceedings must be taken by the Contracting State and that a decision should be rendered within six weeks from the beginning of the proceedings. *Id.* at art. 11.
16. 1980 Hague Convention, *supra* note 4, art. 1 (stating the Convention’s goals are “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States”); see also Pérez-Vera Report, *supra* note 12, ¶ 35 (“Thus, the Convention on the Civil Aspects of International Child Abduction is above all a convention which seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States.”).
17. 1980 Hague Convention, *supra* note 4, art. 3 (defining wrongful removal or retention of a child when “it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention”).

ity to seek a return order for the child within the judicial or administrative system where the child is located.¹⁸ However, the Convention maintains no authority to decide the merits of custody rights.¹⁹ Once an order to return has been granted, custody proceedings begin in the country of habitual residence.²⁰ The country issuing the order, therefore, gives up jurisdiction of the matter completely.

The Convention and ICARA are both silent in regard to issuing stays in a Convention case.²¹ Thus, significant issues arise when a parent wishes to appeal a return order after both the denial of a stay and the child's physical return to the habitual residence. Is the case rendered moot upon the child's return to the habitual residence? Which country has jurisdiction over the matter? The 1980 Hague Convention does not address matters of appeals,²² thus, countries are left to their own interpretation on how to implement the goals of the Convention²³ with an appropriate appellate procedure.

B. Circuit Split on Issue of Mootness

When deciding whether to stay an order, federal courts must use the general law.²⁴ Courts use four general factors to determine when to allow an issuance of a stay:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.²⁵

The factors do not all have to be present in the case. In practice, courts generally find that a stronger showing on one factor will have

18. 1980 Hague Convention, *supra* note 4, art. 8.

19. 1980 Hague Convention, *supra* note 4, art. 19.

20. 1980 Hague Convention, *supra* note 4, art. 16 (declaring that the country to which the child has been removed or retained "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice").

21. A stay is the suspension, postponement, or halting by the court of a judicial action.

22. The Convention does state "[w]here the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay proceedings or dismiss the application for the return of the child." 1980 Hague Convention, *supra* note 4, art. 12. However, this article addresses original return orders and not those on appeal. Furthermore, the direction to stay or dismiss, even in a return order, is not mandatory, as the provision states the State *may* stay or dismiss, not *must*. Thus, whether or not an appeal should be granted after a child has returned is left for the discretion of the States.

23. 1980 Hague Convention, *supra* note 4, at preamble, art. 1.

24. FED. R. CIV. P. 62(c).

25. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

the effect of balancing out weaker factors.²⁶ With cases under the Convention specifically, one court explained:

Staying the return of a child in an action under the Convention should hardly be a matter of course. The aim of the Convention is to secure prompt return of the child to the correct jurisdiction, and any unnecessary delay renders the subsequent return more difficult for the child, and subsequent adjudication more difficult for the foreign court.²⁷

This cautionary note created a reaction within the circuits about the effect of a denial of a stay. The Eleventh Circuit held that an appeal of a denial of a stay was considered moot, while the Third and Fourth Circuits decided the opposite.²⁸

1. *Bekier v. Bekier*

The Eleventh Circuit was the first to provide a holding on the issue of mootness on an appeal of a return order under the 1980 Hague Convention, in *Bekier v. Bekier*.²⁹ Because the court was deciding an issue of first impression, it had trouble finding supportive case law. But the court ultimately determined that an appeal of a return order after the child had physically returned was considered moot.³⁰

In the case, Mr. Bekier and Ms. Bekier were awarded joint and legal custody of their only child, Jonathan.³¹ Mr. Bekier obtained written permission from Ms. Bekier to take their son to Israel in order to become temporary residents.³² Mr. Bekier filed a claim for custody of his son in an Israeli court while Ms. Bekier was visiting, and was granted permanent custody.³³ Shortly after, Ms. Bekier fled with their son and eventually relocated to Florida, while Mr. Bekier was left without knowledge of his son's whereabouts.³⁴

After a private investigator located his ex-wife and son in Florida, Mr. Bekier filed a petition for a return under the 1980 Hague Convention and ICARA.³⁵ The Florida District Court determined that the son was wrongfully removed from Israel, his country of habitual residence, and issued an order that the child be returned to Israel with Mr. Bekier.³⁶ Ms. Bekier was awarded a conditional stay if she filed

26. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2004) (treating the application of the factors "somewhat like a sliding scale").

27. *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996).

28. *See infra* text accompanying notes 29–63.

29. 248 F.3d 1051 (11th Cir. 2001), *abrogated by* *Chafin v. Chafin*, 133 S. Ct. 1017 (2013).

30. *Id.* at 1056.

31. *Id.* at 1052.

32. *Id.*

33. *Id.* at 1052–53.

34. *Id.* at 1053.

35. *Id.*

36. *Id.*

an appeal within ten days and posted a \$100,000 bond.³⁷ Ms. Bekier timely appealed but did not post the bond, and Mr. Bekier and the child returned to Israel.³⁸ The Eleventh Circuit, however, held that because the child had already returned to Israel, the United States no longer had jurisdiction and the case was moot.³⁹

The court rested its decision on cases where the courts literally had no physical ability to grant effective relief at all.⁴⁰ Using these cases as guidance, the court determined that no relief could be granted since the primary relief had already been granted after Jonathan had returned to Israel.⁴¹ The court stated it had “no authority to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case.”⁴² In dicta, the court noted, “We suppose we would have jurisdiction if [their son] had remained in the United States, either under court order or for other reasons.”⁴³ The court did admit that the “decision [to render the case moot] to some degree conflicts with the purposes of the 1980 Hague Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum and to return children to their habitual residence in a timely fashion.”⁴⁴ However, the Eleventh Circuit ultimately dismissed this concern with the trump card: the doctrine of mootness.⁴⁵ This decision set the stage for controversy.

37. *Id.*

38. *Id.*

39. *Id.* at 1054.

40. See *Westmoreland v. Nat'l Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987) (finding the case moot because the original relief of reinstating a pilot's license had already been granted); *B&B Chem. Co., Inc. v. U.S. E.P.A.*, 806 F.2d 987, 989 (11th Cir. 1986) (finding that a challenge to a warrant was moot on appeal because the warrant had already been executed); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984) (dealing with a bankruptcy case in which a stay had not been issued and the disputed property was already sold, leaving the court powerless to grant any form of relief).

41. *Bekier*, 248 F.3d at 1054. The court specifically states that because of the failure to obtain a stay, “we became powerless to grant the relief requested[,] . . . so we must dismiss this appeal” as moot. *Id.* at 1055.

42. *Id.* at 1054 (internal quotation marks omitted).

43. *Id.* at 1055.

44. *Id.* The court also discussed Mr. Bekier's argument that under the Sixth Circuit guidance in *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996), stays should not be granted as a matter of course under the 1980 Hague Convention. *Id.* at 1055. It dismissed this argument, noting that “this dicta by the Sixth Circuit does not address the court's jurisdiction or the possibility that a child's exit from the United States pending appeal, even if the exit is made with the district court's permission, renders the appeal moot.” *Id.*

45. *Id.*

2. *Fawcett v. McRoberts*

Two years after the *Bekier* opinion, the Fourth Circuit held that an appeal was not considered moot and the United States maintains jurisdiction even after the child has returned to the habitual residence.⁴⁶ The facts of the case are similar to those in *Bekier*: Mr. McRoberts and Ms. Fawcett were married in Scotland in 1986, and had two children, only one of whom was at issue in this case.⁴⁷ After their divorce in 1998, custody proceedings were held in Scotland, and eventually, Ms. Fawcett was granted an order by the same Scottish court preventing Mr. McRoberts from taking their son to the United States.⁴⁸ However, shortly after the decree, Mr. McRoberts took his son and moved to the United States and concealed their whereabouts from Ms. Fawcett.⁴⁹ Upon finding Mr. Fawcett and her son, Ms. Fawcett filed a petition in the United States District Court for the Western District of Virginia under the 1980 Hague Convention and ICARA, and the court granted her petition.⁵⁰ The son was eventually returned to Scotland.⁵¹

Contrary to the Eleventh Circuit, the Fourth Circuit strongly supported the policy to allow an appeal on such matters. The court noted that the “overwhelming majority of other courts have also evidenced their agreement with this position by routinely considering the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child’s presence in a foreign country.”⁵² The court determined that relief could be granted on appeal, for “no law of physics would make it impossible for Ms. Fawcett to comply with an order by the district court that she return [her son] to the United States.”⁵³

46. 326 F.3d 491, 497 (4th Cir. 2003), *abrogated by* *Abbott v. Abbott*, 560 U.S. 1 (2010).

47. *Id.* at 492.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See* *Ohlander v. Larson*, 114 F.3d 1531, 1538–39 (10th Cir. 1997) (finding that just because the child had moved did not render the case moot and if it had accepted such arguments parents would be more likely to escape judgment by taking their children out of the court’s jurisdiction); *Janakasis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (deciding the merits of the appeal even after a child had returned on a court order to the Greece); *see also* *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (reviewing merits of appeal even after child had returned to country of habitual residence); *Dalmasso v. Dalmasso*, 9 P.3d 551 (Kan. 2000) (same); *Sampson v. Sampson*, 975 P.2d 1211 (Kan. 1999) (same); *Harkness v. Harkness*, 577 N.W.2d 116 (Mich. Ct. App. 1998) (same).

53. *Fawcett*, 326 F.3d at 496. In fact, the opinion goes on to solidify that not only would it be possible to grant relief, but “such orders are fully within the district court’s power and are commonly issued in the United States.” *Id.*

The Fourth Circuit concluded that even though the United States might not possess a way to enforce the court order in a foreign nation, the court's decision still "affect[s] the matter in issue" and the case cannot be considered moot.⁵⁴ The opinion methodically waded through the potential outcomes after a re-return had been granted, all of which would "affect the matter at issue."⁵⁵ Thus, the Fourth Circuit held the case was not moot, and effectively created the circuit split on the matter.

3. *Whiting v. Krassner*

The Third Circuit was thus faced with two contrary opinions when deciding *Whiting v. Krassner* in 2004.⁵⁶ The facts of the *Whiting* case are similar in nature to both *Bekier* and *Fawcett*. Ms. Whiting and Mr. Krassner, though never married, had a daughter together in New York in 2000. Within a year, their relationship deteriorated, and they created a custody agreement, which in pertinent part allowed Ms. Whiting to take the daughter to Canada until 2003.⁵⁷ In December 2001, Mr. Krassner came to Canada to spend time with his daughter over the Christmas holiday.⁵⁸ However, Mr. Krassner took their daughter back to New York, without Ms. Whiting's consent.⁵⁹ Ms. Whiting immediately filed a petition under the 1980 Hague Convention for the return of their daughter to Canada.⁶⁰ The court had to consider "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief."⁶¹

However, in its determination, the court rejected the *Bekier* opinion, criticizing its reliance on case law with largely different fact pat-

54. *Id.* (internal quotation mark omitted) (quoting *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992)) ("As an initial matter, it is not at all clear to us that a lack of effective methods for enforcing a court order necessarily means that the court's opinion 'cannot affect the matter in issue.'" (quoting *Church of Scientology*, 506 U.S. at 12)). The order issuing re-return "would permit Mr. McRoberts to appear in the Scottish courts simply to seek enforcement of the United States judgment, rather than re-argue the merits of any custody dispute respecting Travis." *Id.*

55. *Id.* (internal quotation marks omitted). The court reasoned that though the foreign nation may refuse to enforce the order, Ms. Fawcett herself "could comply with the court's order of her own volition." *Id.* And even if she refused to comply, "[s]he could be held in contempt, and penalties could be assessed." *Id.* Finally, Ms. Fawcett might very well return to the United States and "Mr. McRoberts could seek to enforce such an order." *Id.* The court did have power to grant relief, even if noncompliance of the order became an issue. *Id.*

56. *Whiting v. Krassner*, 391 F.3d 540 (3d Cir. 2004).

57. *Id.* at 542.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 544 (citations omitted) (internal quotation marks omitted).

terns,⁶² and adopted the rationale of the Fourth Circuit in *Fawcett*.⁶³ The Third Circuit recognized that “[n]othing has occurred during the pendency of this appeal that makes it impossible for the court to grant any effectual relief whatever.”⁶⁴ Thus, the court in *Whiting* created a majority view within emerging case law regarding mootness of appeal, but the split was an issue that ultimately had to be settled in the United States Supreme Court.

C. *Chafin* Facts and Decision

1. *Facts and Procedural History*

Jeffrey Lee Chafin is a United States citizen and a Sergeant First Class in the United States Army.⁶⁵ He met his wife, Lynne Hales Chafin, a citizen of the United Kingdom, when he was stationed in Germany.⁶⁶ In March 2006, the couple married in Scotland and lived together in Germany.⁶⁷ One year later, their daughter E.C. was born, and several months afterwards Mr. Chafin was deployed to Afghanistan.⁶⁸ During Mr. Chafin’s fifteen-month tour of duty, Ms. Chafin took E.C. to Scotland where both mother and daughter remained despite Mr. Chafin’s return to Germany.⁶⁹ In February 2009, Mr. Chafin was transferred to Huntsville, Alabama, and Ms. Chafin and E.C. joined him in an attempt to find a suitable home.⁷⁰ Ms. Chafin remained in Alabama with Mr. Chafin until late in 2010, when she was arrested for domestic violence.⁷¹ The arrest alerted officials that Ms. Chafin’s visa had expired and she was deported to Scotland in February 2011.⁷²

On May 2, 2011, Ms. Chafin filed a petition in the U.S. District Court for the Northern District of Alabama seeking the prompt return of E.C. to Scotland under the 1980 Hague Convention and ICARA.⁷³

62. *Id.* at 545. The Third Circuit opinion rejected the analysis of *Bekier*, stating that “the court relied on cases in which the actions of the lower court simply could not be undone by the appellate court or in which the appellant had already received the relief he or she was seeking during the pendency.” *Id.* In fact, the Third Circuit further stated that “these cases are inapposite and should not have been controlling because the return of a child under The Hague Convention is still being contended by the losing party and relief can be granted.” *Id.*

63. *Id.* at 545.

64. *Id.* (internal quotation marks omitted).

65. *Chafin v. Chafin*, 133 S. Ct. 1017, 1022 (2013).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* From the time Ms. Chafin left the United States until May 2011, Mr. Chafin was the sole caregiver and provider for their daughter, E.C. *Id.*

73. *Id.*

At that time, a custody proceeding pending in an Alabama state trial court was stayed pending the resolution of the federal suit.⁷⁴ The federal district court held a bench trial on October 11–12, 2011, orally finding in favor of the return of E.C. to Scotland.⁷⁵ Ms. Chafin returned to Scotland with E.C. that same day.⁷⁶ The custody proceedings in Alabama were dismissed for lack of jurisdiction, and Ms. Chafin began custody proceedings in Scotland.⁷⁷ Mr. Chafin timely filed a notice of appeal.⁷⁸

In February 2012, the Eleventh Circuit dismissed Mr. Chafin's appeal as moot, determining that once a child has been returned to a foreign country in compliance with a court order, a United States court becomes powerless to grant relief.⁷⁹ The Eleventh Circuit remanded the case to the District Court with instructions to dismiss the suit as moot and vacate its order.⁸⁰ However, on May 7, 2012, Mr. Chafin petitioned for a writ of certiorari in the Supreme Court of the United States, which was granted on August 13, 2012. On February 19, 2013, the Supreme Court issued its unanimous order to vacate the judgment of the Court of Appeals and to remand the case.⁸¹ From the beginning of the court proceedings until the decision of the U.S. Supreme Court, nearly two years passed, and the case still lacked a final decision.

2. *Majority Opinion*

Writing for the majority in *Chafin*, Chief Justice Roberts rejected the Eleventh Circuit opinion and effectively sided with the Third and Fourth Circuits, granting an appeal even when the child had returned to a foreign country. The Court's analysis was based on several key components: first, whether a case or controversy continued to exist even after E.C.'s return to Scotland; second, whether the Court had sufficient authority to grant relief of a re-return; third, whether either Scotland or Ms. Chafin's refusal to comply with the re-return order rendered the case moot on appeal; and finally, whether the 1980 Hague Convention's goals restricted the authority to hear the case on appeal.

74. *Id.*

75. *Id.* Immediately after the oral ruling, Mr. Chafin moved the district court to stay its order pending appeal, but the court denied his motion. *Id.*

76. *Id.*

77. *Id.* The Scottish court granted Ms. Chafin interim custody and a preliminary injunction, which prohibits Mr. Chafin from taking E.C. out of Scotland. *Id.*

78. *Id.*

79. *Id.* (relying heavily the decision in *Bekier*, the Eleventh Circuit dismissed the appeal as moot in a one paragraph order).

80. *Id.* at 1023.

81. *Id.* at 1028.

Initially, the Court quickly concluded that a live case and controversy undoubtedly existed even after E.C.'s return to Scotland; Mr. Chafin desired custody of E.C. in the United States, while Ms. Chafin was fighting for custody in Scotland.⁸² There was little doubt that an ongoing interest and dispute remained in the case as the main issue of whether E.C. should return to Scotland. Secondly, the Court recognized that an appeals court has sufficient authority to grant relief of a re-return.⁸³ The Court reasoned that Ms. Chafin's argument "confuses mootness with the merits."⁸⁴ Mr. Chafin's claim for the re-return of his child "cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction[,] . . . and his prospects of success are therefore not pertinent to the mootness inquiry."⁸⁵ The relief sought by Mr. Chafin is normal within appellate proceedings. He simply desired the reversal of the lower court's opinion, which is one of the typical types of relief sought in an appeal. The "[j]urisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal."⁸⁶ Even though Mr. Chafin's daughter was no longer in the United States, according to the inherent framework of the United States judicial system, the request for relief remained in the jurisdiction of the appellate court.

Third, Ms. Chafin argued that even if an appeal were allowed and the District Court granted a re-return order, she would ignore the order and relief would ultimately be ineffectual, therefore rendering the case moot.⁸⁷ However, the Supreme Court rejected this logic—and that found in the *Bekier* opinion—and determined that even if Scotland ignored the re-return order, the U.S. courts maintained jurisdic-

82. *Id.* at 1024. The Court recognizes that both parties "vigorously contest the question of where their daughter will be raised" and determines that "there is not the slightest doubt that there continues to exist between the parties 'that concrete adverseness which sharpens the presentation of issues.'" *Id.* (citations omitted) (quoting *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011)).

83. *Id.*

84. *Id.*

85. *Id.* See also *Powell v. McCormack*, 395 U.S. 486, 500 (1969) (stating that the argument confused mootness with the power of the plaintiff to recover, "a question which [the Court] is inappropriate to treat at this stage of the litigation"). In other words, at this point, the Court is not deciding whether to grant a re-return order. Instead, the sole job of the Court is to determine whether live controversy remains. The Court already determined that "there is not the slightest doubt that there continues to exist between the parties that concrete adverseness which sharpens the presentation of issues." *Chafin*, 133 S. Ct. at 1024. Thus, Ms. Chafin's argument that Mr. Chafin will not succeed, are "not pertinent to the mootness inquiry." *Id.*

86. *Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891).

87. *Chafin*, 133 S. Ct. at 1024.

tion over the case.⁸⁸ The Court determined that it was not completely powerless to issue a re-return order, for while the child is still alive, and controversy continues over the case, it is possible to grant a form of relief, even if Ms. Chafin would ignore it.⁸⁹ In general, the Court noted, courts often grant relief even where compliance with the order is uncertain.⁹⁰

The Court finally found that the 1980 Hague Convention's goals promote, rather than restrict, the authority of courts to hear an appeal.⁹¹ If the parties had no opportunity to receive relief after the child had left the country, "courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal."⁹² If courts continually granted stays to children in order to preserve the right to appeal, the 1980 Hague Convention's ultimate goal to pursue best interest of the child would be shattered because they would be forced to stay in a country when they could be "readjusting to life in [their] country of habitual residence, even though the appeal had little chance of success."⁹³ Furthermore, if stays were granted more frequently, the number of appeals would likely increase because parents in a losing situation would file an appeal simply to prolong the return of the child to the foreign country of habitual residence.⁹⁴ Or on the other side of the matter, parents who are granted a return of their child would be likely to immediately comply with the order so as to render the case moot.⁹⁵ Both actions undermine the 1980 Hague Convention's intentions to pursue the best interest of the child.

88. *Id.* at 1025.

89. *Id.* The Court reasoned that the future is unpredictable and it is actually physically possible to grant the relief sought by Mr. Chafin, for "no law of physics prevents E.C.'s return from Scotland." *Id.* Furthermore, the Court reasoned that Ms. Chafin may actually comply with the order and return the child to the United States, but if not, courts have the power to issue sanctions with the parties who refuse to comply with the order. *Id.* In essence, the court maintained the authority to provide effective relief in the case.

90. *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004) (denying Austria's motion to dismiss when a U.S. citizen sought to recover paintings stolen from her family by the Nazis or expropriated by Austria); Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (denying Argentina's motion to dismiss when bondholders brought a suit against the country for repayment of bonds); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (finding that even though defendants had been deported and the impact of the decision was uncertain, the defendants might enter the country by their own accord and subject themselves to the order).

91. *Chafin*, 133 S. Ct. at 1027 ("There is no need to manipulate constitutional doctrine and hold these cases moot. Indeed, doing so may very well undermine the goals of the treaty and harm the children it is meant to protect.").

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

The Court did note that one of the most central goals of the 1980 Hague Convention had not been met, as six-year-old E.C. was still without finality of a decision of habitual residence.⁹⁶ But while the opinion emphasized that expedition of 1980 Hague Convention cases is necessary, the Court indicated that a lack of expeditious court proceedings has no effect on mootness.⁹⁷

3. *Concurring Opinion*

Justice Ginsburg, joined by Justice Scalia and Justice Breyer, concurred in the opinion and offered compelling suggestions for future legislative reformation. First, the opinion noted the incredible importance of complying with the 1980 Hague Convention's main goals to ensure both a speedy return of children and cooperation among the foreign nations.⁹⁸ When disputes involve young children, the lack of expedited procedures produces the potential for some children to spend a large percentage of their lives in legal limbo.⁹⁹ The threat of potential re-return creates instability within the home and judicial system. In order for courts in other countries to respect and implement the decisions of the United States judicial system, finality is crucial.¹⁰⁰

Ginsburg pointed out that the England and Wales judicial system has a method that expedites procedures within a reasonable time frame.¹⁰¹ This creates an environment in which stays are granted more readily, for the entire proceeding generally takes less than several months.¹⁰² Both parents and children are assured that a final decision can be rendered so proper custody proceedings can commence in the country of habitual residence. Finally, Ginsburg urged both leg-

96. *Id.* at 1028 (“Cases in American courts often take over two years from filing to resolution; for a six-year-old such as E.C., that is one-third of her lifetime.”)

97. *Id.* at 1027 (“There is no need to manipulate the constitutional doctrine and hold these cases moot.”). While the Court noted that courts “can and should take steps to decide these cases as expeditiously as possible,” the majority opinion did not address potential solutions to those unfortunate situations in which the courts fail to expedite procedures. *Id.*

98. *Id.* at 1029–30 (Ginsburg, J., concurring). See 1980 Hague Convention, *supra* note 4.

99. *Id.* at 1030 (noting that if children were to wait several years before the finality of their residence was established, it would essentially put their lives in limbo for a substantial amount of their lives to that point).

100. A judge of the Family Division of the High Court of Justice of England and Wales did not consider the re-return order to be binding in light of England's jurisdiction in the matter. *DL v. EL*, [2013] EWHC (Fam) 49, [59] (Judgt. of Jan. 17). The judge reasoned that to prolong the finality of a decision is to risk ineffectual results and a lack of cooperation among the Contracting States.

101. *Chafin*, 133 S. Ct. at 1030 (Ginsburg, J., concurring). See *DL v. EL*, [2013] EWHC (Fam) 49 (proceedings in England describing a swift and final decision-making process).

102. *Chafin*, 133 S. Ct. at 1030 (Ginsburg, J., concurring).

islatures and courts to implement the foreign guidance as it allows for appeals and also disposes of the case as quickly and neatly as possible.¹⁰³

III. ANALYSIS

The *Chafin* decision clarified the case law on 1980 Hague Convention cases, declaring that cases on appeal of a return order are not moot when the child has already returned to the country of habitual residence.¹⁰⁴ In support of its decision, the Court stated that to declare an issue moot would be contrary to the 1980 Hague Convention.¹⁰⁵ However, from the beginning of the proceedings until the Supreme Court decision, nearly two years had passed, and still no final decision had been issued. One of the 1980 Hague Convention's main concerns is for children to be promptly returned to their country of habitual residence.¹⁰⁶ Two years within the legal system without a final holding is far too long.¹⁰⁷ With the ease of international travel and increased parental abductions,¹⁰⁸ the United States has a substantial motivation to promote speedy and final decisions to preserve the best interest of the children involved in the disputes. Not only will prompt resolution of the cases comply with the 1980 Hague Convention's main goal of speed and finality, but also will clear dockets more quickly, ensure greater stability for the children and parents involved, and increase cooperation by the foreign nation. The *Chafin* opinion alone, however, does not give specific guidelines to implement expedited procedures. Strict standards must be implemented and enforced in 1980 Hague Convention court proceedings in order to fully comply with its need for speed.

A. Future Application of *Chafin*

Because of *Chafin*, parents involved in 1980 Hague Convention proceedings within the United States can rest assured that if they are

103. *Id.*

104. *Chafin*, 133 S. Ct. at 1028.

105. *Id.* at 1027 (noting that stays would be issued as a matter of course and "would conflict with the Convention's mandate of prompt return to a child's country of habitual residence").

106. 1980 Hague Convention, *supra* note 4, at arts. 1, 2, 7, 11.

107. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 2010, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, Part IV-Enforcement, § 2.2, at 13 (2010) [hereinafter GUIDE TO GOOD PRACTICE] ("There should be strict time frames for courts to process appeals against return orders. Enforcement proceedings should also be conducted expeditiously."). Furthermore, the guide notes that the expeditious proceedings "also extend[] to appeal procedures." *Id.* at § 2.2, ¶ 51, at 13.

108. OFFICE OF CHILDREN'S ISSUES, U.S. DEPT. OF STATE, *supra* note 2.

the losing party, they have the right to an appeal even after their child leaves the country. Of course, *Chafin* is highly important as it eases concerns where the denial of a stay is concerned or where the winning parent immediately returns to the country with the child. Though *Chafin* is a definite victory for losing parents, in reality, the opinion actually has very little legal significance for parents who wish to actually use an appeals process. Without further implementation of expedited procedures, the opinion is meaningless.

First of all, the majority opinion in *Chafin* briefly touches on the subject of time.¹⁰⁹ Future courts applying the *Chafin* decision on an appeal are left with little guidance except that they “should take steps to decide these cases as expeditiously as possible.”¹¹⁰ This is essentially meaningless. Court proceedings in the United States can take more than two years before a final decision is rendered.¹¹¹ An expeditious proceeding to one court could be determined to be any amount of time less than the two-year norm, while another could define expeditious to be no longer than a year, while yet another court could say six months or six weeks. The 1980 Hague Convention stresses the importance of prompt decisions within six weeks, which includes time for appeals.¹¹² Without uniform standards, the time from the beginning of the proceedings until resolution could still be too long to affect any form of relief.

One of the obstacles a parent would face without expedition is the decision on the merits of a case. Even though a future appeal will not be considered moot, the time the child lives in the country while the appeal was pending will be considered when deciding the merits of an appeal, compounding the burden the losing parent must overcome.¹¹³ Appreciating the complexity of considerations courts use to determine habitual residence is key to understanding this argument.

Under the Convention, courts have tried to “resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domi-

109. *Chafin*, 133 S. Ct. at 1026–28.

110. *Id.* at 1027.

111. *Id.*

112. 1980 Hague Convention, *supra* note 4, at art. 11. See GUIDE TO GOOD PRACTICE, *supra* note 107, § 2.2, ¶ 50, at 13.

113. The defenses to a return are limited and apply only when: (1) the parent with legal custody rights was either not exercising that right when the child was removed or retained, or had agreed to the removal or retention; (2) a grave risk of a physical, psychological, or other harm exists upon return; (3) the child is old enough and mature enough to object to the return. 1980 Hague Convention, *supra* note 4, at art. 13. One other exception is available when the return “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” *Id.* at art. 20.

cile.”¹¹⁴ Instead, they are more likely to view each case based on the individual facts and circumstances, rather than a standard set of rules. Though each case is determined on an individual basis, courts have created basic guidelines to follow. The Third Circuit has presented compelling case law, stating that “a determination of whether any particular place satisfie[d] this standard must focus on the child and consists of an analysis of the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.”¹¹⁵

A majority of courts have agreed that habitual residence is a balance of the child’s intent and parental intent; the younger the child the more weight is given to the parental intent and vice versa.¹¹⁶ When the child is too young to have the ability to have the intent to change his or her habitual residence, the court shifts its attention to the settled purpose of the “person or persons entitled to fix the place of residence.”¹¹⁷ However, when the child is old enough to become acclimated to the environment and establish a new habitual residence, his or her perspective will have more weight in the decision.¹¹⁸ Therefore, the two different approaches could combine throughout the appeals process.

In *Chafin*, the trial court originally found in favor of a return to Scotland.¹¹⁹ At that time, because E.C. was of a young age, the standard to overcome was the shared intent of the parents since E.C. was unable to form her own intent. Mr. Chafin was unsuccessful at the trial level.¹²⁰ To make matters worse, after the Supreme Court decision, over two years had passed since the initial proceedings, and E.C. was living in Scotland for over a year pursuant to the return order.¹²¹ Given this passage of time, the likelihood of success on appeal becomes much more diminished. Mr. Chafin will first be required to provide evidence that the original order should be reversed, based on the parental intent of where the habitual residence should be. But E.C. is now six years old, and is much more likely to form her own opinions. She may have become acclimated to Scotland with the intent to establish it as her habitual location. Mr. Chafin will have a seemingly insurmountable burden to prove that habitual residence should be the United States. The *Chafin* opinion is meaningless on the merits of the

114. *In re Bates*, No. CA 122-89, High Court of Justice, Family Div’n Ct. Royal Court of Justice, United Kingdom (1989) (unreported).

115. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

116. *See, e.g., Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001); *Feder*, 63 F.3d 217.

117. *Mozes*, 239 F.3d at 1076.

118. *Feder*, 63 F.3d at 224.

119. *Chafin v. Chafin*, 133 S. Ct. 1017, 1022 (2013).

120. *Id.*

121. *Id.*

appeal, for it does not ensure speedy and final decision, which could affect the court's holding on appeal.

More importantly, even if a parent were to win on appeal, a re-return order is likely to be ignored. Without proper expeditious procedures in place, foreign countries are much less willing to enforce a re-return order. Once a court issues a return order and the child is physically returned to the country of habitual residence, the country of habitual residence immediately gains jurisdiction of all custody proceedings.¹²² If an order of re-return is demanded, the country of habitual residence is not likely to enforce the order since jurisdiction of all custody matters were granted along with the original return order.

This situation is more than a mere threat, but has already proved to be a substantial obstacle.¹²³ In one recent case, the father won on appeal and a re-return order was issued.¹²⁴ However, the mother had already initiated custody proceedings in the English and Welsh courts upon the child's return.¹²⁵ Though the court in England and Wales did not completely ignore the re-return order, it stated that the Texas court no longer had jurisdiction over the matter because the child had "ceased to be a habitual resident."¹²⁶ The court in England and Wales disposed of the matter, finally stating that "[t]he concept of automatic re-return of a child in response to the overturn of the Hague order pursuant to which he came here is unsupported by law or principle, and would . . . be deeply inimical to [the child's] best interests."¹²⁷ The father was granted relief by the Texas court by a re-return order, but in reality, the court order meant nothing. The victory was pointless. Of course, *Chafin* attempts to lay out the possibilities in which the order could potentially grant relief,¹²⁸ but such hypothetical conclusions are an academic approach, which does nothing to effectuate change. The real and imminent risk of rival custody proceedings and conflicting judgments can only be resolved with actual guidance and structure of 1980 Hague Convention appeals.

Clearly, the *Chafin* opinion alone is meaningless unless some standards are implemented ensuring expedited procedures in 1980 Hague Convention cases. Without proper expedited procedures, parents who have the guaranteed right to an appeal will likely still lose the appeal

122. *See supra* section II.A.

123. For an example of concurrent proceedings in Texas and the court in England and Wales in disagreement over the effect of a re-return order, see *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012); *DL v. EL*, [2013] EWHC (Fam) 49.

124. *Larbie*, 690 F.3d at 312.

125. *DL v. EL*, [2013] EWHC (Fam) 49.

126. *Id.* at ¶ 59(a), (b).

127. *Id.* at ¶ 59(e).

128. *Chafin v Chafin*, 133 S. Ct. 1017, 1024–26 (2013) (arguing that the Court can order sanctions against Ms. Chafin or she may decide to comply with the order).

on the merits as time compounds the complexity in the determination of habitual residence. But even if a parent were successful on the merits of the claim, a re-return order is not likely to be enforced after any amount of substantial time has lapsed between the initial order of return and the appeals procedure. Strict time frames must be put in place in order for parents to fully benefit from the *Chafin* decision.

B. Adoption of the English and Welsh Approach to Appeals

The United States must implement some concrete guidelines in the 1980 Hague Convention appeals process in order to eliminate the risk of being ineffectual by promoting cooperation among other foreign nations. Clearly, the *Chafin* opinion alone is ineffective.¹²⁹ A proactive solution must be implemented in order to prevent conflicting judgments.¹³⁰ Speed is the key to success in 1980 Hague Convention cases,¹³¹ and “there should be strict time frames for courts to process appeals against return orders.”¹³² In fact, the 1980 Hague Convention mandates that proceedings should be completed within six weeks.¹³³ With decisions like *Chafin* extending the time frame for proceedings for over two years, the United States clearly needs concrete guidelines in place. In her concurring opinion in *Chafin*, Justice Ginsburg briefly touched on the prospect of implementing an expedited appellate procedure similar to that used in the English and Welsh judicial systems.¹³⁴ A closer inspection of the procedure lends valuable guidance for the United States, and should be implemented through both the judicial action and ultimately the legislative adoption.

The English and Welsh system follows the 1980 Hague Convention’s guidance of expediting procedures to be resolved within a time frame target of six weeks.¹³⁵ In all 1980 Hague Convention proceedings, “an effort is made to ensure that the six-week period includes the appellate process.”¹³⁶ England and Wales recognize that the six-week time frame as “an important feature of the Hague landscape.”¹³⁷ The courts in England and Wales understand that the short time frame for resolving 1980 Hague Convention cases allows for compliance with its

129. See *supra* section III.A.

130. See *supra* text accompanying note 123–27.

131. See GUIDE TO GOOD PRACTICE, *supra* note 107, § 2, ¶ 41, at 11.

132. GUIDE TO GOOD PRACTICE, *supra* note 107, § 2.2, at 13.

133. 1980 Hague Convention, *supra* note 4, at art. 11.

134. *Chafin v. Chafin*, 133 S. Ct. 1017, 1028–31 (2013) (Ginsburg, J., concurring).

135. 1980 Hague Convention, *supra* note 4, at art. 12.

136. Brief of the Centre for Family Law and Policy as *Amicus Curiae* in Support of Respondent at 20, *Chafin v. Chafin*, 133 S. Ct. 1017 (2013) (No. 11-1347), 2012 WL 5451451.

137. *Id.*

main provision.¹³⁸ However, it is important to note that while the six-week time frame is extremely important, England and Wales recognize that “this can only be achieved with the fullest cooperation of the parties.”¹³⁹ Not every case can be resolved in such a short time, but England and Wales ensure that the proper steps are in place in order to eliminate all the procedural delays that wreak havoc in U.S. courts.

The first step toward expedited procedure is to require a leave for appeal. The English and Welsh judicial system requires leave for appeal, which can only be granted by the trial judge or the Court of Appeal.¹⁴⁰ England and Wales only allow leave when “the appeal would have a real prospect of success; or . . . there is some other compelling reason why the appeal should be heard.”¹⁴¹ This practice of requiring leave for appeal is not uncommon, even within the United States.¹⁴² In fact, implementing a requirement of a leave, if implemented correctly, has been noted to expedite procedures.¹⁴³ Of course, courts should avoid at all costs any delays in issuing the leave for appeal, for a delay would undermine the entire purpose of requiring a leave in the first place. Thus, the optimal court to grant a leave is the trial court that issued the order in the first place.¹⁴⁴

Next, the court must decide whether to issue a stay on the return order upon a leave for appeal. Courts in England and Wales typically issue a stay, although it is not mandatory.¹⁴⁵ This is perhaps one of the greatest concerns of the *Chafin* court, as the majority opinion based the decision to allow an appeal on the fact that stays should only be rendered on a case-by-case basis and never as a matter of course.¹⁴⁶ This is a proper and normal reaction of many courts within

138. *Id.* at 20–21 (noting the main provision of the Convention is “to protect children from the harmful effects of child abduction and promptly return them to their state of habitual residence”).

139. The Supreme Court of the United Kingdom: Practice Direction 3, ¶ 3.4.4.

140. Family Procedure Rules 2010, Rule 30.3 (U.K.).

141. *Id.*

142. See 28 U.S.C. § 2253(c) (2012) (no appeal from a case under 28 U.S.C. § 2255 (2012) can be taken from a final judgment of the trial court without first being granted a certificate from a circuit justice or judge).

143. GUIDE TO GOOD PRACTICE, *supra* note 107, ¶¶ 65–67, at 16–17. The Guide suggests that if a leave for appeal were required, that the trial court making the initial order should decide whether the case has leave for appeal. *Id.* at ¶ 67. The Guide also suggests if the appellate court decides, the process should be as speedy and efficient as possible so that no delays in obtaining information undermine the process. *Id.*

144. *Id.* at ¶¶ 66–67, at 16–17. Where the appeals court must issue a leave for appeal, courts should ensure that the courts use the most efficient method of transferring case files. *Id.*

145. *Id.* at ¶ 74, at 19–20, n.111.

146. *Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013).

United States when dealing with Convention cases.¹⁴⁷ Yet, because of the requirement for leave of appeals compounded with other efforts to ensure expedited procedures, English and Welsh proceedings are far less likely to encounter the grave consequences of issuing a stay.¹⁴⁸

Though leave for appeal does not automatically trigger an issuance of a stay, the English and Welsh courts have discretion to issue stays where they may be required.¹⁴⁹ The process still allows for discretion when issuing a stay on a court-by-court basis. It is important for the United States to note, however, that even though stays are normally granted in English and Welsh procedures, “an automatic stay procedure is not necessary if coupled with an expedited appellate structure” because the decision will be final within six-week time frame.¹⁵⁰ In other words, even if an automatic stay procedure were implemented, the practice of granting stays is far less detrimental than the issuance of a re-return order after several years’ time.¹⁵¹ The short time frame would not allow courts within the habitual residence to begin proceedings if the child did return within the appellate proceedings, and conflicting judgments would be avoided. The main concerns of the U.S. courts would be completely removed. Therefore, the danger in issuing stays that courts have tried to avoid in past decisions is completely eliminated.

Next, the English and Welsh appeals process expedites procedures to ensure a final decision within six weeks’ time.¹⁵² Expedited procedures are actually common in a majority of U.S. circuits.¹⁵³ In one example, *Charalambous v. Charalambous*,¹⁵⁴ the court ordered a child be returned to the country of habitual residence. However, instead of a process dragging out for months and years, the First Circuit issued a stay of the order on October 28, 2010.¹⁵⁵ The appeal was expedited and oral argument was held shortly over one month later on

147. See, e.g., *Whiting v. Krassner*, 391 F.3d 540 (3d Cir. 2004); *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996).

148. Brief of the Centre for Family Law and Policy as *Amicus Curiae* in Support of Respondent at 20, *Chafin v. Chafin*, 133 S. Ct. 1017 (2013) (No. 11-1347), 2012 WL 5451451.

149. *Id.* at 22.

150. *Id.*

151. See, e.g., *Larbie v. Larbie*, 690 F.2d 295 (5th Cir. 2012) (issuing of a re-return order was unenforceable in the Scotland court where rival custody proceedings were taking place).

152. Brief of the Centre for Family Law and Policy as *Amicus Curiae* in Support of Respondent, *supra* note 148, at 24.

153. J. GARBOLINI, FEDERAL JUDICIAL CENTER INT’L LITIGATION GUIDE, THE 1980 HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 116 (2012).

154. 627 F.3d 462 (1st Cir. 2010).

155. *Id.*

December 7, 2010.¹⁵⁶ The court rendered a final opinion on December 8, 2010.¹⁵⁷ The entire appeals process was finished within fifty-seven days of the trial court's initial order. Cases like *Charalambous* are evidence enough that the United States is not only capable of implementing expedited procedures similar to England and Wales, but has already been practicing it in some circuits.

Finally, implementation is necessary to ensure that the strict standards are enforced within Convention proceedings. Justice Ginsburg noted that the "rulemakers [sic] and legislators might pay sustained attention to the means by which the United States can best serve the Convention's aims."¹⁵⁸ The most uniform standard could be applied if it were implemented at the legislative level. Currently, ICARA remains silent on the issue of appeals in Convention proceedings.¹⁵⁹ Obviously the legislature has the power to create standards by which courts are forced to use in every decision. However, the recent U.S. federal government shutdown¹⁶⁰ is illustrative of the fact that it is difficult to get any legislation passed currently or at any point in the near future. Thus, it is up to the courts in each jurisdiction within the United States, to take up the changes on their own. Though a much slower process, case law will be established over time. From the trial to the appellate level of the proceedings, courts must work vigorously to ensure that procedural delays are eliminated.¹⁶¹ In doing so, it is possible to implement change, even without the help of the legislative branch.

IV. CONCLUSION

The 1980 Hague Convention is an incredibly important tool for implementing swift and final custody decisions for parents quarreling across international borders. Of course, that is the main purpose of the 1980 Hague Convention: to find a solution that is in the best interest of the child as quickly as possible. But the United States has continually frustrated that purpose, first with circuit splits on the issue of whether an appeal was allowed and now with the recent *Chafin* decision that failed to provide lower courts with a specific framework for dealing with these types of cases in the future. How the courts respond to the *Chafin* decision is critical to further perfecting the 1980

156. *Id.*

157. *Id.*

158. *Chafin v. Chafin*, 133 S. Ct. 1017, 1030–31 (2013) (Ginsburg, J., concurring).

159. *See supra* text accompanying note 22.

160. The United States federal government was shut down from October 1 through 16, 2013. The shutdown was instigated by disagreements on funds for the year 2014, largely in part to Patient Protection and Affordable Care Act, better known as Obamacare.

161. Most courts are already in the habit of using expeditious procedures. GARBOLINI, *supra* note 153. Thus, applying a uniform standard is the next step.

Hague Convention's goals and international cooperation in achieving the same. Without a better system, the United States risks harming families, destroying credibility with foreign nations, and ultimately frustrating the purposes of the 1980 Hague Convention.

At this point, as with any domestic dispute, children are oftentimes left without any ability to act for their own best interest. For this reason, expeditious procedures *must* be implemented, especially in cases where a stay is not issued and the child returns to the foreign "habitual residence." The longer the child is away from the United States, the greater chance that the judicial system in that country will issue custody determinations and disregard any further orders from the United States. Even if the foreign country recognized the validity of a re-return order issued by the United States, the passage of time ultimately decreases the child's sense of stability and security. Additionally, the longer the child is out of United States, the less likely it is that the court will determine that the "habitual residence" is in the United States, simply because the longer the child is situated in one country, especially at a young age, the less willing the court will be to uproot the child again, solely for the purpose of an appeal.¹⁶² But these negative effects of uprooting a child from his or her "home state" can be avoided by providing courts with a simple framework for handling these types of cases.

This is why adopting procedures similar to those in England and Wales is such an important next step for the United States. The court proceedings in England and Wales, including the appellate procedure, are fast-tracked to be completed within a six-week time. Of course, this is not always possible as the parties may not be willing or able to complete the process in this time frame, but at least in those instances the courts cannot be blamed for the lack of efficiency. The legislature has the most significant ability to change the 1980 Hague Convention judicial landscape, but the system cannot afford to wait for legislative guidance. Instead, judges should work vigorously to ensure that procedural delays are eliminated, creating an environment where six-week expedited procedures are not only possible, but become a reality.

162. See *supra* note 113 and accompanying text.